Analysis of Title IX and gender equity in college athletics

Krista M. Redpath
The University of Montana

Follow this and additional works at: http://scholarworks.umt.edu/etd

Recommended Citation

This Thesis is brought to you for free and open access by the Graduate School at ScholarWorks at University of Montana. It has been accepted for inclusion in Theses, Dissertations, Professional Papers by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact scholarworks@mail.lib.umt.edu.
The University of MONTANA

Permission is granted by the author to reproduce this material in its entirety, provided that this material is used for scholarly purposes and is properly cited in published works and reports.

** Please check "Yes" or "No" and provide signature **

Yes, I grant permission
No, I do not grant permission

Author’s Signature

Date 9/4/08

Any copying for commercial purposes or financial gain may be undertaken only with the author’s explicit consent.
ANALYSIS OF TITLE IX
AND GENDER EQUITY IN COLLEGE ATHLETICS

by
Krista M. Redpath
B.A. University of Montana, 1999

presented in partial fulfillment of the requirements
for the degree of
Master of Arts
The University of Montana
August 2000

Approved by:
Jeffrey J. Green
Chair
Dean, Graduate School
9-6-2000
Date
Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 (20 United States Code section 1681) et seq. (Title IX), is a federal statute that was created to prohibit sex discrimination in education programs that receive federal financial assistance. Nearly every educational institution is a recipient of Federal funds and thus, is required to comply with Title IX. Title IX is enforced by the Office for Civil Rights (OCR) of the U.S. Department of Education. OCR has authority to develop policy on the regulation it enforces. In regard to athletic programs, OCR developed an Intercollegiate Athletics Policy Interpretation which was issued December 11, 1979, 44 Fed. Reg. 71413 et. seq. (1979). The 1979 Policy Interpretation remains current policy. In general, courts defer to the policies of the agencies with enforcement authority. The Title IX statute does not solely refer to athletics programs, rather political movements spilling over to athletics. Athletics program requirements are specifically addressed at 34 C.F.R. 106.41 of the Title IX regulation, and athletics scholarships are addressed at 106.37(c) of the Title IX regulation.

The Policy Interpretation establishes three distinct areas in which an athletic program's compliance with Title IX must be examined: (1) the effective accommodation of interests and abilities (i.e., the opportunity to participate in intercollegiate athletics); (2) the provision of financial assistance for athletes (i.e., scholarships); and (3) equivalence in all other program areas, such as equipment, practice times, coaching, publicity, and travel schedules.

Thus, the thesis will present an overview of Title IX, the three-part test, and other benefits, examine the role of the NCAA, and assess gender equity in athletics through four alternative approaches to Title IX policy.
CONTENTS

CHAPTER

1. INTRODUCTION ................................................................. 1

2. HISTORY OF TITLE IX ....................................................... 5

   A. What is Title IX?
   B. Background
   C. How To Comply?
   D. Conclusion

3. THE THREE-PART TEST ..................................................... 16

   A. What is the Three-Part Test?
   B. The First Prong: Substantial Proportionality
   C. The Second Prong: History of Program Expansion
   D. The Third Prong: Full and Effective Accommodation of Interests and Abilities
   E. Conclusion

4. OTHER ATHLETIC BENEFITS AND OPPORTUNITIES: PROGRAM COMPONENTS .................................................. 33

   A. What are other Athletic Benefits?
   B. Provision of Equipment and Supplies
   C. Scheduling of Games and Practice Times
   D. Travel and Per Diem Allowances
   E. Coaching
   F. Provision of Locker Rooms, Practice and Competitive Facilities, Medical and Training Facilities
G. Publicity
H. Recruitment
I. Conclusion

5. THE ROLE OF THE NCAA
   A. What is the NCAA?
   B. Background
   C. Title IX's Impact on the NCAA
   D. Conclusion

6. SUGGESTIONS FOR ALTERNATIVE APPROACHES TO TITLE IX POLICY
   A. Introduction
   B. Establish a Committee
   C. Determine the Needs
   D. Determine the Resources
   E. Alternative Routes
      1. Add a women's sport
      2. Limit squad sizes
      3. Add to the existing women's teams
      4. Drop a men's sport
   F. Conclusion

7. CONCLUSION

APPENDICES

Appendix A: Civil Rights Restoration Act
Appendix B: HEW/Secretary/Civil Rights Office issues Policy Interpretation of the Title IX Education Amendments of 1972
Appendix C: NCAA Fact Sheet

Appendix D: Higher Education Act Reporting

Appendix E: Letter to the Honorable Pat Williams, United States House of Representatives

Appendix F: The University of Montana-Athletics OCR Title IX Corrective Action

SELECTED BIBLIOGRAPHY ................................................. 95
CHAPTER ONE

Introduction

“We must indeed all hang together, or assuredly we shall all hang separately.”
-Benjamin Franklin, 1706-1790

Little did Franklin realize that his cautions in the organizations of the band of rebels who would create a new nation could one day be a model for women creating gender equity in college athletics. In simple terms, the concept is Title IX. Title IX prohibits sex-based discrimination within educational institutions receiving federal financial assistance. Gender equity in intercollegiate athletics is a major concern, receiving increased attention nationally. The term gender equity is a step beyond Title IX, as far as bringing women’s sports to the same level as men’s sports, it is more of a moral and ethical concept. While Title IX covers all areas of educational opportunities, the area receiving the most attention is the requirement that higher education institutions provide substantially equivalent men’s and women’s athletic opportunities.

The Intercollegiate Athletics Policy Interpretation was issued in the Federal Register on December 11, 1979. After nationwide consultation with institutions and athletics organizations, a proposed Policy Interpretation was published for comment on December 11, 1978, in the Federal Register; 700 comments were received, and certain of these comments were incorporated in the final Policy Interpretation. The 1979 Policy
Interpretation divides athletics into three major categories to be analyzed for compliance: sports offerings; scholarships; and other program areas. The three categories are:

I. Accommodation of Interests and Abilities (sports offerings).
II. Athletic Financial Assistance (scholarships)
III. Other Program Areas (everything else-program areas). Including:
   (1) equipment and supplies
   (2) scheduling of games and practice times
   (3) travel and per diem allowances
   (4) coaching
   (5) locker rooms, practice and competitive facilities, medial and training facilities
   (6) publicity
   (7) recruitment

The object of this project seeks to determine if Title IX (nationwide), is promoting equity among all college athletics. To do so, an evaluation of the current system will be critiqued, and suggestions for policy alternatives will be included. In order to examine this assertion, it is necessary to understand the history of Title IX, the effective accommodations of the student-athletes interests and abilities, the provision of financial assistance, and the equivalence of all other programs. The NCAA also plays a critical role. The NCAA is an organization through which colleges and universities speak and act on athletic matters at the national level. It is a voluntary association of more than 12,000 institutions, conferences, organizations, and individuals devoted to the sound administration of intercollegiate athletics.

Chapter two of this thesis is primarily historical in nature. It discusses the basics or background of Title IX, and presumes because of Title IX women have gone from being almost totally excluded from intercollegiate athletics to having a disproportionately small but important share of athletic opportunities. Since its passage nearly a quarter of a
century ago, Title IX has led to greater opportunities for women to play sports, receive scholarships, and obtain other important benefits that flow from sports participation.

To determine if an athletic department is effectively accommodating both sexes, a three-part test has been developed by the Office of Civil Rights (OCR). The Policy Interpretation, together with the Title IX Athletics Investigator’s Manuel, sets out three distinct areas in which athletic program’s compliance with Title IX and its regulations must be examined. Chapter three critiques this test in detail, paying particular attention to compliance. Two important court cases are utilized in describing Title IX: Roberts v. Colorado Board of Education, and Cohen v. Brown University. These two particular cases illustrate notably well the gender equity dilemma that universities across the nation face.

Chapter four focuses on other athletic benefits and opportunities. These program components consist of: (1) equipment and supplies, (2) scheduling of games and practice times, (3) travel and per diem allowances, (4) coaching, (5) provision of locker rooms, practice and competitive facilities, and medical and training facilities, (6) publicity, and (7) recruitment. Different benefits may be justified by the reasonable professional decisions of coaches and other athletics personnel. But there is a fine line between professional decisions and discriminatory treatment. Determining compliance in any of these areas requires comparing the benefits provided to all men’s teams to the benefits provided to all women’s teams.

Chapter five deals with the role of the NCAA (National Collegiate Athletic Association), and is also historical in nature. The competitive athletics programs of
members institutions are designed to be a vital part of the educational system. The basic purpose of the NCAA is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports. Within this commitment to the student-athlete, the NCAA must asks themselves are they doing everything possible to ensure that women’s athletics are being treated equitably and fairly?

The sixth chapter consists of four alternatives approaches to Title IX policy. Each individual university is unique to its own setting, and these suggestions will take into account the needs and the resources of different departments.

I will embracing the question of whether athletic departments (nationwide) are tackling complying with Title IX, thus, my thesis will present an overview of Title IX, assess gender equity in athletics through the three-part test, and other benefits, examine the role of the NCAA, and present four recommendations for alternative approaches to Title IX policy.
CHAPTER TWO

History of Title IX

A. What is Title IX?

"Title IX" refers to Title IX of the Education Amendments of 1972, a Federal Civil Rights Statute that prohibits sex discrimination in education programs, including athletic programs that receive or benefit from federal funding. Since nearly all educational institutions benefit from federal funding, nearly all educational institutions must comply with Title IX. The Office for Civil Rights (OCR) within the U.S. Department of Education is responsible for enforcing Title IX. The OCR has the authority to develop policy on the regulations it enforces. The Federal regulation implementing Title IX became effective July 21, 1975. On December 11, 1979, OCR issued an Intercollegiate Athletics Policy to clarify the Title IX regulatory requirements for athletics programs. (see Appendix B) The 1979 Policy Interpretation remains current policy. In general, courts defer to the policies of the agencies with enforcement authority. The Title IX statute does not solely refer to athletics programs, but rather to political movements spilling over to athletics. Athletic program requirements are specifically addressed at 34 C.F.R. 106.41 of the Title IX regulation, and athletics scholarships are addressed at 106.37(c) of the Title IX regulation.

—

1Title 20 U.S.C. Section 1681
B. Background

Title IX was enacted to address discrimination against women. The legislative history of both Title IX as a whole, and the regulations directed at intercollegiate athletics shows that the purpose of Title IX and its accompanying regulations was to correct the pervasive and persistent discrimination against women present in every aspect of education. The legislative process that led to the enactment of Title IX began with a series of congressional hearings in 1970 that were initiated to determine if there was a need to include gender discrimination in the types of discrimination prohibited by Section 601 of Title VI of the Civil Rights Act of 1964. (see Appendix A) The hearings, which were relied upon in subsequent debates on Title IX, established that a large portion of complaints concerning discrimination against women focused on educational institutions. In response to these hearings, Congress determined that a separate statute was needed to respond to the serious problems of discrimination against women in the area of education. The determination led to the enactment of Title IX in 1972.

During debate on Title IX, Senator Birch Bayh, Title IX’s principal Senate sponsor, explained the purpose of Title IX by stating that it was intended to be a strong and comprehensive measure [that would] provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.¹ One year later in the congressional debates on the regulations promulgated by DOE to apply Title IX to intercollegiate athletics, Senator Bayh stated:

Oddly, no one making the argument that athletics should not be covered by Title IX does so on the premise that there is no discrimination. No one denies that there is something fundamentally wrong with a college or university that relegates its female athletes to second-rate facilities or second-rate equipment or second-rate schedules solely because they are female.³

Later, Senator Bayh again commented on the purpose of the Title IX regulations prohibiting sex discrimination in intercollegiate athletics: “Now, inasmuch as we are trying to compensate for generations of stereotype, I think it is going to take us some time before women really are going to be able to develop full potential of their skills.”⁴

Congress has repeatedly rejected attempts to limit Title IX’s application. In 1974, Congress rejected the Tower Amendment, which would have exempted revenue-producing sports from Title IX coverage. Instead, Congress adopted the Javits Amendment, which affirmed the coverage of all sports and required Title IX regulations to take into account the nature of particular sports.⁵ The regulations followed this directive and, recognize, that football uniforms cost more than swimsuits and do not require that the same amount of money be spent on each. Subsequently, in 1975, Congress formally reviewed the regulations as then required under law. Resolutions were introduced in both houses of Congress disapproving the regulations, but none passed. Thus, Congress accepted the regulations as fully consistent with the Javits Amendment.


⁴Id. at 179

⁵National Women’s Law Center, Washington, D.C., May, 1996
On July, 28, 1980, a Title IX Athletics Interim Manual was issued by the Office for Civil Rights. Distributed to its ten regional offices, this manual provided guidance on conducting investigations of alleged sex discrimination in intercollegiate athletic programs. In 1984, the Supreme Court narrowed the reach of Title IX in the area of intercollegiate athletics with its finding in Grove City College v. Bell. The U.S. Supreme Court decision ruled on February the 28th, that Title IX applied only to programs directly benefitting from federal funds and, thereby significantly limited OCR's jurisdiction in athletics programs. Petitioner Grove City College, a private, coeducational, liberal arts college sought to preserve its autonomy by consistently refusing state and federal financial assistance. Grove City therefore declined to participate in the Regular Disbursement Scheme (RDS) of the DOE, in which schools are given federal funds and those funds are then distributed to students as financial aid for education on the basis of need. The college did, however, enroll students who received Basic Educational Opportunity Grants (BEOG) under the Alternative Disbursement System (ADS). Under ADS, institutions made appropriate certifications to the secretary of education, but the secretary calculated and awarded disbursements directly to eligible students, and the university had no control over the program.

Obviously Title IX prohibits sex discrimination in institutions that are recipients of federal funds. The DOE determined that Grove City qualified as a recipient of federal funds and requested that the college execute an assurance of compliance as required in Section 106.4 of Title IX. This assurance of compliance requires that the college agree to 

“comply, to the extent applicable to Title IX” and ensure that “no person... shall, on the basis of sex, be... subjected to discrimination under any education programs or activity for which it receives or benefits from federal financial assistance. . . .” Grove City refused to execute an assurance, and the departments initiated proceedings to declare the college and its students ineligible to receive BEOG’s. The administrative law judge held that the federal financial assistance received by Grove City obligated it to execute an assurance of compliance and ordered federal assistance terminated until Grove City met the requirements of Title IX.

Grove City and four of its students then filed suit in district court. The court ruled that BEOGs constitute federal financial aid but that the department could not terminate the students’ aid for failure to execute an assurance of compliance. The court of appeals reversed, holding that indirect as well as direct aid triggered coverage under Title IX. The court also found that although Title IX’s language was program-specific, funds flowing from Grove City through its students were similar to non-marked aid, and that in such cases the school itself must be the program. Finally, the court held that the department could terminate such aid for failure to execute an assurance of compliance, and that it was not necessary to prove actual discrimination before termination.

Grove City appealed to the U.S. Supreme Court, arguing that neither it nor any of its programs are recipients of federal financial assistance. The court disagreed, holding that BEOGs are a key component of federal financial aid to institutions, since funds are strictly used for educational costs. The court cited language in the Education 687 F. 2d 684 [3rd Cir. 1982]
Amendments of 1972 which states that one purpose of BEOGs is to provide financial assistance to colleges.

On the question of which programs fall under Title IX, the appeals court held that federal funds given to students free up school funds that can be used elsewhere in the institution. Thus, any programs that are recipients of these school funds are subject to Title IX. Grove’s City’s refusal to execute an assurance of compliance warranted a termination of federal assistance to the student financial aid program and was invalid in that it was not consistent with the program-specific nature of Title IX. The court held that the execution of an assurance of compliance does not itself impose institution-wide obligations. Rather, it requires that each education program or activity which receives or benefits from federal financial assistance comply with Title IX. According to this opinion, only Grove City’s financial-aid program is covered by Title IX. Further, Grove City’s contention that discrimination must be found before federal assistance to its financial-aid program is cut off is invalid. Section 902 of Title IX clearly states that aid may be cut for failure to execute an assurance of compliance. The court also found that Grove City’s final argument, contending that conditioning federal assistance on compliance with Title IX infringes First Amendment rights of the college and its students, held little weight. The Supreme Court noted that: “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. . . Grove City may terminate its participation in the BEOG program and thus avoid the requirements of Title IX. Students affected by the Department’s action may take either their BEOGs elsewhere or else attend Grove City
without financial aid. Accordingly, the judgment of the court of appeals is confirmed.” In the floor statements following the release of this opinion, numerous senators and congressmen made it clear that Title IX was specifically intended to remedy discrimination against women in all areas of education, including athletics.8

Finally, DOE’s Policy Interpretation itself recognized that the purpose of Title IX was to specifically remedy discrimination against women.9 In the Policy Interpretation, DOE set out the following history of discrimination that Title IX and its regulations were intended to address:

Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. During the 1977-78 academic year women students accounted for 48 percent of the national undergraduate enrollment (5,496,000 of 11,670,000 students). Yet, only 30 percent of the intercollegiate athletes are women.10

The argument that Title IX allows an institution to provide fewer intercollegiate athletic participation opportunities to women than it provides to men because women’s athletic interests and abilities are weaker than those of men completely ignores Title IX’s purpose of remediying the discrimination arising out of such stereotyped notions of women’s interests and abilities.

---


9Policy Interpretation, supra note 19, at 71,423 (“The legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions.”).

10Id. at 71,419
In 1988, Congress had another opportunity to examine the application of Title IX to athletic programs during consideration and passage of the Civil Rights Restoration Act. This effectively overturned the Grove City ruling, directing that Title IX applies to all operations of a recipient of Federal funds and thereby restored OCR’s jurisdiction over athletics programs. During this debate, many members of Congress cited Title IX’s coverage of athletics with approval. Another stepping stone for Title IX was issued by the OCR in 1990. The Title IX Athletics Investigator’s Manual which provides guidance to OCR investigators, superseded the 1980 Interim Manual. The OCR issued a final clarification of the Intercollegiate Athletics Policy Guide by adding the three-part test. The clarification explains the three-part test used to analyze compliance in the accommodation of students’ athletics interests and abilities, one of thirteen program areas reviewed for compliance under Title IX. The accommodation of interests and abilities has been the main subject of federal court cases in the 1990's.

The federal courts have strongly stood behind Title IX’s regulations and the Department of Education interpretations in cases brought against colleges, which have failed to provide equal opportunity to their female athletes. For example, in 1993 Auburn University agreed to create a varsity women’s soccer team in response to a Title IX suit challenging its failure to equally accommodate the sports interests of its female students, and the University of Texas elevated two women’s sports to varsity status as part of its

---

11 Congress enacted the Civil Rights Restoration Act of 1987 in response to the Supreme Court’s opinion in Grove City College v. Bell 465 U.S. 555 (1984),
Title IX settlement with female athletes. Universities need to be pro-active instead of reactive in this type of situation. If an institution has not achieved proportionality, then it takes an extraordinary risk if it eliminates women’s teams, or cuts funds or scholarships.

C. How to Comply

To determine if an athletic department is complying with Title IX, three distinct areas must be examined, and the department must be meeting its obligation in each area. The Policy Interpretation establishes three distinct areas in which an athletic program’s compliance with Title IX must be examined:

1. Participation Opportunities

To determine if an athletic department is effectively accommodating both sexes, a three-part test has been developed by the Office of Civil Rights:

(1) Athletic participation opportunities are substantially proportionate to the male/female undergraduate enrollment;

(2) A history and continuing practice of program expansion is responsive to the developing interests and abilities of the under represented sex; and
(3) The interests and abilities of the under represented are fully and equally effectively being accommodated by the existing program.\textsuperscript{12}

An athletic department will be in compliance regarding the first category of participation opportunities if it is meeting any part of the three-part test above. Chapter two is completely dedicated to dissecting the three-part test and analyzing where the deficiencies and discrepancies exist.

2. Financial Aid Allocations

To determine if an athletic department is awarding financial matter in a manner consistent with Title IX, a simple mathematical equation is used:

\[
\frac{\text{Total male scholarship dollars divided by total male athletic participation}}{\text{Total female scholarship dollars divided by total female athletic participation}}
\]

While the law does not require equality in the above calculations, it does require allocation to be substantially proportionate; or, if not substantially proportionate, then the department must prove that the disparity results from legitimate nondiscriminatory factors such as higher tuition rates for out-of-state students or reasonable professional decisions related to program developments. Financial aid is essentially black or white; a university is either providing funding substantially proportionate, or it is not. (see Appendix D)

3. Other Benefits, Opportunities and Treatment

To determine if an athletic department is meeting Title IX obligations in other areas, another three-part test has been developed:

(1) Are policies discriminatory in language or effect?

(2) Do substantial and unjustified disparities exist in the program as a whole?

(3) Are disparities in individual program areas substantial enough to deny quality?

To determine if an athletic department is in compliance with Title IX in other areas of its operations, one must determine opportunities in a manner which produces no more than a negligible difference between the sexes or can explain away any additional differences through nondiscriminatory factors or sex-neutral criteria. Chapter three offers an in-depth look at what exactly defines other benefits, opportunities and treatment.

D. Conclusion

Athletic departments must keep in mind that while Title IX does not require equality, it does require that the sexes be treated equitably. Providing equity will absolutely require programmatic changes and inevitably, more resources or a reallocation of existing resources. The ultimate penalty for failure to comply with Title IX is the withdrawal of federal assistance to the university. As a result, athletic departments must be made aware of Title IX and its implications; and, most importantly, in a time of diminishing resources, universities must be part of the solution in finding the resources to address Title IX concerns.
CHAPTER THREE

The Three-Part Test

A. What is the Three-Part Test?

The 1979 Intercollegiate Athletics Policy Interpretation together with the *Title IX Investigator's Manual* provides a three-part test for determining whether an athletic department discriminates in the provision of intercollegiate participation opportunities. Participation opportunities are, in effect, the number of students actually participating in the program. A participant is someone who is on the squad list and on the team as of the first date of competition, including walk-ons. Anybody quitting after two weeks of practice should not be counted. An athlete who competes for more than one team should be counted for every team for which he or she competes. That is, the athlete who competes on cross country, indoor track and outdoor track should be counted three times. This is a different count than that used for athletics scholarships where athletes are counted only once when they compete on more than one team. The manual indicates that the presence of gender discrimination in any of the following three areas constitutes a

---

13Valerie M. Bonnette & Lamar Daniel, Office for Civil Rights, U.S. Dep't of Educ., *Title IX Investigator’s Manual* (1990) [hereinafter *Investigator’s Manual*] (unpublished document, on the file with *The Review of Litigation*). Unlike the Policy Interpretation, the *Investigator’s Manual* is an internal document and was neither subject to public notice and comment nor ever formally published.
violation of Title IX without regard to the other two areas. Compliance will be assessed in any one of the following ways:

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

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

(3) Where the members of one sex are under represented among intercollegiate athletics, 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.14

This effective-accommodation test has been adopted by many of the courts that have been asked to determine an athletic program’s compliance with Title IX’s provision of intercollegiate participation opportunities. The policy does not require that program components be identical, but provides that men’s and women’s sports programs will be compared to determine whether the colleges’ policies and practices result in overall program equivalence. The policy interpretation also provides a limited number of

acceptable justifications for "nondiscriminatory differences" in each of the three major program areas. Disparities in proportional scholarship awards, for example, might be justified if the difference arose as the result of a nondiscriminatory uneven distribution of higher out-of-state tuition grants between men and women. A lack of women's programs cannot be used to justify discrimination in scholarship awards.

In the application of the effective-accommodation test, the plaintiff would have the burden of establishing the first and third prongs of the test, that intercollegiate-level participation opportunities for male and female students are not provided in numbers substantially proportionate to their respective enrollments and that the interests and abilities of the under represented sex are not being fully and effectively accommodated. The defendant, however, would have the burden of establishing the defense embodied in the second prong, a history and continuing practice of program expansion for the under represented sex.

B. The First Prong: Substantial Proportionality

The first prong of the effective-accommodation test asks a simple question: Do the participation rates of males and females in the institution's intercollegiate athletic program reflect the overall enrollment percentages of males and females? If not, a presumption arises that the allocation of participation opportunities in the institution's intercollegiate athletic program is discriminatory. In order to determine whether the first prong is satisfied, the OCR Investigator's Manual instructs investigators to compare the number of male and female participants in the athletic program with the number of full-time undergraduate students. The manual continues: If the results are substantially
proportionate (for example, if the enrollment is 52 percent male and 48 percent female, then, ideally, about 52 percent of the participants in the athletics program should be male and 48 percent female), the recipient is effectively accommodating the interests and abilities of both sexes. If the calculation of enrollment to participation in the athletics program is not substantially proportionate, then go to step two.15

As an indication of how large the discrepancy between enrollment and participation opportunities may be without violating the substantial-proportionality test, one may look to the case law and to DOE's Policy Interpretation. In Roberts v. Colorado State University,16 the court ruled that an enrollment-participation discrepancy for female students of 10.6 percentage points did not constitute substantial proportionality and therefore failed the first prong of the effective-accommodation test.17 Colorado State University's Title IX suit followed its June 1992 decision to cut men's baseball and women's fast-pitch softball. In February 1993, the federal district court found Colorado had violated Title IX and permanently enjoined it to reinstate the softball program. About three weeks later, the court, unhappy with Colorado's "apparent foot-dragging," ordered it to hire a coach promptly, recruit new members for the team, and organize a fall season. Colorado appealed, contending the district court erred in finding a Title IX violation. Since the men's baseball team had 55 members and the women's softball team had only

15Investigator's Manuel, supra note 27, at 24


17 Id. at 1513.
18, Colorado argued, the cuts increased the proportion of women in its athletic program. The result was to decrease the spread between the percentages of women athletes and percentages of women enrolled to 10.5 percent. Colorado also argued that even if the district court's verdict was correct, it went too far in "micro-managing" the softball program rather than allowing it to present a plan to bring the University into Title IX compliance.

The Tenth Circuit endorsed the now familiar proposition that failure to effectively accommodate student-athletes of both sexes was, itself, sufficient to violate Title IX. Again, the disparity did not constitute "substantial proportionality." Colorado could not show a history and continuing practice of expansion in women's athletic. Since adding golf in 1977, it had dropped three women's sports. While Colorado had eliminated men's teams as well as women's teams, women's participation opportunities had dropped by 34 percent, compared to a 20 percent drop for men. The Tenth Circuit summarily rejected Colorado's argument that Title IX was satisfied because the cuts had affected men relatively more than women and so had increased overall women's participation rates:

We recognize that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs. Nonetheless, the ordinary meaning of the word "expansion" may not be twisted to find compliance under this prong when schools have increased the relative percentage of women's participating in athletics by making cuts in both men's and women's sports programs.18

In this case, the Tenth Circuit noted, the district court had made extensive findings concerning the unmet abilities and interests of the plaintiff softball players: evidence

18 Id at 830
showed the recognition they had received both as a team and as individuals; the feasibility of their organizing a competitive season of play; and that softball is increasing in popularity among high school students in Colorado.19

The Tenth Circuit decided the district court went too far in ordering a fall 1993 exhibition season in order to ensure a "competitive" team the following spring. Nothing in Title IX, the Tenth Circuit wrote, "requires an institution to create a 'top flight' varsity team."20 The Supreme Court denied the University's petition to review the case in November 1993. Colorado, having conformed with the court's order to increase women's participation rates, considers the case closed.

In its Policy Interpretation, DOE states that intercollegiate athletics have been characterized by the historical denial of equitable participation opportunity for female students.21 For example, national figures for the 1977-78 academic year indicated that women accounted for 48 percent of national undergraduate enrollment but only 30 percent of intercollegiate athletes. The 18 percent enrollment-participation discrepancy produced by these figures would not constitute substantial proportionality.22 However, the Big Ten Conference has set an intercollegiate athletic participation goal at a ratio of

19 Id at 833

20 Id at 834

21 Policy Interpretation, supra note 19, at 71,419.

22 For the 1992-93 academic year, the enrollment-participation discrepancy for the University of Texas at Austin was approximately 24%. Plaintiff's Motion for Summary Judgement at, Sanders v. University of Tex., No. A-92-CA-405 (W.D. Tex. filed July 1, 1992).
60 percent males and 40 percent females. Several members of the Big Ten have historically had female undergraduate enrollments greater than 50 percent.\textsuperscript{23} For these Universities, a female participation ratio of 40 percent would produce an enrollment-participation discrepancy greater than 10 percent. The Tenth Circuit held in \textit{Roberts} that a female enrollment-participation discrepancy produced by the Big Ten would almost certainly also be found to fall short of substantial proportionality. Other universities have committed themselves to male to female intercollegiate athletic participation ratios more likely to achieve substantial proportionality.\textsuperscript{24}

Universities should strive for "substantial" equality in scholarships v. participation rates, because they need only reach substantial equality in the proportion of athletic financial aid provided to men and women. Thus, some reasonable disparities are permissible under the scholarship provision of the regulation. However, a university should strive to award scholarships proportionate to participation rates, or at the very least, within two to three standard deviations of participation rates.

Universities failing to show substantial equality can nonetheless comply with the test if disparities are caused by nondiscriminatory factors, such as differences in numbers of out-of-state athletes of each sex and program development decisions. Other nondiscriminatory factors may be identified as well.

\textsuperscript{23}During the 1990-91 academic year, Indiana University had a female undergraduate enrollment of 52.8\%, Michigan State had a female undergraduate enrollment of 51.9\%, and the University of Wisconsin had a female undergraduate enrollment of 50.6\%. \textit{Chron. Higher Educ.}, Apr. 8,1992, at A38, A38-40.

\textsuperscript{24}\textit{Kelley v. Board of Trustees of Univ. Of Ill.}, 832 F. Supp. 237, 242 n.5 (C.D. Ill. 1993).
Universities should also use appropriate statistical techniques to analyze disparities in participation rates and in other program components. Additionally, universities should identify, where possible, the percentage of women available to participate in the existing sports programs from the high school system. Presently that percentage is 36 percent nationwide.  

C. The Second Prong: History of Program Expansion

The key to compliance with this method is to demonstrate a continuing practice of program expansion for the under represented sex. If women are under represented, program expansion means the addition of women's teams. It does not mean: unreasonable additions of walk-ons to women's teams, cutting male participants to improve women's rate of participation, or improving benefits in other program areas such as equipment and supplies and travel per diem. There is no set standard of continuing expansion that ensures compliance. The OCR has considered actions taken in the most recent three years indicators of continuing program expansion. In general, few institutions satisfy this criterion.

Universities cannot rely on the expansion of women's varsity athletic programs carried out in the 1970s to satisfy the second prong of the effective-accommodation test. The court in Cohen v. Brown University held that even though Brown University had greatly expanded its women's varsity sports program in the 1970s, it could not carry its burden of establishing a continuing practice of program expansion for female athletes:

---

With respect to the “program expansion” prong, evidence has shown that Brown does not have a continuing practice of program expansion for women athletes, even though it can point to impressive growth in the 1970s. At least since the late 1970s, the undergraduate enrollment at Brown has hovered at roughly 51 percent-52 percent men and 48 percent, 49 percent women. During this period, however, the percentage of participants in the intercollegiate athletic program has remained fairly constant at approximately 61 percent men and 39 percent female.26

Thus, it is clear that courts refuse to read the word “continuing” out of the second prong of the effective-accommodation test and insist on proof that a college or university has in place an “ongoing” program to reach substantial proportionality. Past efforts alone will not suffice.

Many sports programs have made substantial steps toward athletic equity. A prime example is Stetson University. This university has worked hard to meet Title IX’s goal of gender equity. In 1990-91, just 37 percent of the school’s varsity athletic slots were available to women; today women are 53 percent of the school’s athletes. Scholarship dollars granted to women have also soared from 35.5 percent to almost 48 percent, so that female athletes now receive almost $475,000 each year. Says Stetson’s athletics director, “It’s not an accident our numbers are better. . . we’re not talking just about meeting Title IX; we’re talking about making things equitable.”27

D. The Third Prong: Full and Effective Accommodation of Interests and Abilities

The third and final prong of the effective-accommodation test is one last chance


for intercollegiate athletic departments to establish compliance with Title IX. To do so, the university must demonstrate that even though a discrepancy exists between female enrollment and female participation in the university’s intercollegiate varsity athletic program, “the interests and abilities of that sex have been fully and effectively accommodated by the present program.” 28 In other words, the university must establish that all female athletes who possess the interest and ability to participate in intercollegiate varsity athletics have been given the opportunity to do so. The court in Cohen v. Brown succinctly stated what an institution would have to prove to prevail under the third prong of the effective-accommodation test:

If Brown could establish that despite the statistical disparity between the number of men and women participating on varsity teams, there are no other women who want to compete at this level, the university might have a strong defense. Brown might have demonstrated, for example, that it attempted to create new varsity teams, but there was no interest or ability to play these sports. Or, it might have shown that women have not asked Brown to establish any new varsity teams. 29

In order to determine the extent to which a university has accommodated athletic interests and abilities, DOE’s Policy Interpretation directs an approach based on the existence and success of individual teams and on the expressed interests of students of the underrepresented sex. 30 Also, this method is the general approach used by the OCR in the Investigator’s Manual. Despite numerous attacks leveled by universities, it is also the approach that has been adopted by every federal court that has had the occasion to apply

28Policy Interpretation, supra note 19, at 71,418

29Cohen v. Brown, 991 F.2d 888, 897 (1st Cir. 1993).

30Policy Interpretation, supra note 19 at 71,417
the three-part Title IX compliance standard.\textsuperscript{31}

In 1991, the need for budget reductions prompted Brown University to eliminate four varsity teams from its intercollegiate athletic program, including women's volleyball and gymnastics and men's golf and water polo. Through the reduction, Brown expected to realize an annual savings of about $80,000, with the women's team saving about $62,000 a year. At the time of the decision, 63 percent of the participants in the university's athletic program were men and 37 percent were women, while the university's overall student enrollment was 52 percent and 48 percent, respectively.

Shortly after the university's announcement that the teams would be cut, members of the women's volleyball team and gymnastics teams filed suit, challenging that the university was discriminating against women in violation of Title IX.\textsuperscript{32}

Title IX's implementing regulations, first promulgated by the Department of Education in July, 1975, set out various requirements that an institution must meet to show that its athletic program complies with Title IX.\textsuperscript{33} One of the primary areas of compliance related to sports selection and competition levels. Specifically, the regulations require an institution to demonstrate that the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

\textsuperscript{31}Roberts v. Colorado State Bd. Of Agric., 998 F 2d 824, 831 (10\textsuperscript{th} Cir.), cert. denied, 114 S. Ct. 580 (1993); Cohen v. Brown Univ., 991 F 2d 888, 898 (1\textsuperscript{st} Cir. 1993).


\textsuperscript{33}Policy Interpretation, Office of Civil Rights, 44 Fed. Reg. 71413 (Dec. 11, 1979)
All of the litigation concerning gender equity in intercollegiate athletics, including *Cohen v. Brown University* has focused on the three-prong test used to determine whether the “effective accommodation” requirement has been met.

Since 1991, the Brown case has woven its way through the federal court system. The trial court found that Brown’s athletic program violated Title IX and ordered Brown to submit a compliance plan for the court’s review. Upon submission, the court found that Brown did not compile the plan in good faith and thus imposed the court’s version of a remedial compliance plan on the university. The appeals court, however, while affirming the lower court’s findings on liability, struck down the court-imposed remedial plan out of respect for the principle of academic freedom, which affords educational institutions great leeway in their affairs. Consequently, the appeals court remanded the case back to the lower court, requiring Brown to submit another plan to bring its athletic program into compliance with Title IX.

The Supreme Court’s refusal to consider the Brown case is not a ruling on the merits of the case. By implication, however, the Court did not see that the case presented any significant constitutional question or that a conflict existed among the many lower courts that have heard similar cases. In fact, application of Title IX by the lower courts has been remarkably consistent.

Further, the Supreme Court’s rejection of Brown’s appeal leaves the lower court’s rulings intact, bringing more certainty to the questions of what is necessary for Title IX compliance in intercollegiate athletics, at least in the First Circuit. Until another “test case” comes along, Brown is the law in the First Circuit, and will likely have a persuasive
effect in other circuits.

The history of Cohen v. Brown University as a Title IX test case is over. On April 21, the U.S. Supreme Court denied Brown University’s petition to appeal the decision of the First Circuit Court of Appeals affirming the lower court ruling after trial that the university, which had eliminated two women’s varsity’s teams from its athletic program in the spring of 1991, violated Title IX. Whether intended or not, the Supreme Court’s refusal to review the case was a significant victory for the plaintiffs and a wake up call to educational institutions subject to Title IX.

Measuring Brown’s athletic program against the Policy Interpretation’s effective accommodation of interests and abilities test, the First Circuit made short work of the first (proportionate to enrollment) and second (continuing program expansion) prongs. Brown “elected to stray” from gender parity between its student body and its athletic lineup, and failed “to match uninterruptedly in the direction of equal athletic opportunity.”\(^{34}\) The First Circuit interpreted the third prong (program demonstrates accommodation) to mean an institution must provide women positions on teams equal to the total number of women interested and able to play, at a number up to the student body ratio. The fact there were women students whose interests and abilities were not met (i.e., the women on the eliminated volleyball and gymnastics teams) was proof Brown failed prong number three.\(^{35}\)

\(^{34}\)Id at 906

\(^{35}\)Id at 899
The following lessons can be learned from Brown for cases in which women are the under represented sex in the athletic program. First, if an institution has not achieved proportionality, then it take an extraordinary risk if it eliminates women’s teams. Where an institution eliminates women’s teams, by definition it will not be able to show a practice of program expansion of full and effective accommodation. Hence, if an institution cannot show proportionality, then none of the prongs of the “effective accommodation” test can be met. Second, the Brown case establishes that the elimination or demotion of men’s team is one of many compliance options available to institutions under Title IX. Obviously, Title IX attempts to increase participation by women; but, if the elimination of a men’s team will assist the institution in achieving proportionality, the courts say this is permissible. Third, the Brown courts acknowledge that academic freedom requires courts to refrain from interjecting themselves into the conduct of university affairs. As a result, courts will continue to afford institutions reasonable latitude to create and implement Title IX compliance plans.

Participation rates disproportionate to enrollment are common in programs offering football. Even where women are significantly under represented, however, institutions may comply by offering every team for women in which there is: (1) sufficient interest and ability for a viable team; and (2) a reasonable expectation of competition for the team in the institution’s normal competitive region.

In order to determine if a university is in compliance with this method, one must determine if there is any unmet interest on the part of the under represented sex, which is nearly always women. Identifying unmet interest involves a review of on campus and
feeder programs. On campus programs include: club sports, intramural sports and elective physical education courses. Feeder programs include: high-school programs, junior college programs, Amateur Athletic Union programs, and community, state and regional recreational programs in the institution’s normal recruitment area. A survey of current students has limited use at institutions that recruit athletes, and some random sample surveys might miss entirely the students who have the interest and ability to participate in a particular sport.

Compliance with this third prong is unlikely if there is a sport not currently offered to the under represented sex for which there is sufficient competition and: a club team; and/or significant participation at high schools in the institution’s normal recruitment area; and/or substantial intramural participation. The University of Michigan has successfully undertaken this challenge to work toward equal opportunity in its sports program. The University, an institution with a rich and proud football tradition, has added two women’s sports to its varsity roster without eliminating any men’s teams. By adding women’s soccer and women’s crew, the University’s women’s athletic opportunities prospered without hurting men’s opportunities. The president of the University has stated the University is in full compliance as of 1997.36

E. Conclusion

The message from the federal courts is straightforward. The implications of the message may well be revolutionary to traditions existing in many intercollegiate athletic

---

programs. The message is that institutions which fail to satisfy one of the three parts of the effective accommodation of interests and abilities component violate Title IX, regardless of how well they comply in other areas. Since the majority of institutions do not have gender parity between athletic participation rates and undergraduate enrollment rates (prong one), these cases mean institutions must either continue to expand their programs for the under represented sex (prong two), or show that the interests and abilities of that sex are being fully and effectively accommodated by the existing program (prong three).

From a practical point of view, compliance probably will require an institution to bring its athletic program into parity with enrollment. As commentators Thro and Snow explained it:

...[I]f an institution is going to continue to meet the second part of the test, it will have to add a new women’s sport periodically in order to maintain its history of expansion. Therefore the institution will eventually achieve substantial proportionality. Similarly, if an institution is going to continue to meet the third prong of the test, it will have to constantly be adding new sports as interests and abilities develop. Thus, it is likely that the institution will achieve substantial proportionality as if it accommodates all interests and if new interests never develop.  

Institutions faced with budgetary pressures will not see program expansion as a viable option. For them, the federal courts’ message is that they may not cut participation opportunities for the under represented sex, even if those cuts are balanced with greater cuts for the over represented sex. Doing so would negate a “continuing practice of

---

program expansion” and would be evidence of the institution’s failure to provide opportunities to disappointed team members interested and able to play the eliminated sport. For these institutions, the option suggested by the courts is to eliminate participation opportunities for the over represented sex. An often repeated suggestion is that institutions fielding football teams consider reducing the size of the football squad. Another commentator summarized football’s impact on “substantial proportionality”:

Although the NCAA allowed only 88 football scholarships in 1993, and has reduced that number to 85 for 1994 . . . some schools field teams with up to 145 players. Note that the largest National Football League roster has only 45 players. . . In comparison, the largest women’s team in NCAA Division I is lacrosse, with an average size of 25 players and a maximum of 15 scholarships. . .

The obvious implication here is that institutions should examine the role of “walk-ons” in varsity sports. Institutions might look for ways to encourage participation of women in varsity sports, as well as limit non-recruited, non-scholarship players on men’s teams.

Although the issue was not before them, both the First Circuit in Brown and the Tenth Circuit in Colorado State University acknowledged that the effective accommodation of interests and abilities analysis was “vexing” when applied to the question of creating a new team. How an institution may show that its existing program is fully accommodating the interests of the under represented sex when students of that sex petition to add a team to varsity competition remains unclear.

---


39Brown, 991 F 2d at 904; Colorado State University, 998 F 2d. At 832.
CHAPTER FOUR

Other Athletic Benefits and Opportunities: 
Program Components

A. What are “Other Athletic Benefits?

The Policy Interpretation allows institutions greater flexibility in providing benefits and services to female and male athletes. This flexibility is designed to uphold the right of educators in their decisions on how best to operate the education program, known as intercollegiate athletics. The Policy Interpretation makes compliance with Title IX extremely difficult. Women’s and men’s teams may be provided with different benefits, as long as there is a balance of benefits between the overall programs. For example, it is acceptable for women’s golf to have more competitive events, if men’s tennis has more competitive events than women’s tennis. Moreover, if men’s basketball has three sets of practices uniforms while women’s basketball has only one set of practice uniforms, this may be acceptable if women’s volleyball receives three sets of practice uniforms while men’s track only receives one.

The Policy Interpretation also permits different benefits and services based on the nature of particular sports. For example, providing five pairs of shoes for each participant on the football team may be appropriate, while five pairs of shoes for the swim team is unlikely to have the same priority. And practicing for hours a day may sharpen the skills
of the track team, but running four hours a day is probably excessive for tennis athletes. Simply, the need for benefits and services vary from sport to sport. Analyzing compliance entails a comparison of the extent to which benefits and services are rendered based on what is needed and desired.

The basic test of compliance is equivalence for all athletic programs other than financial aid is equivalence. The availability, quality, and kinds of benefits, opportunities, and treatment afforded the members of each sex must be equal, or equal in effect, unless disparities are justified by actors determined to be nondiscriminatory. Although financial measures are used as a means of assessing equivalency in most areas, expenditures and budgetary allocations, in and of themselves, do not determine whether an institution is in compliance. It is the benefits provided, not the dollars budgeted or spent, that must be equal.

A violation of Title IX is a denial of equal opportunity on the basis of sex. Inevitably this is a judgement call, one that the OCR has the authority to make. Obviously some judgements are easier than others. Problems that have a significant impact on the program and deny equal athletics opportunity on the basis of sex are serious compliance issues. The majority of institutions have a series of minor compliance problems. While each problem does not by itself deny equal athletics opportunity, but collectively they could add up to a denial of equal athletic opportunity. A disparity between programs over new uniforms is a concern, but is not a denial of equal athletics opportunity to women at the institution. Other considerations should be noted, such as the higher the percentage of athletes affected by any disparity, or the more seriousness of the
Title IX is an extremely complex issue. Certain areas, such as equipment and supplies seem minor, but they can often lead to a series of major infractions. The following areas must be taken seriously, and handled with caution.

B. Provision of Equipment and Supplies

Supplies and equipment include everything worn by athletes from football helmets to sports-bras. Sport specific equipment also include: baseball bats, golf clubs, tennis balls, basketballs, and footballs. General equipment include: travel bags, travel sweats, video equipment, and water bottles.

Compliance in this area is achieved when the same or similar percentages of male and female athletes are provided equipment of the same (1) quality, (2) amount, (3) suitability, (4) maintenance and replacement, and (5) availability. For example, men’s football and basketball might represent 50 percent of the male athletes. If football and men’s basketball have excellent equipment and supplies while all other men’s teams have average equipment and supplies, then compliance is achieved when 50 percent of the female athletes are also provided excellent equipment while other female athletes have average quality equipment. Fifty percent of the female athletes may be three or four women’s teams, not just two. A common compliance problem to avoid is for men’s football and basketball teams to be provided with higher quality supplies and equipment than all other men’s teams and women’s teams.

The simplest way to comply in this area is to provide the same amount of

---

equipment items to men's and women's teams in the same sports. This would include supplying the same game uniforms, practice gear, warm-ups, shoes, sport specific equipment, and general areas such as travel bags and sweats. Frequently, women's sports suffer in this area. A common compliance problem arises when women's teams are provided fewer sets of game uniforms, as well as fewer sets of general equipment.

Availability is extremely essential when referring to accessibility of supplies and equipment. Equipment room hours must be equal on both sides. For example, a potential problem would be if a women's team had difficulty exchanging equipment or gear during nontraditional practice hours, while the men's team had no difficulty. Equipment rooms should establish the same replacement schedule for women's and men's teams in the same sports.

A redundant compliance problem among athletic departments occurs when a lack of funds results in one or more women's teams keeping uniforms for three to four years, while men's uniforms are replaced yearly. According to the OCR, investigators examine in detail the current budget and previous year's expenditures for equipment and supplies. They compare the total and average budgets and expenditures for men's and women's teams for equipment maintenance and replacement, purchases of additional equipment, outfitting teams, and supply purchases. Differences in the amounts budgeted or spent are evaluated to determine whether they cause disparities in the benefits provided.

C. Scheduling of Games and Practice Times

Scheduling of practice times and competition include: the time of day of

41 Id. at 49.
competitive events, length of practices, number of competitive events, pre-season and post-season competition. Both the number of contests and the number of days of competition should be counted to identify any differences between women’s and men’s teams. The number of competitive events is counted differently under Title IX than under NCAA rules. Under Title IX, the more competition, the greater the benefit. For example, two tennis matches in one day are two competitive events, not one day of competition. All contests in the traditional and nontraditional seasons are counted, including contests against foreign teams, the U.S. National team, and other contests that may be exempt from NCAA limits.

The only way to comply is to schedule the same number of competitive events for women’s and men’s teams in the same sport. For example the University of Montana men’s basketball 2000-2001 schedule has 29 games, so the Lady Griz must possess the same amount of games. For dissimilar sports, the same percentage of the maximum allowable contests should be scheduled. A common compliance problem occurs when one or fewer contests are scheduled for women’s teams than men’s teams. Or when the

42 Organized competition is considered organized of any one of the following conditions exists: (a) Competition is scheduled and publicized in advance; (b) Official score is kept; (c) individual or team standings are maintained; (d) Official timer or game officials are used; (e) Admission is charged; (f) Teams are regularly formed or team rosters are predetermined; (g) Team uniforms are utilized; (h) A team is privately or commercially sponsored; (I) The competition is either directly or indirectly sponsored, promoted or administered by an individual, an organization or any other agency. The 1999-2000 Division I Manuel. [Bylaw: 14.2.4.5.3] Indianapolis, IN.

43 Practice, which is defined as any meeting, activity, or instruction involving sports-related information and having an athletics purpose, held for one or more student-athletes at the direction of, or supervised by, any member or members of an institution’s coaching staff. [Bylaw: 17.02.1.1].
schedule for a women’s team has significantly fewer events than the maximum, while
schedules for all men’s teams are at or very near the maximum number of contests.

Working around an entire team’s academic schedule is often difficult when
searching for practice times. The simplest approach, in order to avoid conflict is for
women’s and men’s teams in the same sport to practice the same numbers of hours per
week (in accordance with the NCAA’s practice limitations). A common violation of Title
IX occurs when teams must squeeze in their practice time around other groups using the
same facilities, and women’s teams scheduled practices are shorter or at a less convenient
times of day. (e.g., during the dinner hour) If facility availability is a problem, schedules
should be altered so that facilities are shared equitably. For this program component,
“equivalence” appears to mean equally appropriate opportunities for practice and
competition, at equally desirable times.44

D. Travel and Per Diem Allowances

Compliance in this area involves a thorough review of: (1) modes of
transportation, (2) housing furnished during travel, (3) length of stay before and after
competitive events, (4) per diem allowances, and (5) dining arrangements.45 Distance,
size of travel squad, others accompanying the team, and the amount of equipment are also
important travel factors. The most viable solution for travel is men’s and women’s teams
should be treated according to their respective numbers. A nondiscriminatory policy
universities should utilize is to establish a mile rule. If the destination of the away game

44Id. at 57-60.
is more than 200 miles, (budget pending) the teams will fly; if the destination is less than 200 miles, a bus will be taken. A compliance problem would be limiting women's teams to bus travel, while men's teams solely fly. Furthermore, hotel stay should be approached the same way to avoid an infraction. If 50 percent of the male squad athletes are two athletes per room, the same should apply for the women squad athletes.

E. Coaching and Tutoring

The Policy Interpretation and Manual addresses coaching under two separate program components: (1) opportunity to receive coaching and academic tutoring, and (2) assignment and compensation of coaches and tutors. Compliance is assessed in coaching by examining the equivalence of:

(a). Availability: the relative availability of full-time and part-time coaches and graduate assistants.

(b) Assignment: the training, experience, and other professional qualifications of coaches, and

(c) Compensation: the allocation of funds for coaching to the men's and women's programs.\(^{46}\)

Availability of coaches is assessed by examining participant ratios, the distribution of different classifications of coaches, and the length of coaches' contracts.\(^{47}\) The Policy Interpretation states that in general, assignment or compensation policies or practices will be found to violate the athletics provisions of the Regulation only where they deny male

\(^{46}\)Id at 21.

\(^{47}\)Id. at 22-24.
and female athletes coaching of equivalent, quality, nature, or availability. Institutions are required to provide equivalent coaching to their male and female athletes.

A simple compliance approach is to provide the same number of coaches for women’s and men’s teams in that same sport and equivalent numbers for dissimilar sports. For example, if men’s basketball has a head coach, two assistants and a restricted earnings coach, then women’s basketball should have the same. For dissimilar sports, coaches should be available to the same extent appropriate for the sports. In the past, a common compliance problem was the provision of two assistant coaches for men’s basketball and one assistant for women’s basketball, while all other coaching assignments were equitable. Coaching contracts should be handled with the same approach. The women’s and the men’s programs should have the same lengths of contract.

The Policy Interpretation and Manual addresses academic tutoring under two separate program components also: (1) opportunity to receive coaching and academic tutoring, and (2) assignment and compensation of coaches and tutors. Compliance is assessed by examining the equivalence of:

(a) **Availability**: the relative availability of academic tutoring to male and female athletes,

(b) **Assignment**: the qualifications and experience of tutors, and

(c) **Compensation**: the allocation of funds for tutoring

If an institution provides special tutoring or academic counseling services to athletes, as


49 Id at 25.
distinguished from the general student body, investigators examine the criteria used to
determine who receives these services, the procedures used to provide the services, and
whether there are any differences between the services provided for male and female
athletes. If there are “no real differences” (e.g., if the athletics program obtains tutors for
any athlete whose grades are below a certain minimum level), no further investigation is
undertaken.50

The simplest way to comply is to pay all tutors the same wage regardless of
qualifications. However, if different rates of pay are appropriate the compliance problem
to avoid is for tutors receiving higher pay rates to be assigned to athletes or teams of one
sex more than athletes or teams of the other sex.

F. Provision of Locker Rooms, Practice, Competitive and Medical Facilities

Athletics facility issues have consistently been at the fore front of gender equity.
The OCR’s Investigator’s Manual identifies sub-components of each factor to consider
during compliance visits. Compliance is assessed by examining the equivalence of the:

(a) quality and availability of the facilities provided for practice and competitive
events,
(b) exclusivity of use of those facilities,
(c) availability of locker rooms,
(d) quality of locker rooms,
(e) maintenance of practice and competitive facilities, and
(f) preparation of facilities for practice and competitive events.51

The Manual further suggests some other specifics to be considered include: facility age,
continuity of locker assignments, other uses of facilities, general conditions, adequacy of

50 Id at 26.

areas, proximity of locker rooms to competition space, exclusive use of locker rooms for varsity teams, support services available (e.g., laundry, training, and taping), and the condition and sufficiency of practice and competitive facilities.

There are other planning issues not included in the Manual. It is important for teams to have access to the competition facility for practice to maintain a home court advantage. Equity considerations expand to the amenities of the competition facility including: locker rooms for visiting teams separate from the home team, coaches, and official lockers separate from team areas. Where both sexes participate on the same teams, separate locker rooms should be comparable. For home games, men’s and women’s locker rooms both need to be within a similar reasonable distance to competition spaces.

The preparation of facilities for competitive events may also involve putting out benches or chairs for players, setting up scorers’ tables, public-address systems and media areas. Common compliance problems occur when women’s coaches and athletes sweep floors, line fields, or set up tables and chairs for practices or competitive events, while maintenance staff perform these duties for men’s teams.

Provision of medical and training facilities and services have five components in the OCR Investigator’s Manual to consider during determination of compliance. These include:

(a) Availability of medical personnel and assistance,  
(b) Health, accident, and injury insurance,  
(c) Availability and quality of weight and training and facilities,  
(d) Availability and quality of conditioning facilities, and
(e) Availability and qualifications of athletic trainers

Facility-related sub-components identified in the Manual include general condition, quality, size, sufficiency, services available, schedule of access and proximity to locker rooms, practice and competitive facilities. Equitable physical adjacencies need to be achieved between trainers, training facilities and the men’s and women’s locker rooms, practice and competition areas. Quality of the training area includes pleasant and durable materials, good acoustical treatment, a sound system, controllable lighting with access to daylight, views and fresh air. Adequate space between equipment is necessary for safety as well as increasing use. Trainers should be able to view the entire training room from their office.

G. Publicity

Three factors are reviewed for compliance:

(a) Availability and quality of sports information personnel,

(b) Access to other publicity resources for men’s and women’s programs, and

(c) Quality and quantity of publications and other promotional devices featuring women’s and men’s programs.

A simple compliance solution is to assign professional personnel to the same or similar numbers of women’s and men’s teams to the same extent. Publications should be handled in the same manner and include: media guides, schedule cards, posters, and press releases.

Efforts to publicize, promote or to market women’s and men’s programs should

---

be equivalent even if the result may not be equivalent. Athletic departments should avoid
the common compliance problem pertinent in the past where the staff promotes and
publicizes men’s programs and makes little or no effort for the women’s programs.

H. Recruitment

Determining compliance involves a review of:

(a) Opportunities for coaches and other personnel to recruit,

(b) Whether financial and other resources are equivalently adequate, and

(c) Treatment of prospective student-athletes.

Recruiting is essential in establishing and maintaining a strong program. The NCAA
encourages each individual institution to establish and distribute written policies for
recruiting prospects. They should be clearly thought out, printed, and distributed so that
all coaches and administrators know what they are. The opportunity to recruit is analyzed
in the same manner as the opportunity to receive coaching. The same considerations are
made regarding the number of coaches assigned to each team, length of contract,
percentage of time assigned to coaching, and employment conditions. Any circumstances
affecting coaching ability may affect the opportunity to recruit. All coaches would agree
that recruiting is one of the most important if not the most important component of a
program, and must again be handled equitably.

Compliance is achieved when dollars budgeted and spent for female and male
athletes are proportional to their respective rates of participation. That is, if women are
40 percent of the participants and men are 60 percent, then 40 percent of the recruitment
dollars should be allocated to the women’s program and 60 percent to the men’s program.
No statistical tests or percentage point differences have been established that define noncompliance. Obviously, some justifications for disproportionate spending are acceptable. Team needs for any particular year may vary, for example, when a large number of athletes graduate in a given year. Recruitment needs for teams to be added to the program also may create a significant imbalance between the women's and the men's programs.

I. Conclusion

As gender equity expands, greater expectations will be put on these components. Achieving compliance with Title IX need not be difficult, even for programs that currently have serious compliance problems. Many benefits for male and female athletes may be shared to achieve compliance; other benefits may be provided on an alternating basis. The flexibility allowed under the Policy Interpretation permits a range of options for resolving any compliance concern. Compliance does require effort, planning, and occasionally imagination. Since the enactment of Title IX, gender equity changes have been significant, and have continued to grow and improve.
A. What is the NCAA?

The NCAA stands for the National Collegiate Athletic Association. All sizes and types of institutions, from the largest state universities to small private and church-affiliated colleges, make up the NCAA. The NCAA is an organization through which colleges and universities speak and act on athletics matters at the national level. It is a voluntary association of more than 12,000 institutions, conferences, organizations and individuals devoted to the sound administration of intercollegiate athletics. There are more than 600 members that do not compete on the major-college level. The requirements for an active membership to the NCAA are:

(1) maintaining at least four intercollegiate sports for men and for women (one in each of the three traditional seasons), unless the institution conducts athletics programs for one sex;

(2) comply with all NCAA legislation (as certified by the chief executive officer) dealing with financial aid, recruiting playing seasons, post-season competition and other areas of administration, and

53The 2000-01 NCAA Division I Manual. [Bylaw: 1.1]
(3) agree to cooperate fully with the NCAA enforcement program and to respect penalties imposed by that program.

In addition to active members—four-year institutions with full competitive and legislative privileges—the Association provides for member conferences, affiliated members (coaches associations, and other related groups), provisional members, (institutions fulfilling a three-year requirement before eligibility for active membership) and corresponding members (institutions, conferences, and nonprofit organizations not qualifying for the other categories).

Active members determine which of the three membership divisions is most appropriate for their programs, based on their ability to meet criteria established by the divisions. Generally; the differences in classifications include sports sponsorship minimum criteria, football and basketball scheduling requirements, academic and eligibility standards, and financial aid limitations. Each division may propose changes in certain bylaws that are applicable only to that division, but such changes can be rescinded by a two-thirds vote at a Convention. Representation on the Council, Executive Committee and Presidents Commission, as well as on many other committees, is determined by each division. Each division also has its own steering committee and its own committee to oversee its championships. There are a variety of purposes of this Association:

1) To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit;
2) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports to conformity with the constitution and bylaws of this Association;

3) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship, and amateurism;

4) To formulate, copyright and publish rules of play governing intercollegiate athletics;

5) To preserve intercollegiate athletics records;

6) To supervise the conduct of, and to establish eligibility standards for, regional and national athletics events under the auspices of this Association;

7) To cooperate with other amateur athletics organizations in promoting and conducting national and international athletics events;

8) To legislate, through bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics; and

9) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletics programs on a high level.54

The overall purpose of the NCAA is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and

54Manual, [Bylaw: 1.2]
professional sports."\textsuperscript{55} Legislation governing the conduct of intercollegiate athletics programs of member institutions applies to simple athletic issues such as eligibility, and complex issues such as the twenty hour practice rule. Member institutions are obligated to apply and enforce legislation, and the enforcement procedures of the Association are applied to institutions failing to fulfill this obligation.

B. Background

The NCAA was born on March 31, 1906. Formally known as the Intercollegiate Athletic Association of the United States,\textsuperscript{56} the organization began small and weak with unlimited potential. The NCAA’s father was football, while its mother was higher education. From 1906-1939 the Association grew in membership, and in services it provided to its members. (and began to resemble the NCAA of today) Although, the Association did not limit itself to just one sport, football was the original seed.

At the first convention of the IAAUS, held December 29, 1906, much of the business dealt with the constitution and bylaws which spelled out the Association’s purpose. The NCAA News proclaimed “Its object shall be regulation and supervision of college athletics throughout the United States, in order that the activities... may be maintained on an ethical plane in keeping with the dignity an high purpose of education.”\textsuperscript{57} For the next several years the Association concerned itself with the problems football, basketball, track and field, and baseball. In addition, the Association

\textsuperscript{55}\textit{Manual} [Bylaw: 1.3.1]


\textsuperscript{57}http://www.ncaa.org
continued to struggle with issues of amateurism and eligibility.

The Association broadened its reach throughout the years to include many more championships, but the NCAA still did not include women. With the passage of Title IX in 1972, changes began to surface. Women’s sports became a part of the Association with the addition of women’s championships to the NCAA in 1981 and 1982. Women were finally at the forefront of a decade of change. In 1973, on the advice of legal counsel, the NCAA rescinded its ruling prohibiting female student-athletes from competing for NCAA championships. That same year, Dacia Schileru, a diver from Wayne State University Michigan became the first female to compete in an NCAA championship when she entered the College Division Swimming and Diving Championships.58

C. Title IX’s impact on the NCAA

Today the NCAA supports Title IX, but the Association actively sought in the 1970s and 1980s, a relative conservative application of how the law should apply to college athletics. In 1974, the NCAA asked Sen. John Tower, (Rep-Texas), to propose an amendment that would have excluded intercollegiate athletics from the legislation. The amendment failed. The next year the Association’s president, John Fuzak of Michigan State University, wrote to President Ford stating, “The Department of Health, Education, and Welfare (HEW) feels the concepts of Title IX as expressed could seriously damage, if not destroy, the major men’s intercollegiate athletic programs.” The NCAA continued

to lobby Washington throughout the 1970s and 1980s, seeking to limit jurisdiction of Title IX. The NCAA sued HEW in 1976, arguing that HEW was exceeding its sphere of influence by venturing in intercollegiate athletics. The court dismissed the case in 1978, deciding that the NCAA did not have sufficient legal standing to sue on its members behalf on this issue. Referring back to the case of Grove City College v. Bell, the NCAA publicly supported the efforts of Grove City College. In 1978, the Supreme Court ruled that Title IX applied to Grove City, but only to those departments that actually received the funds. The narrow interpretation effectively denied the application of Title IX to non-federally funded programs such as college athletic departments. In 1988, despite negative efforts from the NCAA, Congress enacted the Civil Rights Restoration Act, requiring that all educational institutions that receive either direct or indirect federal funds be subject to Title IX. The Civil Rights Restoration Act restored the power of Title IX and caused the Association, as well as its member institutions, once again to rethink Title IX and its impact.

Despite repeated efforts from the NCAA to limit Title IX, our country finally realized it was here to stay. Women must be treated fairly. However, most schools today (2000) are not in compliance with Title IX. The reason they are getting away with it is because of lack of enforcement. If the NCAA declared tomorrow that no school would be eligible to participate in championships or competitions if it was not in compliance with Title IX, there would be a drastic increase in opportunities for women. Although our country is making strides in the right direction, universities need to develop master plans, or come up with alternatives to strive for.
D. Future of Title IX

Although significant progress has been made toward achieving the goal of gender equity in intercollegiate athletics, much remains to be done. In March 1992, the NCAA, published the results of the first national survey regarding the status of women in intercollegiate athletics. The results of that survey conclusively demonstrate that the problems documented in 1979 still characterize intercollegiate athletics. According to the NCAA, although over one-half of all college undergraduate students are now women, they only constitute roughly one-third of all intercollegiate athletes. At Division I schools, females constitute only 30.9 percent of all athletes. Female students constitute 32.1 percent of all athletes at Division II institutions and 34.9% of all athletes at Division III institutions.

The distribution of the tens of millions of athletic-scholarship dollars allocated by NCAA member institutions every year follows a similar pattern. According to the NCAA study, the average Division I institution allocates 30.5 percent of its athletic scholarship dollars to its female students while the average Division II institution allocates 31.8

---

59 NCAA Gender-Equity Study, Summary of Results (March 1992) [hereinafter NCAA Gender-Equity Study](on file with The Review of Litigation). The survey was conducted in 1991 and incorporates the responses of 646 of the NCAA’s 847 member institutions Id. at 1.

60 Id at 4.

61 Id at 21.

62 Id at 26.

63 Id at 4.
percent of its scholarship aid to females.\textsuperscript{64} The dollar differences underlying these percentage differences are substantial. For example, according to the survey, the average Division I institution spends $1,221,930 on athletic scholarships in a single academic year.\textsuperscript{65} Holding that number constant but assuming that women receive a 50 percent share, female students would receive $238,165 more in scholarship assistance than they currently receive from the average Division I institution in a single year.

Female athletes also receive a substantially smaller share of operating support than their male classmates. At Division I institutions, female athletes receive, on average, only 22.6 percent of total operating expenses.\textsuperscript{66} At Division II institutions, females receive 33.3 percent.\textsuperscript{67} In other words, institutions continue to spend a reduced share of their recruiting budget on female athletes. Division I institutions spend on average of 17.2 percent of their recruiting budget on women,\textsuperscript{68} and Division II institutions spend 24.5 percent.\textsuperscript{69} This is in spite of the fact that of the athletic participants in these divisions, only 30.9 percent and 32.1 percent, respectively, are female.

E. Conclusion

\textsuperscript{64}NCAA Gender-Equity Study, \textit{supra} note 129, at 20. Division III institutions do not grant scholarships.

\textsuperscript{65}Id at 4.

\textsuperscript{66}Id at 5.

\textsuperscript{67}Id at 26.

\textsuperscript{68}NCAA Gender-Equity Study, \textit{supra} note 129, at 5.

\textsuperscript{69}Id at 21.
Only, now, more than twenty years after its enactment, is Title IX beginning to live up to its promise in the area of intercollegiate athletics. The courts have consistently rejected all attempts to declaw Title IX since the passage of the Civil Rights Restoration Act in 1987. A prime example is Roberts v. Colorado State Bd. Of Agric, a class action suit brought under Title IX. This suit challenges gender equity in an intercollegiate athletic program, and the Tenth Circuit suggested that the appropriate remedy would be an injunction shutting down the men’s intercollegiate program altogether; until the defendant university brought its overall athletic program into compliance with Title IX.70

Ten years ago, the idea that a federal court would enjoin a Division I university’s participation in men’s intercollegiate athletics in order to achieve gender equity would have been unthinkable. Today, however, Title IX has finally moved forward, and that climb is becoming less steep.

CHAPTER SIX

Suggestions for Alternative Approaches to Title IX Policy

A. Introduction

Litigation involving Title IX gender discrimination in intercollegiate athletics is expanding rapidly. Institutions contemplating reductions in athletic programs, or responding to requests for expansion of resources for women's sports should be aware of the issue of Title IX compliance. More than twenty years after the passage of legislation designed to prohibit discrimination in higher education, the issue of gender equity in college athletics now commands the attention of athletic directors and university administrators across the country. Motivated by a desire to do the right thing, as well as to avoid litigation, collegiate athletic departments and conferences are seriously examining the issue of gender equity and seeking realistic solutions.

Title IX lawsuits can have serious consequences for the institutions involved, including:

(1) Monetary damages: Through damage awards and settlements, plaintiffs have received monetary damages as compensation for Title IX violations. In one case, a settlement agreement provided for damages in the amount of $60,000.
(2) *Attorneys' Fees:* Prevailing Title IX plaintiffs may be awarded their attorney's fees. Awards of attorneys' fees reportedly have ranged as high as $100,000 to $700,000.

(3) *Court-Mandated Funding of Programs:* Court orders requiring the retention or creation of varsity teams necessarily entail financial obligations related to supporting the teams. For institutions with already strained budgets, creating and funding such teams may require significant changes in men's athletics programs.

(4) *Additional or Broader Litigation:* Litigation of one Title IX claim may engender additional claims. The discovery and trial process may lead to expansion of the original suit, entirely separate actions, or an OCR investigation. An OCR investigation, even if originally based on a narrow claim, generally encompasses all aspects of an institution's intercollegiate athletics program.  

The challenge at institutions nationwide is to examine all phases of their departments of athletics and recreation, with regard to gender equity. The goal is to develop a model which overall benefits the resources, opportunities and participation available to men and women student-athletes. Each university must come up with a mission statement, and a set of goals.

Universities goals and objectives are founded on the concept of developing long range strategic plans. A goal is the overall conclusion you wish to accomplish, and it is

---

71 "Title IX In Intercollegiate Athletics." United Educators Risk Retention Group, Inc., (Sept. 15, 1993).

72 The University of California Title IX Expansion Plan (Released May 12, 1994)
generally subjective and qualitative in nature. For example, a goal might be: “To ensure compliance with university, NCAA, and conference rules and regulations.” This is a very general statement and gives no indication as to how this process will be accomplished. It is unclear how the goal is accomplished, so it is necessary to come up with objectives. An objective is how, what, when, and in some cases, by whom the goal will be accomplished. The more quantifiably based information that is found in the objective, the more easy it will be to accomplish the goal. It gives the goal the substance it needs to be accomplished. The previous example could be developed further by adding objectives, such as the following:

Ex) The Director of Athletics will initiate a meeting composed of a delegated Title IX board within the athletics department:

1. Compliance Coordinator
2. Associate Athletic Director
3. Sports Information Director
4. A designated coach from each team
5. A student representative

Next, invite a representative from the NCAA Legislative Services Department to meet with all conference administrators, coaches, and support personnel (selected committee) to renew pertinent NCAA Legislation related to the NCAA Division I level. The goals and objectives set forth must be feasible and achievable from the outset, since there is no sense in writing goals and objectives that cannot be met in a reasonable manner. A compliance plan should be developed in four steps: (1) establish a committee; (2) determine the needs of the department; (3) determine the resources of the department; and (4) develop an action plan for compliance.
B. Establish a Committee

The first step in developing a Title IX action plan is to establish a committee to review every aspect of the athletics department operations that are subject to Title IX scrutiny. The committee should be comprised of: (1) Athletic Director; (2) Associate Athletic Director; (3) Compliance Director; (4) Sports Information Director; (5) A coach from each team; and (6) student representative.

C. Determine the Needs

The committee should educate the staff about the self-study process and consider gender equity education and sensitivity training for the entire staff. As mentioned above, this is particularly important if the committee has been established following a Title IX complaint, or certification with conditions. Title IX is concrete and refers to a section of Federal law: the Education Amendments of 1972, whereas the concept of gender equity is more abstract. Based on a philosophical or moral approach to distribution of resources, the focus of equity is fairness. Simply put, gender equity means treating athletes of both genders fairly. But there is a wide range of opinion about what is “fair.” Many questions arise such as, is it fair to limit or cut established men’s programs in order to make programs available for women? In the absence of new resources, is it fair to continue to discriminate against women by not cutting men’s programs? Does fairness mean that athletes of different genders in the same sport must be treated exactly the same? Do the special circumstances of football exempt it from gender equity considerations? Gender equity issues such as these have come to the forefront at a time when most universities and their athletic departments are coping with serious budget problems, making even
more difficult and divisive the redistribution of resources.

Furthermore, it is essential that all head coaches understand the process and the purpose of the committee. The committee should also obtain any available resources from the NCAA and conference offices, such as survey data, guidelines, and any other helpful materials. Once the committee is established, the first step is to define “equitable.” The definition developed by the NCAA Gender Equity Task Force is:

“At an institutional level, gender equity in intercollegiate athletics describes an environment in which fair and equitable distribution of overall athletics opportunities, benefits and resources is available to women and men and in which student-athletes, coaches, and athletics administrators are not subject to gender-based discrimination.”

The second job for the committee in determining the needs of the department is to review the department’s master plan. The master plan should consist of all financial aid data, and current squad lists. The committee should also investigate the possibility of using an outside consultant, or gather information from other universities within the same region that have gone through a Title IX investigation. Having information from another university is extremely helpful in understanding how the OCR may examine an athletics department when a complaint is filed. Additionally, the committee should help in determining areas of emphasis for its examination of the department.

At a minimum, the committee should review the OCR Investigator’s Manuel and the 1979 Title IX Policy Interpretation issued by formerly the Department of Health, Education, and Welfare. The OCR’s Investigator’s Manual is also essential, and universities should use this resource, in conjunction with materials from other

\[\text{Gender Equity Task Force. The National Collegiate Athletic Association: 1993}\]
universities. This will give the committee a fairly complete picture of the scope that their examination should have in order to be effective. The committee should also obtain a copy of the *NCAA Guide to Gender Equity* and the *NCAA Gender Equity Task Force Report*.

D. Determine the Resources

In determining the resources of the department, the first factor to be considered is where the university is in its budget cycle, and what resources will or could be available to address short-term needs in the current fiscal year. The committee should also be in contact with the appropriate personnel at the university who has the information about potential assistance from the state or the primary funding body for the institution. Such assistance could include direct financial assistance to the department for needed facility upgrades, tuition waivers for the "under-represented gender", and/or possible taxes on specific items such as cigarettes or supplement university building budgets. Other resources to consider are: student fees dedicated to women's or non-revenue sports; new sources; conference income; private fund-raising campaign; and corporate partners and sponsorships.

E. Alternative Routes

After the committee has determined the needs and resources of the department, it should begin to draft an action plan or alternatives to ensure compliance with Title IX. (see Appendix E) It is important that the action plan go beyond the "letter of the law," which will create and maintain an environment that has dignity and respect for everyone. Short-term needs should be addressed as quickly as possible. Relatively quick action on
the part of the department to address short-term needs is important in showing the
commitment of the university and the athletics department to Title IX compliance. Any
short-term needs that cannot be resolved fairly quickly, should be prioritized. In addition,
available resources should be committed to their resolution.

In developing the alternatives, the committee should be careful to set a reasonable
amount of time for phasing in new participation opportunities, whether it be to add
women to squad rosters, limit squad sizes, add an existing women’s team, or drop a
men’s sport. It is also extremely important to examine whether the current opportunities
in the department are quality opportunities and to consider roster management as an
alternative. Finally, it might be worthwhile to develop a general definition of what
constitutes a quality athletics opportunity. Coaching attention, the number of
competitions, the practice-to-competition ratio, contributions to the program, and cost per
athletic opportunity are some of the factors that should be included in such a definition.
Here are a list of four alternative approaches to Title IX policy:

1. Adding a Women’s Sport

Adding a women’s sport is the preferred, alternative although there are many
requirements that are mandatory. New sports will require competition and practice
facilities, as well as locker rooms. Other support services (athletic training, tutoring and
advising, promotions, and media relations) would also need to be expanded to serve the
additional student-athletes adequately. Criteria to use in evaluating whether to add sports,
and which sports to add include: (1) availability of funding (operational and financial
aid); (2) number of sports to be added; (3) cost effectiveness (cost per athlete); (4) team
size; (5) conference standing; (6) NCAA standing; (7) availability of facilities; (8) need for expansion of other support services; (9) existence of a club program to draw from; (10) availability of recruits within the state, and nationally; (11) desired level of competition for the team (local, regional, national); (12) availability of intercollegiate competition; and (13) coaching requirements (number, availability). Universities need to look at the impact of Title IX, since this is an extremely sensitive area.

Athletic departments must not look to add a men’s varsity sport regardless of what other deletions or additions they are making to men’s programs, or additions they are making to women’s programs without a very careful review of Title IX compliance. Departments should also pay careful attention to club sports and explore upgrading them to varsity status, and listen to requests for them to be given varsity status. Budget problems will probably not be a legitimate nondiscriminatory reason for rejecting them. An OCR investigation or Title IX suit will focus on overall program funding and the cost of the additional “rejected” sport may look small in comparison to the entire budget.

2. Limiting Squad Sizes

Establishing realistic limits on men’s squad sizes is a way to help bring participation ratios closer to proportionality without hurting the competitive level of existing programs or requiring additional funds. A smaller number of men should mean increased availability of support services for other student-athletes. However, there is a strong opinion in departments and on various committees that limiting men’s squad sizes would have a negative effect on fund raising, especially in those sports which, over the years, have built a large alumni donor base. Given the history of reliance on fund raising
for sports' operating budgets within athletic departments, some coaches hold that the imposition of squad size limits would be damaging to the continued vitality of their programs. Is college football really so fragile a game that it cannot surrender a few scholarships to help fund a women's teams? According to Michigan State football coach George Perles, "You can't bite the hand that feeds you... If you cut and cut and cut, your product won't be worthwhile to sell to advertisers." Football can best afford to make sacrifices. If football coaches were to stick the same name on the depth chart for the third-string right side linebacker as for the third-string left linebacker, athletic departments could fund women's sports that get lost in the shuffle. If the average Division-I football scholarship is worth $10,000 a year, five scholarships could pay for a women's soccer program. The NFL somehow survives with rosters that average 47 players. The first reduction in football scholarships came in 1973 when a 105-scholarship cap was introduced. Universities thought this would probably bring more parity and thus more prosperity to the major college game. Eliminating just 5 to 10 players on each football team would be enough to fund an additional women's sport at each university struggling to comply with Title IX. (see Appendix E) Although this alternative seems to be the most incriminating, it is also the most realistic.

3. Adding To Existing Women's Teams

The third option is increasing the number of participant's on current women's teams. There is a sharp difference among different committees as to the viability of this option. On one side there is the view that a number of women's teams could easily carry

larger rosters, and that the coaches should be required to do so. Coaches of some of the women’s teams would be willing to carry larger squads if they had full complements of coaches and sufficient practice space and funding; which have been limiting factors in the past. Some believe that membership on a varsity team, regardless of whether or not the person ultimately competes, has value. This school of thought also allows that having more spots open on a given team may help generate interest in participation by women students. Finally, some believe that if men’s teams are being forced to cut participants, then some women’s teams should be forced to add.

On the other side is the concern that numbers should not be increased unless there are meaningful opportunities to participate. While there are developmental aspects to all sports, and the educational value derived from participation would theoretically be the same regardless of skill level, the ultimate goal of an intercollegiate program is to field elite teams capable of winning conference and national championships. Some coaches are concerned about diluting their effectiveness with the team if they carry players who are not talented enough to compete at the Division I level. Junior varsity teams once utilized, are not a realistic option for most women’s sports, since very few schools sponsor JV squads, resulting in a lack of competition for these groups. NCAA coaching limitations, as well as budget and facility issues, are other concerns with this approach to equalizing participation opportunities.

Desired or workable participation levels might also be sport specific. Some sports (usually individual sports as opposed to team sports) lend themselves to larger squad sizes because of the nature of the practices and competitions. Financial aid availability,
cultural differences between men and women in what constitutes meaningful participation, and preferences of coaches are other factors which affect the viability of adding more participants to existing teams.

4. Dropping Men's Sports

Universities, in general, disagree about including this as any kind of alternative. Some believe that its inclusion might be seen as an endorsement of that option; others hold that we should not pretend that this painful alternative does not exist. Dropping sports would most likely have a negative public relations impact, as well as a possible negative impact on fund raising. Although dropping mens sports in general constitutes a negative attitude, unfortunately it is often necessary in order to bring the overall interests proportionate to one another.

Under Title IX an institution may take affirmative action to overcome the effects of conditions which result in limited participation in an athletic program by one sex.\(^{75}\) In Cohen v.Brown, the First Circuit interpreted this to allow an institution to attempt to achieve gender parity between its athletic program and its student body by “subtraction and downgrading that is, by reducing opportunities for the over represented gender while keeping opportunities stable for the under represented gender (or reducing them to a much lesser extent.)”\(^{76}\) Whether such action constitutes lawful “affirmative action” or an impermissible gender based classification, sometimes called “reverse discrimination,” has recently been addressed by the Seventh Circuit in the case at the University of Illinois.

\(^{75}\)34 CFR 06.3 (b)

\(^{76}\)Id at 898, n.15
Men at the University of Illinois brought suit on the grounds that elimination of the men’s swimming team, but not the women’s swimming team constituted gender discrimination. Evidence showed that when the team was cut, undergraduate enrollment was 56 percent men and 44 percent women. At the same time, men had 77 percent of the varsity positions while women had 23 percent. The Seventh Circuit affirmed the district’s courts summary judgement in favor of the University. The court held the University’s decision to drop the men’s team was consistent with the Title IX regulations and Policy Interpretation requirement that men and women participate in intercollegiate athletics “substantially proportionate” to the number of students of each sex enrolled at the institution. Moreover, the “substantial proportionality” requirement violated neither Title IX nor the Equal Protection Clause.

While the University’s decision to reduce its athletic offerings was motivated by budget considerations, other considerations, such as the need to comply with Title IX influenced the selection of particular programs to be terminated. The factors relied on were: (1) whether or not the Big Ten Conference and NCAA sponsored a championship in the sport; (2) the tradition of success of the sport at the University; (3) the level of interest and participation in the sport at the high school level; (4) the adequacy of the University’s facilities for the sport; (5) the level of spectator interest in the sport; (6) gender and ethnic issues; and (7) the cost of the sport. Men’s swimming was selected for termination because, among other things, the program was historically weak, swimming is not a widely offered athletic activity in high schools, and it does not have a large

---

77Kelley v. Board of Trustees, No. 93-3205 (7th Circuit, Sept. 1, 1994)
spectacular following. According to the University of Illinois, they did not eliminate the women’s program because the school’s legal counsel advised that such action would put the University at risk of violating Title IX. The reason being for cutting the men’s team and not the women’s team was because as the case-law makes clear, if the percentage of student-athletes of a particular sex is substantially proportionate to the percentage of students of that sex in the general student population, the athletic interests of that sex are presumed to be accommodated. The University’s decision to retain the women’s swimming program, even though budget constraints required that the men’s program be terminated was a reasonable response to the requirements of the applicable regulation and policy interpretation.

F. Conclusion

Title IX presents a challenge to athletics departments nationwide. Successfully meeting this challenge requires the commitment of leaders within the university community as well as the athletics department. Taking action before a compliant is filed against the department greatly increases the ability of the department to resolve challenges presented by Title IX without affecting current programs. Waiting for a complaint or lawsuit to be filed often results in cutting sports and reducing opportunities for student-athletes. The Title IX situation can often be resolved with careful and appropriate planning. I have went over four policy alternatives athletic departments should consider in order to comply with Title IX. One might be more viable than another, but the bottom line is compliance.

78 Cohen, 991 F. 2d at 98
There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of “romantic paternalism” which, in practical effect, put women, not a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim:\(^7\)

\[\text{"Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . ."}\]

It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in a job market and

\(^{7}\)\text{411 U.S. 677 (1973).}
perhaps most conspicuously, in the political arena.\textsuperscript{80}

One of the areas of greatest legal vulnerability for institutions of higher education is the rapidly evolving requirement for gender equity in college athletics, driven by recent court cases interpreting Title IX of the Education Amendments of 1972. Gender equity in intercollegiate athletics is a difficult and complicated topic. Still, there are lessons to be learned, among them is the interplay of law and policy issues in higher education, and the opportunities offered by changes in the law to re-examine old assumptions and practices.

Title IX presents a challenge to athletics departments nationwide. Successfully meeting this challenge requires the commitment of leaders within the university community as well as the athletics department. Waiting for a complaint or lawsuit to be filed often results in cutting sports and reducing opportunities for student-athletes who are caught in the middle of a situation that can often be resolved with careful and appropriate planning.

There are three different areas universities need to look at. For instance, in terms of participation, make sure schools are keeping their eyes open to see what possible women's teams they might add. (where women have interest and ability to participate at the varsity level) If a school decides it needs to cut back for any reason, it better not touch an active women's team unless the athletic program has reached proportionality. In regards to financial aid, it is very simple to crunch the numbers and make sure the financial aid offered is proportionate to athletic participation rates. Overall, universities

\textsuperscript{80}Id. at 684-86 (footnotes omitted) (quoting Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley J., concurring).
are not in compliance in these particular areas.

Three weeks after they were announcing that they were dropping their men’s and women’s swimming team, the University of Washington officials decided that the programs could stick around after all. According to Barbara Hedges, the university’s athletics director, the outcry from the alumni and members of the swimming community in the Pacific-Northwest had persuaded her to change her mind. Had Washington followed through with its plans, it would have been the first Division I university in at least a decade to drop a women’s sport.

With respect to overall program benefits, institutions should make sure the rules applied to women do not differ from those applied to men. If a school decides to give better treatment to the members of some men’s teams (football) then it needs to make sure it gives similarly better treatment to the same percentage of members of the women’s team. It is fairly easy to treat men and women the same, if is what the school really wants to do. The question ought not to be “what’s the bare minimum we can do to have good defense if we get challenged,” but rather how do we make sure women get as many benefits in intercollegiate athletics as men do.
Public Law 100-259
100th Congress

An Act

To restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Civil Rights Restoration Act of 1987".

FINDINGS OF CONGRESS

Sec. 2. The Congress finds that—

(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and

(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

EDUCATION AMENDMENTS AMENDMENT

Sec. 3. (a) Title IX of the Education Amendments of 1972 is amended by adding at the end the following new sections:

"INTERPRETATION OF 'PROGRAM OR ACTIVITY'

Sec. 908. For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of—

(1) a department, agency, special purpose district, or other instrumentality of a State or of a local government;

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—
PUBLIC LAW 100-259—MAR. 22, 1988

"(ii) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(iii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organization.

(b) Notwithstanding any provision of this Act or any amendment thereto:

"NEUTRALITY WITH RESPECT TO ABORTION

"Sec. 909. Nothing in this title shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

REHABILITATION ACT AMENDMENT

Sec. 4. Section 504 of the Rehabilitation Act of 1973 is amended—

(1) by inserting "(a)" after "Sec. 504."); and

(2) by adding at the end the following new subsections:

"(b) For the purposes of this section, the term 'program or activity' means all of the operations of—

"(1XA) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(2XA) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(aX10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3XA) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
DEPARTMENT OF EDUCATION

Office for Civil Rights

Office of the Secretary

Intercollegiate Athletics: Sex Discrimination
HEW/Secretary/Civil Rights Office issues policy interpretation of Title IX Education Amendments of 1972; effective 12-11-79
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office for Civil Rights
Office of the Secretary
45 CFR Part 86
Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW

ACTION: Policy interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the Intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits.

EFFECTIVE DATE: December 11, 1979

FOR FURTHER INFORMATION CONTACT: Colleen O'Connor, 330 Independence Avenue, Washington, D.C. (202) 245-6071

SUPPLEMENTARY INFORMATION:

I. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation, in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 844 of the Education Amendments of 1974 further provides:

The Secretary of (of HEW) shall prepare and publish * * * proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

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

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation.\footnote{The regulation specifically refers to club sports separately from intercollegiate athletics. Accordingly, under this Policy Interpretation, club sports are covered by regulation.}

Footnotes continued on next page
Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

- Compliance in Financial Assistance (Scholarships) Based on Athletic Ability: Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.

- Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.

- Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in an institution's existing athletic program. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- "Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities. If, however, there were disparities in nondiscriminatory factors, and
- Benefits and opportunities for male and female athletes were not financially measurable.

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either:

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or
- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of women.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

(1) Institutions and representatives of athletic programs expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently, the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilitate an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justification for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department determined that the approach of stating actual compliance factors would be more useful to all concerned.

(3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditures patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental internal deliberations and the major points raised, is set forth at Appendix II of this document.

VI. Historic Patterns of Intercollegiate Athletics Program Development and Operations

In its proposed Policy Interpretation of December 11, 1978, the Department...
The Department has modified that published a summary historic. The Policy Interpretation comment and consultation process. The summary is set forth at Appendix A to this document.

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 86.37(c) and 86.41(c).

A. Athletic Financial Assistance (Scholarships)

1. The Regulation—Section 86.37(c) of the regulation provides:

"[Institutions] must provide reasonable opportunities for such award of financial assistance for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics.

2. The Policy—The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the number of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if the comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

a. At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men and women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

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

3. Application of the Policy—A. This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.

b. When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

4. Definition—For purposes of examining compliance with this Section, the participants will be defined as those athletes:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport, or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

B. Equivalence in Other Athletic Benefits and Opportunities

1. The Regulation—The Section also addresses the need to provide and maintain athletic opportunities and programs that are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible.

2. The Policy—The Department will assess compliance with both the Section 86.37(c) (1) and (c) (2) on the accommodation of student interests and abilities is covered in detail in the following Section C of this policy interpretation.

(3) Scheduling of games and practice times;

4. Travel and per diem expenses;

(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 services and facilities;

(9) Provision of housing and dining services and facilities; and

(10) Publicity

Section 86.37(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity.

Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.

2. The Policy—The Department will assess compliance with both the Section 86.37(c) (1) and (c) (2) on the accommodation of student interests and abilities is covered in detail in the following Section C of this policy interpretation.
nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable.

b. Some aspects of athletic programs may not be equivalent for men and women because of legitimately sex-neutral factors related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Such differences are justifiable to the extent that they do not reduce overall equality of opportunity.

c. The activities directly associated with the operation of a competitive event in a single-sex sport may, under some circumstances, create unique demands or imbalances in particular program components. Provided any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree, the resulting differences may be found nondiscriminatory. At many schools, for example, certain sports—notably football and men's basketball—traditionally draw large crowds. Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind. These differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in spectator appeal and if the levels of event management support available to both programs are based on sex-neutral criteria (e.g., facilities used, projected attendance, and staffing needs).

d. Some aspects of athletic programs may not be equivalent for men and women because institutions are undertaking voluntary affirmative actions to overcome effects of historical conditions that have limited participation in athletics by the members of one sex. This is authorized at § 60.3(b) of the regulation.

3. Application of the Policy—General Athletic Program Components—Equipment and Supplies (§ 86.41(c)(2)). Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment. Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

   (1) The quality of equipment and supplies;
   (2) The amount of equipment and supplies;
   (3) The suitability of equipment and supplies;
   (4) The maintenance and replacement of the equipment and supplies; and
   (5) The availability of equipment and supplies.

b. Scheduling of Games and Practice Times (§ 86.41(c)(3)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

   (1) The number of competitive events per sport;
   (2) The number and length of practice opportunities;
   (3) The times of day competitive events are scheduled;
   (4) The times of day practice opportunities are scheduled; and
   (5) The opportunities to engage in available pre-season and post-season competition.

c. Travel and Per Diem Allowances (§ 86.41(c)(4)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

   (1) Modes of transportation;
   (2) Housing furnished during travel;
   (3) Length of stay before and after competitive events;
   (4) Per diem allowances; and
   (5) Dining arrangements.

d. Opportunity to Receive Coaching and Academic Tutoring (§ 86.41(c)(5)).

(1) Coaching—Compliance will be assessed by examining, among other factors:

   (a) Relative availability of full-time coaches;
   (b) Relative availability of part-time and assistant coaches; and
   (c) Relative availability of graduate assistants.

(2) Academic tutoring—Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

   (a) The availability of tutoring; and
   (b) Procedures and criteria for obtaining tutoring assistance.

e. Assignment and Compensation of Coaches and Tutors (§ 86.41(c)(6)). In

general, a violation of Section 86.41(c)(6) will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.

Nondiscriminatory factors can affect the compensation of coaches. In determining whether differences are caused by permissible factors, the range and nature of duties, the experience of individual coaches, the number of assistant coaches supervised, and the level of competition will be considered.

Where these or similar factors represent valid differences in skill, effort, responsibility or working conditions they may, in specific circumstances, justify differences in compensation. Similarly, there may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary.

(1) Assignment of Coaches—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

   (a) Training, experience, and other professional qualifications;
   (b) Professional standing.

(2) Assignment of Tutors—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

   (a) Tutor qualifications;
   (b) Training, experience, and other qualifications.

(3) Compensation of Coaches—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

   (a) Rate of compensation (per sport, per season);
   (b) Duration of contracts;
   (c) Conditions relating to contract renewal;
   (d) Experience;
   (e) Nature of coaching duties performed;
   (f) Working conditions; and
   (g) Other terms and conditions of employment.

(4) Compensation of Tutors—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

   (a) Training, experience, and other professional qualifications;
   (b) Professional standing.

*The Department's jurisdiction over the employment practices of recipients under Subpart E, §§ 60.51-60.81 of the Title IX regulation has been successfully challenged in several court cases. Accordingly, the Department has suspended enforcement of Subpart E, Section 86.41(c)(8) of the regulation. However, the Department authorizes the Department to consider the compensation of coaches of men and women in the determination of the equality of athletic opportunity provided to male and female athletes.
(a) Hourly rate of payment by nature of subjects tutored; (b) Pupil loads per tutoring season; (c) Tutor qualifications; (d) Experience; (e) Other terms and conditions of employment.

1. Provision of Locker Rooms, Practice and Competitive Facilities

(b) Requirements provided for practice and competitive events; (c) Availability and quality of conditioning facilities; and (d) Preparation of facilities for practice and competitive events.

2. Provision of Medical and Training Facilities and Services

(c) Tutor qualifications; (d) Experience; (e) Other terms and conditions of employment.

3. Provision of Housing and Dining Facilities and Services

(f) Tutor qualifications; (g) Experience; (h) Other terms and conditions of employment.

4. Provision of Support Services

(g) Availability of locker rooms; (h) Quality of locker rooms; (i) Maintenance of practice and competitive facilities; and (j) Preparation of facilities for practice and competitive events.

5. Provision of Medical and Training Facilities and Services

(k) Tutor qualifications; (l) Experience; (m) Other terms and conditions of employment.

6. Provision of Housing and Dining Facilities and Services

(n) Tutor qualifications; (o) Experience; (p) Other terms and conditions of employment.

7. Provision of Support Services

(q) Tutor qualifications; (r) Experience; (s) Other terms and conditions of employment.

8. Provision of Medical and Training Facilities and Services

(t) Tutor qualifications; (u) Experience; (v) Other terms and conditions of employment.

9. Provision of Housing and Dining Facilities and Services

(w) Tutor qualifications; (x) Experience; (y) Other terms and conditions of employment.

10. Provision of Support Services

(z) Tutor qualifications; (aa) Experience; (ab) Other terms and conditions of employment.

Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.

Such examinations will review the following factors:

(1) Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;

(2) Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and

(3) Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

b. Provision of Support Services

The administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions.

In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:

(1) The amount of administrative assistance provided to men's and women's programs;

(2) The amount of secretarial and clerical assistance provided to men's and women's programs.

5. Overall Determination of Compliance

The Department will base its compliance determination under §86.41(c) of the regulation upon an examination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole; or

c. Whether disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.

C. Effective Accommodation of Student Interests and Abilities

1. The Regulation

The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at §86.41(c), requires the Director to consider, when determining whether equal opportunities are available—

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity.

Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. The Policy

The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

a. The determination of athletic interests and abilities of students;

b. The selection of sports offered; and

c. The levels of competition available including the opportunity for team competition.

3. Application of the Policy—Determination of Athletic Interests and Abilities

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. Application of the Policy—Selection of Sports

In the selection of sports, the regulation does not require institutions
to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

a. Contact Sports—Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

b. Non-Contact Sports—Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

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

5. Application of the Policy—Levels of Competition.

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(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.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(1) Whether the competitive schedules for men’s and women’s teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution’s normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

b. Overall Determination of Compliance.

The Department will base its compliance determination under § 86.41(c) of the regulation upon a determination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution’s program as a whole; or

c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

VIII. The Enforcement Process

The process of Title IX enforcement is set forth in § 86.71 of the Title IX regulation, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights Act of 1964. The enforcement process prescribed by the regulation is supplemented by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.

According to the regulation, there are two ways in which enforcement is initiated:

• Compliance Reviews—Periodically the Department must select a number of recipients (in this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX. (45 CFR 80.7(a))

• Complaints—The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient’s programs. (45 CFR 80.7(b))

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.

The Department has 90 days to conduct an investigation and inform the recipient of its findings, and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between the Department and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance. Sometimes the violation is relatively minor and can be corrected immediately. At other times, however, the negotiations result in a plan that will correct the violations within a specified period of time. To be acceptable, a plan must describe the manner in which institutional resources will be used to correct the violation. It also must state acceptable time tables for reaching interim goals and full compliance. When agreement is reached, the Department notifies the institution that its plan is acceptable. The Department then is obligated to review periodically the implementation of the plan.

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate.
If the plan is not adequate to correct the violations (or to correct them within a reasonable period of time) the recipient will be found in noncompliance and voluntary negotiations will begin. However, if the institutional plan is acceptable, the Department will inform the institution that although the institution has violations, it is found to be in compliance because it is implementing a corrective plan. The Department, in this instance also, would monitor the progress of the institutional plan. If the institution subsequently does not completely implement its plan, it will be found in noncompliance.

When a recipient is found in noncompliance and voluntary compliance attempts are unsuccessful, the formal process leading to termination of Federal assistance will be begun. These procedures, which include the opportunity for a hearing before an administrative law judge, are set forth at 45 CFR 80.8-80.11 and 45 CFR Part 81.

IX. Authority


Roma Stewart,

Director, Office for Civil Rights, Department of Health, Education, and Welfare.


Patricia Roberts Harris,

Secretary, Department of Health, Education, and Welfare.

Appendix A—Historic Patterns of Intercollegiate Athletics Program Development

1. Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. During the 1977-78 academic year women students accounted for 48 percent of the national undergraduate enrollment (5,499,000 of 11,267,000 students).1 Yet, only 30 percent of the intercollegiate athletes are women.2

The historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women. One source indicates that, on the average, colleges and universities are providing twice the number of sports for men as they are for women.3

2. Participation by women in sports is growing rapidly. During the period from 1971-1978, for example, the number of female participants in organized high school sports increased from 294,000 to 2,083,000—an increase of over 600 percent.4 In contrast, between Fall 1971 and Fall 1977, the enrollment of females in high school decreased from approximately 7,600,000 to approximately 7,150,000 a decrease of over 6 percent.5

The growth in athletic participation by high school women has been reflected on the campuses of the nation's colleges and universities. During the period from 1971 to 1976 the enrollment of women in the nation's institutions of higher education rose 52 percent, from 3,400,000 to 5,201,000.6 During this same period, the number of women participating in intramural sports increased 100 percent from 276,167 to 576,167.7 In club sports, the number of women participants increased from 16,386 to 25,541 or 55 percent. In intercollegiate sports, women's participation increased 102 percent from 31,852 to 64,375.8 These developments reflect the growing interest of women in competitive athletics, as well as the efforts of colleges and universities to accommodate those interests.

3. The overall growth of women's intercollegiate programs has not been at the expense of men's programs. During the past decade of rapid growth in women's programs, the number of intercollegiate sports available for men has remained stable, and the number of male athletes has increased slightly. Funding for men's programs has increased from $1.2 to $2.2 million between 1970-1977 alone.9

4. On most campuses, the primary problem confronting women athletes is the absence of a fair and adequate level of resources, services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that are members of both the National Collegiate Athletic Association (NCAA) and the Association for Intercollegiate Athletics for Women (AIAW), the average annual scholarship budget is $39,000. Male athletes receive $2,020 or 78 percent of this amount, and female athletes receive $7,000 or 22 percent, although women are 30 percent of all the athletes eligible for scholarships.10

Likewise, substantial amounts have been provided for the recruitment of male athletes, but little funding has been made available for recruitment of female athletes.

Congressional testimony on Title IX and subsequent surveys indicates that disparities also exist in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities.11

5. At several institutions, intercollegiate football is unique among sports. The size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports, both men's and women's. Title IX requires that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity."12

However, the unique size and cost of football programs have been taken into account in developing this Policy Interpretation.

Appendix B—Comments and Responses

The Office for Civil Rights (OCR) received over 700 comments and recommendations in response to the December 11, 1978 publication of the proposed Policy Interpretation. After the formal comment period, representatives of the Department met for additional discussions with many individuals and


grups including college and university officials, athletic associations, athletic directors, women's rights organizations and other interested parties. HEW representatives also visited eight universities in order to assess the potential of the proposed Policy Interpretation and of suggested alternative approaches for effective enforcement of Title IX.

The Department carefully considered all information before preparing the final policy. Some changes in the structure and substance of the Policy Interpretation have been made as a result of concerns that were identified in the comment and consultation process.

Persons who responded to the request for public comment were asked to comment generally and also to respond specifically to eight questions that focused on different aspects of the proposed Policy Interpretation.

Question No. 1: Is the description of the current status and development of intercollegiate athletics for men and women accurate? What other factors should be considered?

Comment A: Some commentors noted that the description implied the presence of intent on the part of all universities to discriminate against women. Many of these commentors held a vague compliance standard in the regulation.

Comment B: Some commentors stated that the statistics used were outdated in some areas, incomplete in some areas, and inaccurate in some areas.

Response: The description of the current status and development of intercollegiate athletics for men and women was designed to be a factual, historical overview. There was no intent to imply the universal presence of discrimination. The Department recognizes that there are many colleges and universities that have been and are making good faith efforts, in the midst of increasing financial pressures, to provide equal athletic opportunities to their male and female athletes.

Question No. 2: Is the proposed two-stage approach to compliance practical? Should it be modified? Are there other approaches to be considered?

Comment: Some commentors stated that Part II of the proposed Policy Interpretation "Equally Accommodating the Interests and Abilities of Women" represented an extension of the July 1978, compliance deadline established in § 80.41(d) of the Title IX regulation. Response: Part II of the proposed Policy Interpretation was not intended to extend the compliance deadline. The format of the two stage approach, however, seems to have encouraged that perception; therefore, the elements of both stages have been unified in this Policy Interpretation.

Question No. 3: Is the equal average per capita standard based on participation rates practical? Are there alternatives or modifications that should be considered?

Comment A: Some commentors stated it was unfair or illegal to find noncompliance solely on the basis of a financial test when more valid indicators of equality of opportunity exist.

Response: The equal average per capita standard was not a standard by which noncompliance could be found. It was a standard of presumptive compliance. In order to prove noncompliance, HEW would have been required to show that the unexplained disparities in expenditures were discriminatory in effect. The standard, in part, was offered as a means of simplifying proof of compliance for universities. The widespread confusion concerning the significance of failure to satisfy the equal average per capita expenditure standard, however, is one of the reasons it was withdrawn.

Comment B: Many commentors stated that the equal average per capita standard penalties those institutions that have increased participation opportunities for women and rewards institutions that have limited women's participation.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumptive compliance, the question of its effect is no longer relevant. However, the Department agrees that universities that had increased participation opportunities for women and wished to take advantage of the presumptive compliance standard, would have had a bigger financial burden than universities that had done little to increase participation opportunities for women.

Question No. 4: Is there a basis for treating part of the expenses of a particular revenue producing sport differently because the sport produces income used by the university for non-athletic operating expenses on a non-discriminatory basis? If so, how should such funds be identified and treated?

Comment: Some commentors stated that this question was largely irrelevant because there were so few universities at which revenue from the athletic program was used in the university operating budget.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumptive compliance, a decision is no longer necessary on this issue.

Question No. 5: Is the grouping of financially measurable benefits into three categories practical? Are there alternatives that should be considered?

Specifically, should recruiting expenses be considered together with all other financially measurable benefits?

Comment A: Most commentors stated that, if measured solely on a financial standard, recruiting should be grouped with the other financially measurable items. Some of these commentors held that at the current stage of development of women's intercollegiate athletics, the amount of money that would flow into the women's recruitment budget as a result of separate application of the equal average per capita standard to recruiting expenses, would make recruitment a disproportionately large percentage of the entire women's budget. Women's athletic directors, particularly, wanted the flexibility to have the money available for other uses, and they generally agreed on including recruitment expenses with the other financially measurable items.

Comment B: Some commentors stated that it was particularly inappropriate to base any measure of compliance in recruitment solely on financial expenditures. They stated that even if proportionate amounts of money were allocated to recruitment, major inequities could remain in the benefits to athletes. For instance, universities could maintain a policy of subsidizing visits to their campuses of prospective students of one sex but not the other. Commentors suggested including an examination of differences in benefits to prospective athletes that result from recruiting methods would be appropriate.

Response: In the final Policy Interpretation, recruitment has been moved to the group of program areas to be examined under § 80.41(c) to determine whether overall equal athletic opportunity exists. The Department accepts the comment that a financial measure is not sufficient to determine whether equal opportunity is being provided. Therefore, in examining athletic recruitment, the Department will primarily review the opportunity to recruit, the resources provided for recruiting, and methods of recruiting.
measurable benefits and opportunities fair? Are there other factors that should be considered?

Comment: Most commentors indicated that the factors named in the proposed Policy Interpretation (the "scope of competition" and the "nature of the sport") as justifications for differences in equal average per capita expenditures were so vague and ambiguous as to be meaningless. Some stated that it would be impossible to define the phrase "scope of competition", given the greatly differing competitive structure of men's and women's programs. Other commentors were concerned that the "scope of competition" factor that may currently be designated as "non-discriminatory" was, in reality, the result of many years of inequitable treatment of women's athletic programs.

Response: The Department agrees that it would have been difficult to define clearly and then to quantify the "scope of competition" factor. Since equal average per capita expenditure has been dropped as a standard of presumed compliance, such financial justifications are no longer necessary. Under the equivalency standard, however, the "nature of the sport" remains an important concept. As explained within the Policy Interpretation, the unique nature of a sport may account for perceived inequities in some program areas.

Question No: 7: Is the comparability standard for benefits and opportunities that are not financially measurable fair and realistic? Should other factors controlling comparability be included? Should the comparability standard be revised? Is there a different standard which should be considered?

Comment: Many commentors stated that the comparability standard was fair and realistic. Some commentors were concerned, however, that the standard was vague and subjective and could lead to uneven enforcement.

Response: The concept of comparing the non-financially measurable benefits and opportunities provided to men and female athletes has been preserved and expanded in the final Policy Interpretation to include all areas of examination except scholarships and accommodation of the interests and abilities of both sexes. The standard is that equivalent benefits and opportunities must be provided. To avoid vagueness and subjectivity, further guidance is given about what elements will be considered in each program area to determine the equivalency of benefits and opportunities.

Question No: 8: Is the proposal for increasing the opportunity for women to participate in competitive athletics appropriate and effective? Are there other procedures that should be considered? Is there a more effective way to ensure that the interests and abilities of both men and women are equally accommodated?

Comment: Several commentors indicated that the proposal to allow a university to gain the status of presumed compliance by having policies and procedures to encourage the growth of women's athletics was appropriate and effective for future students, but ignored students presently enrolled. They indicated that nowhere in the proposed Policy Interpretation was concern shown that the current selection of sports and levels of competition effectively accommodate the interests and abilities of women as well as men.

Response: Comment accepted. The requirement that universities equally accommodate the interests and abilities of their male and female athletes (Part II of the proposed Policy Interpretation) has been directly addressed and is now a part of the unified final Policy Interpretation.

Additional Comments

The following comments were not responses to questions raised in the proposed Policy Interpretation. They represent additional concerns expressed by a large number of commentors.

(1) Comment: Football and other "revenue producing" sports should be totally exempted or should receive special treatment under Title IX.

Response: The April 18, 1978, opinion of the General Counsel, HEW, concludes that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulation in the administration of any revenue producing activity". Therefore, football or other "revenue producing" sports cannot be exempted from coverage of Title IX.

In developing the proposed Policy Interpretation the Department concluded that although the fact of revenue production could not justify disparity in average per capita expenditure between men and women, there were characteristics common to most revenue producing sports that could result in legitimate non-discriminatory differences in per capita expenditures. For instance, some "revenue producing" sports require expensive protective equipment and most require high expenditures for the management of events attended by large numbers of people. These characteristics and others described in the proposed Policy Interpretation were considered acceptable, non-discriminatory reasons for differences in per capita average expenditures.

In the final Policy Interpretation, under the equivalent benefits and opportunities standard of compliance, some of these non-discriminatory factors are still relevant and applicable.

(2) Comment: Commentors stated that since the equal average per capita standard of presumed compliance was based on participation rates, the word should be explicitly in terms of equal, average per capita expenditures and in terms of comparability of other opportunities and benefits for male and female participating athletes.

Response: Although the final Policy Interpretation does not use the equal average per capita standard of presumed compliance, a clear understanding of the word "participant" is still necessary, particularly in the determination of compliance where scholarships are involved. The word "participant" is defined in the final Policy Interpretation.

(3) Comment: Many commentors were concerned that the proposed Policy Interpretation neglected the rights of individuals.

Response: The proposed Policy Interpretation was intended to further clarify what colleges and universities must do within their intercollegiate athletic programs to avoid discrimination against individuals on the basis of sex. The Interpretation, therefore, spoke to institutions in terms of their male and female athletes. It spoke specifically in terms of equal, average per capita expenditures and in terms of comparability of other opportunities and benefits for male and female participating athletes.

The Department believes that under this approach the rights of individuals were protected. If women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby. Under the proposed Policy Interpretation, for example, if female athletes as a whole were receiving their proportional share of athletic financial assistance, a university would have been presumed in compliance with that section of the regulation. The Department does not want and does not have the authority to force universities to offer identical programs to men and women. Therefore, to allow flexibility within women's and men's programs, the proposed Policy Interpretation stated that an institution would be presumed in compliance if the average per capita expenditures on athletic scholarships for men and women, were equal. This same flexibility (in scholarships and in other areas) remains in the final Policy Interpretation.
(4) Comment: Several commentors stated that the provision of a separate dormitory to athletes of only one sex, even where no other special benefits were involved, is inherently discriminatory. They felt such separation indicated the different degrees of importance attached to athletes on the basis of sex.

Response: Comment accepted. The provision of a separate dormitory to athletes of one sex but not the other will be considered a failure to provide equivalent benefits as required by the regulation.

(5) Comment: Commentors, particularly colleges and universities, expressed concern that the differences in the rules of intercollegiate athletic associations could result in unequal distribution of benefits and opportunities to men's and women's athletic programs, thus placing the institutions in a posture of noncompliance with Title IX.

Response: Commentors made this point with regard to § 86.6(c) of the Title IX regulation, which reads in part: "The obligation to comply with (Title IX) is not obviated or alleviated by any rule or regulation of any * * * athletic or other * * * association * * *" Since the penalties for violation of intercollegiate athletic association rules can have a severe effect on the athletic opportunities within an affected program, the Department has re-examined this regulatory requirement to determine whether it should be modified. Our conclusion is that modification would not have a beneficial effect, and that the present requirement will stand.

Several factors enter into this decision. First, the differences between rules affecting men's and women's programs are numerous and change constantly. Despite this, the Department has been unable to discover a single case in which those differences require members to act in a discriminatory manner. Second, some rule differences may permit decisions resulting in discriminatory distribution of benefits and opportunities to men's and women's programs. The fact that institutions respond to differences in rules by choosing to deny equal opportunities, however, does not mean that the rules themselves are at fault; the rules do not prohibit choices that would result in compliance with Title IX. Finally, the rules in question are all established and subject to change by the membership of the association. Since all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve collectively any wide-spread Title IX compliance problems resulting from association rules. To the extent that this has not taken place, Federal intervention on behalf of statutory beneficiaries is both warranted and required by the law. Consequently, the Department can follow no course other than to continue to disallow any defenses against findings of noncompliance with Title IX that are based on intercollegiate athletic association rules.

(6) Comment: Some commentors suggested that the equal average per capita test was unfairly skewed by the high cost of some "major" men's sports, particularly football, that have no equivalently expensive counterpart among women's sports. They suggested that a certain percentage of those costs (e.g., 50% of football scholarships) should be excluded from the expenditures on male athletes prior to application of the equal average per capita test.

Response: Since equality of average per capita expenditures has been eliminated as a standard of presumed compliance, the suggestion is no longer relevant. However, it was possible under that standard to exclude expenditures that were due to the nature of the sport, or the scope of competition and thus were not discriminatory in effect. Given the diversity of intercollegiate athletic programs, determinations as to whether disparities in expenditures were nondiscriminatory would have been made on a case-by-case basis. There was no legal support for the proposition that an arbitrary percentage of expenditures should be excluded from the calculations.

(7) Comment: Some commentors urged the Department to adopt various forms of team-based comparisons in assessing equality of opportunity between men's and women's athletic programs. They stated that well-developed men's programs are frequently characterized by a few "major" teams that have the greatest spectator appeal, earn the greatest income, cost the most to operate, and dominate the program in other ways. They suggested that women's programs should be similarly constructed and that comparability should then be required only between "men's major" and "women's major" teams, and between "men's minor" and "women's minor" teams. The men's teams most qualified as "major" designation have been football and basketball, with women's basketball and volleyball being frequently selected as the counterparts.

Response: There are two problems with this approach to assessing equal opportunity. First, neither the statute nor the regulation calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.

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

(8) Comment: Some commentors suggest that equality of opportunity should be measured by a "sports-specific" comparison. Under this approach, institutions offering the same sports to men and women would have an obligation to provide equal opportunity within each of those sports. For example, the men's basketball team and the women's basketball team would have to receive equal opportunities and benefits.

Response: As noted above, there is no provision for the requirement of identical programs for men and women in Title IX. The statute provides that institutions offering athletic programs may choose to provide individual opportunities for men or women. As the Department has pointed out, however, the provision for the requirement of equality of opportunity (86.41(c)) gives institutions the latitude to structure programs within the guidelines of the statute. Therefore, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.
Comment: A coalition of many colleges and universities urged that there are no objective standards against which compliance with Title IX in intercollegiate athletics could be measured. They felt that diversity is so great among colleges and universities that no single standard or set of standards could practicably apply to all affected institutions. They concluded that it would be best for individual institutions to determine the policies and procedures by which to ensure nondiscrimination in intercollegiate athletic programs.

Specifically, this coalition suggested that each institution should create a group representative of all affected parties on campus. This group would then assess existing athletic opportunities for men and women, and, on the basis of the assessment, develop a plan to ensure nondiscrimination. This plan would then be recommended to the Board of Trustees or other appropriate governing body.

The role foreseen for the Department under this concept is:

(a) The Department would use the plan as a framework for evaluating complaints and assessing compliance;
(b) The Department would determine whether the plan satisfies the interests of the involved parties; and
(c) The Department would determine whether the institution is adhering to the plan.

These commenters felt that this approach to Title IX enforcement would ensure an environment of equal opportunity.

Response: Title IX is an antidiscrimination law. It prohibits discrimination based on sex in educational institutions that are recipients of Federal assistance. The legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions. The Department accepts that colleges and universities are sincere in their intention to ensure equal opportunity in intercollegiate athletics to their male and female students. It cannot, however, turn over its responsibility for interpreting and enforcing the law. In this case, its responsibility includes articulating the standards by which compliance with the Title IX statute will be evaluated.

The Department agrees with this group of commenters that the proposed self-assessment and institutional plan is an excellent one. Any institution that engages in the assessment/planning process, particularly with the full participation of interested parties as envisioned in the proposal, would clearly reach or move well toward compliance. In addition, as explained in Section VIII of this Policy Interpretation, any college or university that has compliance problems but is implementing a plan that the Department determines will correct those problems within a reasonable period of time, will be found in compliance.
1. **ATHLETIC SCHOLARSHIPS**
   Is the institution providing reasonable opportunities for scholarships for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics?

2. **ACCOMMODATION OF ATHLETIC INTERESTS AND ABILITIES**
   Is the institution offering athletics programs to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes? One of three factors considered consecutively assess this component. 1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments. 2. Where 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 interests and abilities of that sex. 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.

3. **EQUIPMENT AND SUPPLIES**
   1. quality; 2. amount; 3. suitability; 4. maintenance & replacement; 5. availability

4. **SCHEDULING OF GAMES AND PRACTICE TIME**
   1. number of competitive events per sport; 2. number and length of practice opportunities; 3. time of day competitive events are scheduled; 4. time of day practice opportunities are scheduled; 5. opportunities to engage in available pre-season and post-season competition

5. **TRAVEL AND PER DIEM ALLOWANCE**
   1. modes of transportation; 2. housing furnished during travel; 3. length of stay before and after competitive events; 4. per diem allowances; 5. dining arrangements

6. **OPPORTUNITY TO RECEIVE COACHING**
   1. relative availability of full-time coaches; 2. relative availability of part-time and assistant coaches; 3. relative availability of restricted earnings coaches

**ASSIGNMENT OF COACHES**
1. training, experience, and other professional qualifications; 2. professional standing

**COMPENSATION OF COACHES**
1. rate of compensation (per sport, per season); 2. duration of contracts; 3. conditions relating to contract renewal; 4. experience; 5. nature of coaching duties performed; 6. working conditions; 7. other terms and conditions of employment
7. **OPPORTUNITY TO RECEIVE ACADEMIC TUTORING**
   1. availability of tutoring; 2. procedures and criteria for obtaining tutorial assistance

   **ASSIGNMENT OF TUTORS**
   1. tutor qualifications; 2. training, experience, and other qualifications

   **COMPENSATION OF TUTORS**
   1. hourly rate of payment by nature of subjects tutored; 2. pupil loads per tutoring season; 3. tutor qualifications; 4. experience; 5. other terms and conditions of employment

8. **LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES**
   1. quality and availability of the facilities provided for practice and competitive events; 2. exclusivity of use of facilities provided for practice and competitive events; 3. availability of locker rooms; 4. quality of locker rooms; 5. maintenance of practice and competitive facilities; 6. preparation of facilities for practice and competitive events

9. **MEDICAL AND TRAINING FACILITIES AND SERVICES**
   1. availability of medical personnel and assistance; 2. health, accident and injury insurance coverage; 3. availability and quality of weight and training facilities; 4. availability and quality of conditioning facilities; 5. availability and qualifications of athletic trainers

10. **HOUSING AND DINING FACILITIES AND SERVICES**
    1. housing provided; 2. special services as part of housing arrangements (e.g. laundry facilities, parking space, etc.)

11. **PUBLICITY**
    1. availability and quality of sports information personnel; 2. access to other publicity resources for men's and women's programs; 3. quantity and quality of publications and other promotional devices featuring men's and women's programs

12. **SUPPORT SERVICES**
    1. the amount of administrative assistance provided to men's and women's programs; 2. the amount of secretarial and clerical assistance provided to men's and women's programs

13. **RECRUITMENT OF STUDENT ATHLETES**
    1. whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit; 2. whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; 3. whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex

Source: Title IX Athletics Investigator’s Manual 1990, prepared by Lamar Daniel and Valerie M. Bonnette, Policy and Enforcement Service
NCAA Fact Sheet

1. Participants in NCAA-sponsored sports: All divisions.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Men</td>
<td>184,593</td>
<td>186,046</td>
<td>187,041</td>
<td>189,642</td>
<td>189,084</td>
<td>208,957</td>
<td>203,189</td>
<td>203,686</td>
</tr>
<tr>
<td>Women</td>
<td>92,778</td>
<td>96,467</td>
<td>99,859</td>
<td>105,532</td>
<td>110,524</td>
<td>130,098</td>
<td>130,700</td>
<td>137,110</td>
</tr>
</tbody>
</table>

* Provisional members are included in these figures.

Source: NCAA Participation Statistics.

4. Graduation rates: Division I only.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Men Student-Athletes</td>
<td>48%</td>
<td>52%</td>
<td>53%</td>
<td>53%</td>
<td>53%</td>
<td>53%</td>
<td>51%</td>
<td>52%</td>
</tr>
<tr>
<td>Men Student Body</td>
<td>52%</td>
<td>54%</td>
<td>54%</td>
<td>55%</td>
<td>55%</td>
<td>54%</td>
<td>53%</td>
<td>54%</td>
</tr>
<tr>
<td>Women Student-Athletes</td>
<td>61%</td>
<td>68%</td>
<td>67%</td>
<td>69%</td>
<td>67%</td>
<td>68%</td>
<td>67%</td>
<td>68%</td>
</tr>
<tr>
<td>Women Student Body</td>
<td>55%</td>
<td>57%</td>
<td>58%</td>
<td>58%</td>
<td>59%</td>
<td>58%</td>
<td>58%</td>
<td>59%</td>
</tr>
<tr>
<td>Minority* Men Student Athletes</td>
<td>34%</td>
<td>41%</td>
<td>43%</td>
<td>42%</td>
<td>43%</td>
<td>43%</td>
<td>41%</td>
<td>40%</td>
</tr>
<tr>
<td>Minority* Men Student Body</td>
<td>30%</td>
<td>30%</td>
<td>33%</td>
<td>34%</td>
<td>35%</td>
<td>33%</td>
<td>34%</td>
<td>31%</td>
</tr>
<tr>
<td>Minority* Women Student Athletes</td>
<td>44%</td>
<td>54%</td>
<td>53%</td>
<td>58%</td>
<td>58%</td>
<td>59%</td>
<td>56%</td>
<td>53%</td>
</tr>
<tr>
<td>Minority* Women Student Body</td>
<td>36%</td>
<td>36%</td>
<td>41%</td>
<td>41%</td>
<td>43%</td>
<td>42%</td>
<td>45%</td>
<td>41%</td>
</tr>
</tbody>
</table>


* Minority = African-American only.
5. Professional Career Probability.

<table>
<thead>
<tr>
<th>Sport</th>
<th>High School Student-Athletes</th>
<th>College Student-Athletes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men's Basketball</td>
<td>3 in 10,000</td>
<td>2 in 100</td>
</tr>
<tr>
<td>Football</td>
<td>1 in 1,000</td>
<td>3 in 100</td>
</tr>
</tbody>
</table>

Source: NCAA Research Staff.

6. Revenue and Expenses.

<table>
<thead>
<tr>
<th>Division</th>
<th>Average Total Revenue</th>
<th>Average Total Expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>I-A</td>
<td>$17,734,000</td>
<td>$17,297,000</td>
</tr>
<tr>
<td>I-AA</td>
<td>$4,160,000</td>
<td>$4,903,000</td>
</tr>
<tr>
<td>I-AAA</td>
<td>$3,036,000</td>
<td>$3,645,000</td>
</tr>
<tr>
<td>II (with football)</td>
<td>$1,165,000</td>
<td>$1,635,000</td>
</tr>
<tr>
<td>II (without football)</td>
<td>$906,000</td>
<td>$1,276,000</td>
</tr>
<tr>
<td>III (with football)</td>
<td>N/A</td>
<td>$772,000</td>
</tr>
</tbody>
</table>

8. Cash Disbursements:

Division I institutions in 1997-98 = $148,017,496.00
Source: NCAA Annual Reports 1997-98.

9. Total Athletics Scholarship Dollars Awarded:

1997-98 estimate = $ 829,300,000.00
Source: NCAA Gender-Equity Study 1997-98.

10. Women in Administrative Positions at NCAA Member Institutions

<table>
<thead>
<tr>
<th>Year</th>
<th>CEO</th>
<th>% of Total</th>
<th>FA</th>
<th>% of Total</th>
<th>AD</th>
<th>% of Total</th>
<th>SW</th>
<th>% of Total</th>
<th>Fifth Person</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990-91</td>
<td>75</td>
<td>9%</td>
<td>80</td>
<td>10%</td>
<td>63</td>
<td>8%</td>
<td>475</td>
<td>59%</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>1993-94</td>
<td>113</td>
<td>13%</td>
<td>112</td>
<td>13%</td>
<td>103</td>
<td>12%</td>
<td>627</td>
<td>73%</td>
<td>163</td>
<td>19%</td>
</tr>
<tr>
<td>1996-97</td>
<td>155</td>
<td>17%</td>
<td>159</td>
<td>18%</td>
<td>134</td>
<td>15%</td>
<td>726</td>
<td>80%</td>
<td>173</td>
<td>19%</td>
</tr>
</tbody>
</table>
HIGHER EDUCATION ACT REPORTING

Reporting of Institutional Information Concerning Intercollegiate Athletics Programs

All coeducational institutions of higher education in any Federal student financial aid program and have
intercollegiate athletics programs must provide information concerning their intercollegiate athletics program

This act and accompanying Federal regulations require that the following information, based on the
previous reporting year, be available for inspection by students, prospective students, and the public
by October 15 each year.

Name of Institution: _______________________
Information for the Reporting year beginning _________ and ending __________

Number of undergraduates (i.e., full-time, baccalaureate, degree-seeking students) by gender:
using fall semester enrollment figures

<table>
<thead>
<tr>
<th></th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male undergraduates</td>
<td>_____</td>
<td>_____</td>
</tr>
<tr>
<td>Female undergraduates</td>
<td>_____</td>
<td>_____</td>
</tr>
<tr>
<td>Total undergraduates</td>
<td>_____</td>
<td>_____</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male athletes</td>
<td>_____</td>
<td>_____</td>
</tr>
<tr>
<td>Female athletes</td>
<td>_____</td>
<td>_____</td>
</tr>
<tr>
<td>Total athletes</td>
<td>_____</td>
<td>_____</td>
</tr>
</tbody>
</table>

Total Financial assistance (dollars)
Men: __________
Women: __________

Total Expenditures (dollars)
Men: __________
Women: __________

Name of person completing form: __________________________
Signature: __________________________
Title: __________________________
Telephone number: __________________________
Date completed: __________________________
April 24, 1995

The Honorable Pat Williams  
United States House of Representatives  
Washington, DC 20515  

Dear Pat:

I write to ask for your support for continuing the current status of Title IX, and for your opposition to the proposal of the American Football Coaches Association to exclude football from Title IX. Title IX is working, although it has taken twenty-five years to get where we are today.

Excluding football from Title IX will give this sport the license to continue excessive program expenditures and justify schools providing 100 more athletic opportunities for male athletes than for female athletes. This is not right.

Your Subcommittee on Postsecondary Education has an oversight hearing on Title IX scheduled for May 9. Please do not change Title IX and please oppose any exclusion for football.

Thank you for your continued support of equity for women.

Sincerely,

Barbara B. Hollmann  
Dean of Students  
Former Associate Director of Intercollegiate Athletics
<table>
<thead>
<tr>
<th>Recommendation Number</th>
<th>Individual Responsible</th>
<th>Action Number</th>
<th>Action</th>
<th>Implementation Date</th>
<th>Completion Date</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Moos</td>
<td>1</td>
<td>Implement additional women's sports programs and increase grants in aid for existing women's sports programs.</td>
<td>07/94</td>
<td>Completed.</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Noble</td>
<td>1</td>
<td>Collect national, regional and state sports participation and physical education data. Also collect UM intramural enrollment data.</td>
<td>08/94</td>
<td>Completed.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Noble</td>
<td>2</td>
<td>Develop and pretest a survey instrument to assess students interests and abilities.</td>
<td>06/94</td>
<td>Completed.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Noble</td>
<td>3</td>
<td>Forward survey and assessment to OCR for review and approval.</td>
<td>09/94</td>
<td>Completed.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Noble</td>
<td>4</td>
<td>Survey student body Fall '94 and forward results to OCR.</td>
<td>12/94</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Noble</td>
<td>4</td>
<td>Survey in Spring '95 and forward results to OCR.</td>
<td>06/95, 06/95</td>
<td>Revised action and date.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Noble</td>
<td>5</td>
<td>Evaluate survey results and determine if women's participation in intramurals and physical education courses indicates potential interest in sports not offered at the intercollegiate level.</td>
<td>06/95</td>
<td>Additional action.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Noble</td>
<td>6</td>
<td>Develop written policies, procedures, and criteria for determining how and whether sports will be added to the athletic program and the level of competition appropriate to those sports. This should include a procedure to track &quot;expressed interest&quot; in sports by current students in addition to tracking sports popular with potential students.</td>
<td>04/95</td>
<td>Completed additional action.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Noble</td>
<td>7</td>
<td>Determine how often a survey and assessment will be conducted.</td>
<td>04/95</td>
<td>Completed additional action.</td>
<td></td>
</tr>
</tbody>
</table>
### THE UNIVERSITY OF MONTANA-ATHLETICS OCR TITLE IX CORRECTIVE ACTION

#### AUDIT RECOMMENDATIONS AND ACTION PLAN

<table>
<thead>
<tr>
<th>Recommendation Number</th>
<th>Individual Responsible</th>
<th>Action</th>
<th>Implementation Date</th>
<th>Completion Date</th>
<th>Status</th>
<th>Action Number</th>
<th>Action</th>
<th>Implementation Date</th>
<th>Completion Date</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>Moos</td>
<td>Add women's golf and soccer teams.</td>
<td>07/94</td>
<td>Completed.</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Moos</td>
<td>Prepare budget for FY '95 to document support for women's programs.</td>
<td>09/94</td>
<td>Completed.</td>
<td></td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**THE UNIVERSITY WILL OFFER TWO ADDITIONAL VARSITY-LEVEL INTERCOLLEGIATE TEAM SPORTS FOR WOMEN, AND SUPPORT THE TEAMS AT LEVELS EQUIVALENT TO THE MEN'S TEAMS.**

4  
**THE UNIVERSITY WILL ENSURE FEMALE ATHLETES HAVE THE OPPORTUNITY TO COMPETE IN A NUMBER OF COMPETITIVE EVENTS PER SPORTS EQUIVALENT TO THAT OF THE MALE ATHLETES.**

| Moos | 1 | Develop FY '95 competitive schedules to ensure equivalent opportunities. | 03/94 | Completed. |

5  
**THE UNIVERSITY WILL PROVIDE EQUIVALENT PRACTICE SESSIONS FOR THE WOMEN'S AND MEN'S TEAMS REGARDING THE TIME OF DAY PRACTICES ARE SCHEDULED.**

| Hughes | 1 | Develop equivalent practice schedules for FY '95. | 06/94 | Completed. | 1 |
| Hughes | 2 | Document notification to coaches regarding length of practice. | 09/94 | Completed 2/95. |

6  
**THE UNIVERSITY WILL ENSURE HOUSING PROVIDED FEMALE ATHLETES DURING TRAVEL IS EQUIVALENT TO THAT PROVIDED MALE ATHLETES, IN PARTICULAR THE NUMBER OF ATHLETES ASSIGNED TO THE ROOM.**

| Moos | 1 | Modify future lodging accommodations to ensure equitable room assignments. | 07/94 | Revised implementation date. |

| Moos | 2 | Adjust FY '95 budgets to document the support increase for women's travel. | 06/94 | Revised completion date. |

7  
**THE UNIVERSITY WILL DEVELOP A POLICY FOR DETERMINING COACHES' SALARIES AND REASSESS CURRENT SALARIES ON THIS BASIS.**

<p>| Moos | 1 | Develop and implement salary criteria policy. | 09/94 | Developed, but not implemented. | 07/95 | Revised implementation date. |</p>
<table>
<thead>
<tr>
<th>Recommendation Number</th>
<th>Individual Responsible</th>
<th>Action</th>
<th>Action Number</th>
<th>Implementation Date</th>
<th>Completion Date</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>Moos</td>
<td>Provide OCR with detail for salary adjustments.</td>
<td>2</td>
<td></td>
<td>09/94</td>
<td>Completed.</td>
</tr>
<tr>
<td>13</td>
<td>Moos</td>
<td>Relieve the Assistant Women's Basketball Coach of her duties as Assistant Coach for Women's Golf; pending budget approval for the Assistant Women's Golf Coach position.</td>
<td>3</td>
<td>08/95</td>
<td></td>
<td>Additional action.</td>
</tr>
</tbody>
</table>

8  
THE UNIVERSITY WILL PROVIDE LOCKERS AND LOCKER ROOMS FOR WOMEN'S TEAMS EQUIVALENT TO THOSE PROVIDED TO THE MEN'S TEAMS.

<table>
<thead>
<tr>
<th>Recommendation Number</th>
<th>Individual Responsible</th>
<th>Action</th>
<th>Action Number</th>
<th>Implementation Date</th>
<th>Completion Date</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>Moos</td>
<td>Prepare plans for locker room construction and renovation.</td>
<td>1</td>
<td>09/94</td>
<td>Revised completion date.</td>
<td></td>
</tr>
<tr>
<td>Moos</td>
<td></td>
<td>Prepare and implement fundraising plan.</td>
<td>2</td>
<td>09/93</td>
<td>Implemented, not completed.</td>
<td></td>
</tr>
<tr>
<td>Moos</td>
<td></td>
<td>Prepare report to OCR addressing concerns in 4/94 letter regarding locker room facilities.</td>
<td>3</td>
<td>09/94</td>
<td>Completed.</td>
<td></td>
</tr>
<tr>
<td>Moos</td>
<td></td>
<td>Construct new equivalent locker room facilities.</td>
<td>4</td>
<td>09/95</td>
<td>Pending.</td>
<td></td>
</tr>
</tbody>
</table>

12  
THE UNIVERSITY WILL PROVIDE PUBLICATIONS FOR WOMEN'S TEAMS EQUIVALENT IN QUALITY AND TYPE TO THE MATERIALS PROVIDED FOR MEN'S TEAMS.

<table>
<thead>
<tr>
<th>Recommendation Number</th>
<th>Individual Responsible</th>
<th>Action</th>
<th>Action Number</th>
<th>Implementation Date</th>
<th>Completion Date</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>Moos</td>
<td>Produce volleyball and soccer programs and media guides for FY '95 and budget accordingly.</td>
<td>1</td>
<td>09/94</td>
<td>Completed.</td>
<td></td>
</tr>
</tbody>
</table>

13  
THE UNIVERSITY WILL PROVIDE SUPPORT SERVICES AND CLERICAL STAFF TO WOMEN'S TEAMS AT A LEVEL EQUIVALENT TO THAT PROVIDED TO THE MEN'S TEAMS.

<table>
<thead>
<tr>
<th>Recommendation Number</th>
<th>Individual Responsible</th>
<th>Action</th>
<th>Action Number</th>
<th>Implementation Date</th>
<th>Completion Date</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>Moos</td>
<td>Reassign clerical and support services assignments.</td>
<td>1</td>
<td>06/94</td>
<td>Completed.</td>
<td></td>
</tr>
<tr>
<td>Moos</td>
<td></td>
<td>Request a new clerical position in the FY 1995 budget.</td>
<td>2</td>
<td>04/94</td>
<td>Resubmitted in FY 96 budget.</td>
<td></td>
</tr>
<tr>
<td>Moos</td>
<td></td>
<td>If authorized, hire new clerical support staff.</td>
<td>3</td>
<td>09/94</td>
<td>Revised completion date.</td>
<td></td>
</tr>
<tr>
<td>Recommendation Number</td>
<td>Individual Responsible</td>
<td>Action Number</td>
<td>Action</td>
<td>Implementation Date</td>
<td>Completion Date</td>
<td>Status</td>
</tr>
<tr>
<td>-----------------------</td>
<td>------------------------</td>
<td>---------------</td>
<td>--------</td>
<td>---------------------</td>
<td>-----------------</td>
<td>--------</td>
</tr>
<tr>
<td>14</td>
<td>Moos</td>
<td>1</td>
<td>Acquire additional office space and reassign personnel.</td>
<td>09/94</td>
<td>Completed.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Moos</td>
<td>2</td>
<td>Schedule conference room usage to ensure equivalent availability for the men's and women's programs.</td>
<td>07/94</td>
<td>Completed 2/95.</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>Moos</td>
<td></td>
<td>Acquire additional courtesy cars and reassign access to the courtesy cars.</td>
<td>09/94</td>
<td>Completed.</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Moos</td>
<td></td>
<td>Discontinue the practice of marketing any video highlight tapes.</td>
<td>06/94</td>
<td>Completed.</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Moos</td>
<td>1</td>
<td>Revise FY '95 budgets to begin to address the disparity in recruiting budgets.</td>
<td>09/94</td>
<td>Completed.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Moos</td>
<td>2</td>
<td>Complete recruitment budget adjustments for women's programs ensuring equivalencies to participation rates.</td>
<td>09/96</td>
<td>Revised completion date 06/01/95</td>
<td></td>
</tr>
</tbody>
</table>
SELECTED BIBLIOGRAPHY


Grant, C. and Gruber C., “Gender Equity and the Welfare of the Student Athlete,” The University of Iowa. (Winter 1994).

Kahn, K., “Succeeding in Gender Equity with Students and Staff,” in Title IX Compliance Bulletin for College Athletics, (January 1999).

Kramer, W., *Guide to Title IX & Intercollegiate Athletics*, Squire, Sanders & Demsey, Washington counsel to the NCAA, with the assistance of others at Squire, Sanders, & Demsey, 1988.


LEGAL CASES

*Cohen v. Brown University*, 809 F. Supp. 978, aff’d. 991 F. 2d 888 (1st Cir. 1993)


STATUTES AND REGULATIONS


34 CFR 106 et seq. (OCR Interpretative regulations of Title IX)

44 Fed. Reg. 71,413 (1979) Office for Civil Rights Policy Interpretation