

## HOW THE “BOYS OF FALL” ARE FAILING TITLE IX

### INTRODUCTION

In 2011, the University of Auburn Athletic Department had more than \$100 million in expenditures, ranking 7<sup>th</sup> in the National Collegiate Athletics Association (NCAA).<sup>1</sup> Of that \$100 million, \$39 million went solely toward operating their school’s football program, the highest- spending football program in the country.<sup>2</sup> Comparatively, the Auburn football program generated more than \$76 million in revenue in 2011, more than three-fourths of the athletic department’s total revenue.<sup>3</sup> Football at Auburn is one of 19 varsity sports offered to more than 500 student-athletes.<sup>4</sup>

Auburn is a typical example of how a college athletic department with a football team competing at the highest level, the Football Bowl Subdivision (FBS), generates and spends money. As University of Texas head football coach Mack Brown commented regarding his school leading the country in total athletic department expenditures at more than \$133 million, “I think when we make it, we have the right to spend it. That’s the way America is.”<sup>5</sup> Meanwhile, the University of Texas cut 200 jobs in administrative and non-academic areas and has plans to eliminate another 400 in the coming years, including 95 teaching positions.<sup>6</sup>

Athletic departments at all 120 FBS schools are required to comply with Title IX. Title IX was enacted as part of the Education Amendments of 1972 and states, in principal part, that “No person in the United States shall, on the basis of sex, be excluded from participation in, be

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<sup>1</sup> Steve Wieberg, Jodi Upton and Steve Berkowitz, *Texas athletics overwhelm rivals in revenue and spending*, USA TODAY, May 5, 2012.

<sup>2</sup> Raju Kansagra, *Top 20 Revenue Generating College Sports Programs*, BEYOND SPORTS U (Jan. 4, 2012), <http://www.beyondsports.com/top-20-revenue-generating-college-sports-programs/>.

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

<sup>4</sup> THE OFFICIAL HOME OF AUBURN UNIVERSITY ATHLETICS, <http://www.auburntigers.com> (last visited Mar. 11, 2013).

<sup>5</sup> Wieberg, *supra* note 1.

<sup>6</sup> Kansagra, *supra* note 2.

denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance ...”<sup>7</sup> When enacted, few anticipated the effect that Title IX would have on the aspirations of equality for girls and women in sports. However, the effect of this legislation has been paramount to the advancement of women in sports, and in turn, society. It has undoubtedly made strides to level the playing field.<sup>8</sup>

Part I of this note will examine the current sports landscape and the implications of Title IX. Part II will explain the equal participation and equal treatment tests used to determine whether an athletics program is in compliance with Title IX and discuss danger signs of non-compliance. Part III will discuss how the current disproportionate expenditures on revenue-generating sports, particularly football, do not fit with the Title IX structure. Part IV will discuss the criticisms and effects of Title IX interpretation. And Part V will explain the impact of the reduction in football scholarships on NCAA Division I Title IX compliance levels.

## I. CURRENT SPORTS LANDSCAPE

The impact of Title IX, on its 40<sup>th</sup> Anniversary, was readily apparent in the success of the 2012 United States Women’s Olympic team. For the first time, Team USA included more women than men. The U.S. women outperformed the men, winning 58 medals compared to the men’s 45, and 29 gold medals compared to the men’s 17.<sup>9</sup> Although Title IX has been highly criticized and is the target of reform, the story of the London Olympics is evidence that something right is happening in our collegiate athletic and youth programs that are the primary

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<sup>7</sup> 20 U.S.C. 1681(a) (West 1972).

<sup>8</sup> A study of all NCAA institutions in 2012 revealed that the number of female professionals employed within intercollegiate athletics, the number of women’s intercollegiate teams, the number of women’s teams per school, the number of female head coaches of women’s teams, the number of paid assistant coaches of women’s teams, and the number of female paid assistant coaches are all at their highest ever level. R. Vivian Acosta & Linda Jean Carpenter, *A Longitudinal, National Study Thirty-Five Year Update 1977-2012*, WOMEN IN INTERCOLLEGIATE SPORT, 2012, at A-B. See also Barack Obama, *President Obama Reflects on the Impact of Title IX*, NEWSWEEK, June 25, 2012.

<sup>9</sup> Jeff Briggs, *2012 Olympic Medal Count: A Graphical Breakdown*, SB NATION, August 13, 2012, <http://www.sbnation.com/london-olympics-2012/2012/8/13/3239222/olympic-medal-count-usa-women-graphs>.

feeder system for our Olympic teams.<sup>10</sup> Is this success due more to American women reaching equality with American men, or is it because American women are advancing at a faster pace than women around the globe? Although every participating country had a female on its Olympic team for the first time ever, women on the Saudi Arabian team were forced to walk behind their male counterparts and were called prostitutes at home.<sup>11</sup> The silver medal-winning Japanese women's soccer team flew coach, while the men's team, who failed to medal, was upgraded to business class.<sup>12</sup>

Alternatively, some might argue that Team USA's success is because Title IX is stunting the growth of American men at a faster pace than the rest of the world.<sup>13</sup> Regardless of the answer, Title IX is surely a validation of the impact of Title IX in raising the level of the United States female athletic participation and performance. In addition, the increased participation effect of Title IX is positively correlated with women's capacity as wage earners after their playing careers are over. Recent studies have shown that women and men who participated in high school sports earn 14-19% higher wages among working adults.<sup>14</sup>

In a time of economic downturn, athletic departments continue to spend excessive amounts of money on their revenue-generating sports, specifically men's basketball and football, relying on these sports to keep their athletic departments afloat. Exorbitant amounts are spent in order to attract the best recruits, turn them into the best possible athletes, and, in turn, win games to generate more revenue for their schools. This escalation in spending is often referred to as the

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<sup>10</sup> Ann Killion, *Amid 40<sup>th</sup> anniversary of Title IX, women set new standard in London*, SI.COM, August 12, 2012, [http://sportsillustrated.cnn.com/2012/olympics/2012/writers/ann\\_killion/08/12/2012-olympics-women-title-ix/index.html](http://sportsillustrated.cnn.com/2012/olympics/2012/writers/ann_killion/08/12/2012-olympics-women-title-ix/index.html).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See Dennis K. McBride, Laura L. Worcester, & Stephanie L. Tennyson, *Women's Athletics and the Elimination of Men's Sports Programs: A Reevaluation*, 19 CATO J. 323 (1999).

<sup>14</sup> Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports* 4 (Nat'l Bureau of Econ. Research Working Paper Series, Working Paper No. 15728, Feb. 2010).

“arms race” because as competitors escalate their spending on revenue-producing sports, a school is required to match that move to remain competitive.<sup>15</sup> Most of the leaders in intercollegiate athletics acknowledge the need for national action related to this escalation.<sup>16</sup> A cap by measure of law is one of the most effective ways to put a limit on the commercialized world of college athletics.<sup>17</sup> Title IX is an avenue for decreasing these excess expenditures. Equality required under Title IX calls for an examination into the legal standard required by college athletics. Institutions spending disproportionate amounts on their football programs are essentially exempting themselves from Title IX.<sup>18</sup> While this might be the most profitable, or only profitable, way to operate a college athletic department, that does not make these programs exempt from Title IX. The Court of Appeals ruled in 1993 that financial difficulties are not an excuse for non-compliance.<sup>19</sup>

Inequality in the travel, facilities, game and practice times, publicity, locker rooms, equipment, and recruitment is prevalent and is often an unreported violation of Title IX.<sup>20</sup> Reducing the expenditures of football will undoubtedly free up resources to make these opportunities more equal for women’s sports and other non-revenue men’s sports.

Critics of Title IX often claim that the way the law is regulated discriminates against men in non-revenue sports such as baseball, wrestling, and lacrosse, claiming it has been implemented

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<sup>15</sup> SPORTING EQUALITY 14 (Rita J. Simon ed. 2005).

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

<sup>17</sup> Jeff Zillgitt, *College athletics needs budget cap, thinking cap*, USA TODAY, Feb. 18, 2004.

<sup>18</sup> Alicia Irons, *The Economic Inefficiency of Title IX*, 8 MAJOR THEMES IN ECON. 27, 40-41 (2006) (suggesting that reducing football scholarships is one way universities can come close to Title IX compliance).

<sup>19</sup> *Favia v. Indiana University of Pennsylvania*, 7 F. 3d 332 (3<sup>rd</sup> Cir. 1993) (holding that although more slots for female competition might be created by eliminating the women’s gymnastics team and adding women’s soccer, the action sought by the University would increase the funding gap and the result would be viewed as moving I.U.P. farther from the goals of Title IX).

<sup>20</sup> Erin E. Buzuvis, Kristine E. Newhall; *Symposium: Title IX at Forty: Equality beyond the three-part test: Exploring and explaining the invisibility of Title IX’s Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427, 449 (2012).

to treat men unfairly.<sup>21</sup> Those opposed to the broad reach of Title IX claim that “athletic quotas” have resulted in less, not more, overall participation in athletics.<sup>22</sup>

However, the real culprit behind this reverse discrimination is college football, not the interpretation or implementation of Title IX. When Title IX’s “quota system” causes schools to decide between men’s sports, football always wins. In order to continue the advancement of equality of women in sports and society, while maintaining a landscape in college athletics where athletes in non-revenue men’s and women’s sports are treated equally, changes to the structure of college football programs is necessary. In this respect, decreasing the number of allowable football scholarships is the best way the NCAA can fully and fairly fulfill the purposes of Title IX.

## II. COMPLIANCE REQUIREMENTS FOR TITLE IX

In 1974, Title IX was made applicable to intercollegiate sports when the Department of Health, Education, and Welfare (“HEW”) promulgated regulations that “include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.”<sup>23</sup> In furtherance of Title IX, the 1979 Policy Interpretation requires institutions to be in compliance with both the equal participation and equal treatment tests.<sup>24</sup>

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<sup>21</sup> See, e.g. Brittney Andres, *Title IX A Losing Game For Men*, NATIONAL REVIEW ONLINE, Jan. 31, 2011, available at [http://www.cbsnews.com/8301-215\\_162-2629083.html](http://www.cbsnews.com/8301-215_162-2629083.html); Eric Pearson, *After 40 years, Title IX is getting old for boys*, WASH. POST, June 22, 2012; Carrie Lukas, *Title IX’s Dark Legacy*, U.S. NEWS AND WORLD REPORT, June 22, 2012.

<sup>22</sup> Pearson, *supra* note 21.

<sup>23</sup> Education Amendments of 1974, Pub. L. 93-380, § 844, 88 Stat. 484, 612 (Aug. 21, 1974). This regulation became known as the “Javits Amendment;” J. Brad Reich, *All The [Athletes] are Equal, but Some are More Equal Than Others: An Objective Evaluation of Title IX’s Past, Present, and Recommendations for its Future*, 108 Penn St. L. Rev. 525, 528 (2003).

<sup>24</sup> Title IX of the Educational Amendments of 1972, 44 Fed. Reg. 71415 (Dec. 11, 1979) (policy interpretation of Title IX and intercollegiate athletics).

## A. The Equal Participation Component's Three-Prong Test

The equal participation component requires analysis of a three-pronged test, which inquires as follows:

1. **Substantial Proportionality:** Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollment; or
2. **History and Continuing Practice of Program Expansion:** Whether 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 interests and abilities of the members of that sex; or
3. **Interests and Abilities Fully and Effectively Accommodated:** 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.<sup>25</sup>

### 1. Substantial Proportionality

Substantial proportionality is the term most widely cited to criticize the “quota” system and to ensure equality of opportunity to females in athletics. Total college enrollment figures show that females outnumbered their male counterparts for the first time in the late 1970s, and they have steadily increased their numerical advantage ever since.<sup>26</sup> This effectively requires most institutions, without a showing of the other two prongs, to have more female athletic participants than male in order for their athletic participation to correspond with their enrollment.<sup>27</sup>

This substantial proportionality model is becoming even more difficult to meet, as women are attending college in record numbers. According to the National Center for Educational Statistics (“NCES”), 57% of the students enrolling at four-year institutions in 2009 were

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<sup>25</sup> *Id.*

<sup>26</sup> Digest of Education Statistics Table 196, National Center for Education Statistics, (last visited Jan. 15, 2013), available at [http://nces.ed.gov/programs/digest/d11/tables/dt11\\_196.asp](http://nces.ed.gov/programs/digest/d11/tables/dt11_196.asp).

<sup>27</sup> Daniel Borzelleca, *The Male-Female Ratio in College*, FORBES, Feb. 16, 2012.

female.<sup>28</sup> In 2010, the U.S. Department of Education stated: “women now account for a disproportionate share of the enrollments of higher-education institutions at every degree level and are likely to become an even more dominant presence on campuses over the coming decade.”<sup>29</sup> NCES projects that by 2020, women will represent 59 percent of total undergraduate enrollment at degree-granting institutions.<sup>30</sup> Keeping in mind the correlation required between enrollment and scholarship allocation between the genders, male student-athletes’ scholarship numbers will have to decline or the number of scholarship opportunities for females must increase. Thus, if the number of football scholarships remains constant as the number of females attending college continues to rise, non-revenue men’s sports will continue to get a smaller piece of the scholarship pie.

Examples of universities cutting men’s sports programs in order to comply with the Title IX’s proportionality requirement are prevalent. In November 2012, Mount St. Mary’s University announced Title IX cuts, dropping men’s soccer and both men’s and women’s golf.<sup>31</sup> Its university president cited financial constraints and noted the school’s long-term commitment to Title IX.<sup>32</sup> Ultimately, if schools don’t institute the equal numbers mentioned by the university’s president, they will face threats or lawsuits on behalf of activist groups.<sup>33</sup> The University of Delaware announced in 2011 that it was cutting its men’s track and cross-country teams in an effort to comply with Title IX.<sup>34</sup> In 2006, in the absence of a lawsuit, complaint, investigation,

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<sup>28</sup> Digest of Education Statistics Table 196, *supra* note 26.

<sup>29</sup> Palash R. Ghosh, *Why are more women than men going to college?*, INTERNATIONAL BUSINESS TIMES, Dec. 6, 2011.

<sup>30</sup> Digest of Education Statistics Table 196, *supra* note 26.

<sup>31</sup> Adam Vencill, *The Mount to nix three sports teams*, FREDERICK NEWS POST, November 13, 2012.

<sup>32</sup> *Id.*

<sup>33</sup> American Sports Council, *They Can’t Blame Football*, SAVING SPORTS, November 16, 2012, <http://savingsports.org/2012/11/16/they-cant-blame-football/>.

<sup>34</sup> Katie Thomas, *Colleges Cut Men’s Programs to Satisfy Title IX*, NY TIMES (May 1, 2011).

or financial constraints,<sup>35</sup> James Madison University cut seven men's teams<sup>36</sup> to comply with the law.<sup>37</sup> At the time, the James Madison student body was 61% female, and the change was intended to boost the proportion of female athletes from about 50% to 61%.<sup>38</sup>

Unfortunately, the result of the proportionality requirement is often an overall decrease in athletic participation for both women and men, evident in the Mount St. Mary's situation mentioned supra. Before the cuts, Mount St. Mary's had 311 athletes, 45.3% female and 54.7% male.<sup>39</sup> After 36 athletes (20 men's soccer, 9 men's golf, and 7 women's golf) were cut, Mount St. Mary's now has 275 total athletes, 48.7% female and 51.3% male.<sup>40</sup> Since the school still did not achieve proportionality, the school is also likely to place roster caps on men's lacrosse, men's track, and baseball.<sup>41</sup> Moves such as the one made by Mount St. Mary's are criticized by both advocates for Title IX as well as those who blame Title IX for holding back men's sports.<sup>42</sup> The result of this cut is that schools are moving further away from the intent of Title IX: encouraging equal participation in sports.<sup>43</sup>

## 2. History and Continuing Practice of Program Expansion

Compliance with this option focuses on whether an institution has expanded the number of intercollegiate participation opportunities for women, while providing flexibility in choosing

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<sup>35</sup> The eliminated teams cost the university about \$550,000 in a sports budget of \$21 million. The athletic director said that saving money was no factor in the decision.

<sup>36</sup> Men's teams included swimming, cross country, indoor and outdoor track, gymnastics, wrestling, and archery. The school also cut three women's sports: gymnastics, fencing, and archery.

<sup>37</sup> Bill Pennington, *At James Madison, Title IX is Satisfied, but the Students Are Not*, NY TIMES, Oct. 7, 2006, [http://www.nytimes.com/2006/10/07/sports/othersports/07madison.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2006/10/07/sports/othersports/07madison.html?pagewanted=print&_r=0).

<sup>38</sup> *Id.*

<sup>39</sup> Vencill, *supra* note 30.

<sup>40</sup> American Sports Council, *supra* note 33.

<sup>41</sup> *Id.*

<sup>42</sup> See e.g., Daniel R. Marburger and Nancy Hogshead-Makar, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports*, 14 MARQ SPORTS L.REV. 65; Greg Garber, *Landmark Law Faces New Challenges Even Now*, ESPN.COM, <http://espn.go.com/gen/womenandsports/020619title9.html>;

<sup>43</sup> Mount St. Mary's does not have a football team.

which teams they add.<sup>44</sup> The number of female athletes actually participating in varsity athletics determines female participation opportunities.<sup>45</sup> “An institution that has eliminated some participation opportunities for women can still satisfy Option Two if the elimination is offset by a strong history of program expansion.”<sup>46</sup>

The Office for Civil Rights (“OCR”) is responsible for enforcing Title IX, and will review the entire history of the athletics program. The “developing interests” piece of the second prong consists of opportunities that currently exist at an institution. Prong two considers an institution’s good faith remedial efforts through actual program expansion, and does not include efforts by an institution to increase the proportional participation opportunities for the underrepresented sex by (1) reducing opportunities for the overrepresented sex alone or by (2) reducing participation opportunities for the overrepresented sex to a proportionately greater degree than the underrepresented sex.<sup>47</sup> The ordinary meaning of “expansion” cannot be used to find compliance under Title IX when schools use a decrease in men’s sports as a way of inflating female participation percentages. As a result, the judiciary has made it extremely difficult for a school to show compliance with the program expansion prong. Although the OCR claims that any of the three prongs can be met for a school to satisfy Title IX,<sup>48</sup> schools that fail to meet the proportionality prong have been unsuccessful in using the program expansion prong as a safe harbor.<sup>49</sup>

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<sup>44</sup> *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 965 (9<sup>th</sup> Cir. 2010).

<sup>45</sup> *Id.* at 965-66.

<sup>46</sup> *Id.* at 971. For a thorough discussion of the steps necessary to comply with Prong Two, see *Mansourian*, 602 F.3d 957.

<sup>47</sup> Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

<sup>48</sup> Office for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, (July 11, 2003), available at <http://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

<sup>49</sup> See *Favia*, 7 F. 3d 332.

The cuts made by James Madison University to achieve compliance with the substantial proportionality prong was criticized by both male and female student-athletes at James Madison, claiming that the implementation of the law is “out-of-whack” and questioning the underlying motives of the administration’s decision to reduce the number of sports offered by the school.<sup>50</sup> Emphasizing the importance and strict requirement of the “continuing practice” prong, one scholar pointed out that if James Madison had been “incrementally responding to women’s sports opportunities over the years, they wouldn’t be in the situation they found themselves in. It is decades of inertia by decision makers that leads to Title IX compliance problems. So now this generation has to deal with massive cuts.”<sup>51</sup>

### **3. Interests and Abilities Fully and Effectively Accommodated**

In the 1990s, a group of female student-athletes brought suit against Brown University, claiming its athletic participation violated Title IX.<sup>52</sup> The crux of the claim consisted of the university’s decision to demote two women’s sports teams from varsity to club status (as well as demoting two men’s teams from varsity to club status).<sup>53</sup> The First Circuit rejected Brown’s argument that the university was fully accommodating women’s interests (or lack of interest) in sports as it existed and denied their theory that this numeric balancing independent of student interest would amount to an affirmative action-style quota system.<sup>54</sup> The court wrote: “[T]here exists the danger that, rather than providing a true measure of women’s interest in sports, statistical evidence purporting to reflect women’s interest instead provides only a measure of the

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<sup>50</sup> Pennington, *supra* note 37.

<sup>51</sup> Pennington, *supra* note 37, (quoting Ellen Staurowsky, professor of sport management at Ithaca College, author, and expert on Title IX issues).

<sup>52</sup> *Cohen v. Brown Univ.*, 101 F.3d 155, 163 (1<sup>st</sup> Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports.”<sup>55</sup>

By making the “effective accommodation” provision harder to satisfy, the court placed more emphasis on the substantial proportionality prong.<sup>56</sup> The court held that substantial proportionality was a rebuttable presumption for Title IX compliance, and that if a school could not meet substantial proportionality, it could attempt to comply under the remaining two prongs.<sup>57</sup> However, *Cohen* made it clear that complying with either of these other two prongs is extremely difficult, effectively creating a single prong of substantial proportionality to determine Title IX compliance.<sup>58</sup> This single prong is frequently termed a “quota system,” most often by those criticizing the effects of Title IX on non-revenue men’s sports. Many colleges now use the substantial proportionality method because it is a permanent fix.<sup>59</sup> The other two prongs require continuous efforts and are therefore a short-term solution.<sup>60</sup>

In 2010, the White House made it even more difficult for schools to comply with the third prong. A university’s compliance can no longer be achieved by simply surveying female students to gauge their interest in athletics.<sup>61</sup> Critics of Prong Three’s survey method claimed that the 2005 “model survey” allowed colleges to skirt the gender-equity law, as it was often emailed out to students, and unresponsive surveys were counted to indicate a lack of interest.<sup>62</sup>

In addition, it required women to enroll in a school where their interests were not met, actually

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<sup>55</sup> *Id.* at 179.

<sup>56</sup> Nancy Levit and Robert R.M. Verchick, FEMINIST LEGAL THEORY 113 (Richard Delgado and Jean Stefancic eds., 2006).

<sup>57</sup> *Id.* at 171.

<sup>58</sup> Levit, *supra* note 56, at 113.

<sup>59</sup> Thomas, *supra* note 34.

<sup>60</sup> *Id.*

<sup>61</sup> U.S. Department of Education, Title IX Enforcement Highlights, (June 2012) available at <http://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf>. See also Amanda Paulson, *College sports: White House tweaks Title IX rules*, CHRISTIAN SCIENCE MONITOR (April 20, 2010), <http://www.csmonitor.com/USA/Education/2010/0420/College-sports-White-House-tweaks-Title-IX-rules>.

<sup>62</sup> Erin Buzuvis, *Civil Rights Commission Endorses Model Survey*, TITLE IX BLOG (April 2, 2010, 8:06 AM), <http://title-ix.blogspot.com/2010/04/civil-rights-commission-endorses-model.html>.

perpetuating existing disparities in athletic opportunities.<sup>63</sup> The result was a cycle where opportunities remained stagnant because of the absence of interest and ability.<sup>64</sup> Now, schools may still use the survey, but it must be part of a comprehensive approach to gauge student interest.<sup>65</sup>

Many agree that this move pushes colleges even farther toward a quota system, resulting in inflexibility that causes colleges to cut less popular sports for both men and women.<sup>66</sup> The shortcoming of this resultant quota system is magnified when over half of most male scholarships are allotted to one sport. A quota system, which almost always results in decreasing men's opportunities rather than increasing women's opportunities in athletics, increases the disproportionality that exists among male scholarship allocation, as non-revenue sports are cut while football scholarship numbers at an institution remain constant.

In response to this quota system, cases alleging discrimination against men are continually raised. In 2010, eleven of the 96 complaints received by OCR involved allegations of discrimination against men.<sup>67</sup> Of the 80 athletics-related Title IX complaints received in 2009, ten of them involved allegations by men.<sup>68</sup> However, these men have had a poor success rate in the courts.<sup>69</sup>

#### **4. Institutional Response to the Equal Participation Component**

The institutional response to Title IX is juxtaposed to the initial intent of the legislation. Most schools cannot afford to both add women's athletics while maintaining men's sports.<sup>70</sup>

Title IX does not prevent schools from deciding to eliminate a men's team, or even eradicating

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Paulson, *supra* note 61.

<sup>66</sup> Levit, *supra* note 56, at 114.

<sup>67</sup> Thomas, *supra* note 34.

<sup>68</sup> *Id.*

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

<sup>70</sup> Reich, *supra* note 23.

its entire athletic department.<sup>71</sup> Because of the narrow judicial interpretations requiring substantial proportionality, most schools have pursued substantial proportionality by both cutting men's athletic opportunities while keeping women's opportunities constant, or by adding women's athletic opportunities that often do not reflect the athletic interests of the female student body.<sup>72</sup> Not only are they unreflective of the female student body, they are far from an accurate reflection of the interests of female high school athletes. For example, New York Times reported that in 2004, 2,359 high school girls participate in rowing, while 2,295 of those girls received college rowing scholarships (97.3%) worth an average of \$9,723.<sup>73</sup> Comparatively, over 600,000 girls participate in track and field and only 9,888 are awarded scholarships (1.6%) worth an average of \$8,105.<sup>74</sup>

The NCAA, not Title IX, details exactly how many scholarships an FBS school may offer. The NCAA began regulating women's scholarships in 1982 and has tried to match limits to participation rates.<sup>75</sup> However, the scholarship limits now bear little resemblance to the popularity of certain sports, as indicated by high school participation. For example, for every 100,000 high school volleyball players, the NCAA allows colleges to offer fewer than three scholarships, while it allows more than 900 scholarships per 100,000 high school women's crew participants.<sup>76</sup> Similar comparisons exist between women's basketball or softball and equestrian.<sup>77</sup> The NCAA has effectively told schools they can comply with Title IX by herding

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<sup>71</sup> *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 275 (6<sup>th</sup> Cir. 1994) (citing Cohen, 991 F.2d at 898-99).

<sup>72</sup> Reich, *supra* note 23.

<sup>73</sup> *Scholarships: Slicing the Pie*, N.Y. TIMES (March 10, 2008), [http://www.nytimes.com/imagepages/2008/03/10/sports/20080310\\_SCHOLAR\\_GRAPHIC2.html](http://www.nytimes.com/imagepages/2008/03/10/sports/20080310_SCHOLAR_GRAPHIC2.html). These numbers reflect the number of students receiving scholarships not the number of total scholarships awarded, due to the fact that scholarships may be split up between more than one student-athlete.

<sup>74</sup> *Id.*

<sup>75</sup> Peter Keating, The silent enemy of men's sports, ESPN THE MAGAZINE, May 23, 2012, <http://espn.go.com/espnw/title-ix/7959799/the-silent-enemy-men-sports>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

women onto teams on which they have little relative interest in order to comply with the proportionality requirement.<sup>78</sup> This is not only frustrating to women competing in more popular sports, such as basketball or track and field, but unfair to men who do not play football. While popular non-football men's teams, such as wrestling, track and field and baseball get cut, unpopular women's sports like rowing and ice hockey remain. It effectively "undermines Title IX by making compliance with the law seem ludicrous."<sup>79</sup>

"Opponents of Title IX routinely mock the emergence of rowing and sand volleyball programs, as if they're required by federal mandates. But those voices never mention that NCAA rules, not Title IX, forbid colleges from giving more scholarships to cross country runners and softball players."<sup>80</sup>

As a result of such a large portion of scholarships being allocated to football, women have more athletic scholarship opportunities available than men among identical sports (i.e. more women's basketball scholarships than men's basketball, more softball than baseball scholarships, etc.) with lacrosse being the sole exception.<sup>81</sup> Women also compete in six more sports than do men.<sup>82</sup>

Regardless, statistics reveal that Title IX has undoubtedly increased female interest and participation in sports. Since 1972, when Title IX first provided opportunities for female athletes, female participation in "high school athletics has skyrocketed by almost 900%, disproving claims made by opponents of Title IX that women participate at lower levels in varsity sports because they are not interested in athletics."<sup>83</sup> In 1971-72, 294,015 girls

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<sup>78</sup> *Id.*

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

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> National Women's Law Center, *Title IX and Women's Athletic Opportunity: A Nation's Promise Yet To Be Fulfilled*, (July 2008), <http://www.nwlc.org/sites/default/files/pdfs/Nation's%20Promise%20July%202008.pdf>.

participated in high school sports.<sup>84</sup> Forty years later, 3.2 million girls participated in sports for the 2011-12 school year.<sup>85</sup> Male participation has risen from 3.6 million in 1971-72 to almost 4.5 million in 2011-12.<sup>86</sup>

### **B. The Equal Treatment Component**

The second component to determine if a program complies with Title IX examines whether benefits, opportunities, and treatments afforded sports participants are equivalent, though not necessarily required to be identical.<sup>87</sup> Title IX specifically looks at the following program components: equipment and supplies; scheduling of game and practice time; travel and per diem allowances; opportunity to receive academic tutoring; opportunity and compensation of coaching; locker rooms, practice and competitive facilities; medical and training facilities and services; housing and dining facilities and services; publicity; support services; and recruitment of student-athletes.<sup>88</sup> The equal treatment question is often easier to apply than the three-pronged equal participation model. Equal treatment in athletics is often assessed by a simple standard: “If the male athletes had to switch places with female athletes, would they do so without complaint?”<sup>89</sup>

While it is clear that Title IX’s goal of equal treatment has not been realized,<sup>90</sup> the reasons are somewhat difficult to grasp. Equal opportunity often overshadows the equal treatment requirement of Title IX. Although equal treatment violations are often reported by students, parents, administrators, and coaches, the visibility of these complaints remains low in comparison to the publicity surrounding Title IX’s often controversial three-part test contained in its equal

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<sup>84</sup> National Federation of State High School Associations (NFHS), 2011-2012 High School Athletics Participation Survey 2 (2012), available at <http://www.nfhs.org/content.aspx?id=3282>.

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

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

<sup>87</sup> 34 C.F.R. § 106.41(e) (2012).

<sup>88</sup> 34 C.F.R. § 106.41(e) (2012).

<sup>89</sup> Buzuvis, *supra* note 20.

<sup>90</sup> *See id.* at 428-29.

opportunity regulation.<sup>91</sup> In addition, scholars have focused significantly more research and attention on Title IX's equal opportunity three-prong test, and thus equal treatment is often under-analyzed in academic literature.

### **C. Current Compliance with Title IX in Intercollegiate Athletics**

Using Equity in Athletics Disclosure Act data for approximately 700 Division I, II, and III institutions, the “vast majority” of institutions remain out of compliance with Title IX.<sup>92</sup> Institutional characteristics associated with a large proportionality gap (all else equal) include: location in the Midwest and South; larger share of undergraduates who are female; and having a football team.<sup>93</sup> Summary data estimates show that at the average institution in 2001-02, women comprise 55 percent of the student population, but only 42 percent of the varsity athletes are women.<sup>94</sup> In 2001-02, more than 58 percent of Division I BCS institutions have more than a 5 percent discrepancy between their percentage female enrollment and their percentage of female athletes,<sup>95</sup> a disparity that the judiciary would likely interpret as non-compliance.<sup>96</sup> Even including the few compliant institutions, the average proportionality gap was 13 percentage points in 2001-02.<sup>97</sup> These study also indicated that NCAA I-A (renamed NCAA FBS) schools would come very close to compliance if football were “either exempted from Title IX coverage or capped at 50 players.”<sup>98</sup> However, the data makes it clear that non-compliance issues are not just happening at the Division II and Division III levels, where schools escape the national media

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

<sup>92</sup> Deborah J. Anderson, John J. Cheslock, and Ronald G. Ehrenberg, *Gender Equity in Intercollegiate Athletics: Determinants of Title IX Compliance*, Feb. 9, 2004, at 3.

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

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

<sup>95</sup> *Id.* at 10.

<sup>96</sup> 73 percent of BCS institutions have more than a 3 percent discrepancy.

<sup>97</sup> Anderson, *supra* note 92, at 20.

<sup>98</sup> *Id.* at 7.

attention and can fly under the radar. Non-compliance is happening among the biggest and most competitive athletic departments in the country.

When analyzing the complete Title IX picture, Arthur H. Bryant hypothesizes that less than 10 percent of FBS schools are in compliance with Title IX.<sup>99</sup> Even when schools provide opportunities for females to participate in intercollegiate athletics, they are receiving far less than equal treatment.<sup>100</sup> In a time of economic downturn, most educational administrators are not sufficiently dedicated to achieving equality.<sup>101</sup> “The federal government has never brought a single enforcement action against a school for violating Title IX. Most coaches, parents, and students don’t know their rights. So lawsuits are not filed unless schools do something egregious enough to get girls and women angry.... Then females sue – and they win.”<sup>102</sup>

### **III. Disproportionate Expenditures by Revenue-Generating Sports**

One need not look further than the football training complex at most FBS schools to see the disparity that exists between the locker room, practice, and competitive facilities. For example, the Texas A&M football program recently announced the opening of the largest football-only training facility in the NCAA.<sup>103</sup> Part of this “Development Center” includes a \$9 million, 20,000-square foot weight room complete with cameras and electronic tablets at each of 16 weight-lifting platforms.<sup>104</sup> Other Texas A&M varsity sports continue to use Nedum Steed

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<sup>99</sup> Arthur H. Bryant, Title IX at 40: Most schools still aren’t in compliance, THE CHRISTIAN SCIENCE MONITOR, June 27, 2012. Bryant is the executive director of Public Justice, a national public interest law firm that has successfully represented more women intercollegiate athletes and potential athletes in Title IX litigation than any organization in the country.

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

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

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

<sup>103</sup> Sean Lester, *Aggies open largest football-only training facility in the NCAA*, DALLAS MORNING NEWS, August 7, 2012, <http://collegesportsblog.dallasnews.com/2012/08/aggies-open-largest-football-only-training-facility-in-the-ncaa.html/>.

<sup>104</sup> *Id.*

Laboratory, which opened in 1985.<sup>105</sup> The Nedum Steed facility is likely still one of the top strength and conditioning resources in the country, nicer than the facilities at many smaller athletic departments. However, this training facility, used by all eleven female sports and the other seven male sports, cannot approach the resources and facilities available only to football players. How could this glaring disparity be reconciled with Title IX? The answer is simple: it cannot.

The question then follows: why is nothing done? OCR is charged with enforcing the law, however enforcement has long been a problem with Title IX. Any school that is found to be violating Title IX risks losing its federal funds. However, in the forty-year history of the law this measure has never been used.<sup>106</sup> Additionally, the office cannot cite any instance in which the OCR has referred a case of suspected discrimination against female athletes to the justice department for additional action, and thus little chance exists that a school's shortcomings will be fully investigated, and even if they are, few will be meaningfully punished.<sup>107</sup> Lawsuits drag on for years, meanwhile affected athletes long since graduate and move on.<sup>108</sup> In addition, when a complaint arises against a school, the university is often allowed to investigate itself.<sup>109</sup> OCR claims it has become more aggressive in the last few years, investigating Louisiana State University and Butler University.<sup>110</sup>

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<sup>105</sup> [www.aggieathletics.com](http://www.aggieathletics.com),  
[http://www.aggieathletics.com/ViewArticle.dbml?SPSID=632734&SPID=93247&&DB\\_OEM\\_ID=27300&ATCLID=205237937](http://www.aggieathletics.com/ViewArticle.dbml?SPSID=632734&SPID=93247&&DB_OEM_ID=27300&ATCLID=205237937)

<sup>106</sup> Katie Thomas, *Long Fights for Sports Equity, Even with the Law*, N.Y. TIMES, July 28, 2011.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* Linda Joplin filed a complaint against the University of Southern California (USC) in 1998, alleging that female athletes at USC were being denied their fair share of scholarship dollars and other sports spending. As of 2011, this case still remained open.

<sup>109</sup> *Id.* Amidst allegations that Ball State University in Indiana was losing a disproportionate number of women's coaches, OCR opted to let Ball State investigate itself. After a two-week inquiry in which Ball State failed to interview a single coach, the university concluded that there was no evidence that any of the coaches had been unfairly treated or let go. *Id.*

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

A parallel situation occurred at a high school in Kentucky, where a lawsuit challenged the construction of a field house built almost exclusively for the Oldham High School football teams.<sup>111</sup> OCR found the schools did not provide equal locker room facilities for female athletes as required by Title IX.<sup>112</sup> In 2012, the U.S. Department of Education published their Title IX Enforcement Highlights. OCR reported initiation of 17 proactive investigations of possible Title IX violations between the fiscal years of 2009 and 2011 and received more than 900 complaints. OCR emphasized their steps taken in several areas, including: investigating male booster clubs to determine if this is creating inequities in benefits; ensuring equal opportunities for “primetime” scheduling of high school athletic events; and obtaining redress<sup>113</sup> where a university failed to maintain adequate locker rooms (forcing female athletes to change in cars and sheds), unequal medical and training services, and unequal travel accommodations.<sup>114</sup>

#### **A. Private sport-specific donations**

Institutions have a responsibility under Title IX to ensure that male and female programs are provided with equivalent benefits, treatment, services, or opportunities regardless of their source.<sup>115</sup> The private funds used to support athletics programs, although neutral in principle, are likely to be subject to the same historical patterns that Title IX was enacted to address.<sup>116</sup>

[I]f all benefits are not considered in examining interscholastic athletics, the purpose and effect of the Title IX requirements could be routinely undermined by the provision of unequal benefits through private financial assistance...This does not mean that teams

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<sup>111</sup> Buzuvis, *supra* note 20, at 448.

<sup>112</sup> Press Release, National Women’s Law Center, U.S. Department of Education Office for Civil Rights Finds Two Oldham County High Schools do not Provide Equal Facilities for Female Athletes as Required by Title IX (Aug. 12, 2011), available at <http://www.nwlc.org/press-release/us-department-education-office-civil-rights-finds-two-oldham-county-high-schools-do-no>.

<sup>113</sup> Redress included a resolution agreement between the university and OCR resulting in construction of upgraded facilities and other equitable treatment. U.S. Department of Education, Title IX Enforcement Highlights, (June 2012), available at <http://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf>.

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

<sup>115</sup> Jurupa Unified School Dist., OCR File No. 09-01-1222 (Feb. 7, 1995), available at <http://www2.ed.gov/about/offices/list/ocr/letters/jurupa.html>.

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

must ‘share’ proceeds from fundraising activities. It does, however, place a responsibility upon the district to ensure that benefits, services, treatment, and opportunities overall, regardless of funding sources, are equivalent for male and female athletes.<sup>117</sup>

The source of funds is irrelevant. The benefit provided is the measure. Booster club funds or monies designated for a particular purpose or team does not relieve the school’s obligation to provide equal benefits.<sup>118</sup>

The situation was also addressed at Merritt Island High School in Florida involving the disparity in the school’s baseball and softball fields.<sup>119</sup> Booster club money was used to upgrade the school’s baseball field, including new bleachers, an announcer’s booth, an electronic scoreboard, a batting cage, bathrooms, and lights for night games. The softball field received no such upgrades, and no other girls’ team received offsetting favorable treatment.<sup>120</sup> United States District Court for the Middle District of Florida enjoined the high school to take steps toward equalization of the facilities.<sup>121</sup>

In the case of Texas A&M University’s football-only facility mentioned supra, it is unclear whether offsetting benefits were provided for female athletes. If they were provided, the school might be able to establish that the benefits were equivalent overall. However, this is unlikely. Substantial benefits would need to be provided to women’s athletic teams in order to offset the \$9 million improvement in the football team’s training facility. Although Title IX and its regulations do not “require institutions to expend equal amounts of money on members of each sex,” funding is at least an element in deciding whether the equality of opportunity Title IX

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

<sup>118</sup> *See Chalenor v. University of North Dakota*, 142 F.Supp.2d 1154 (D.N.D. 2000) (holding that although providing the necessary funding for athletic programs for both sexes is an important part of providing equal opportunity, it is not the gravamen of Title IX; a school may not skirt the requirement of providing both sexes equal opportunity through the guise of outside funding).

<sup>119</sup> *Daniels v. School Board*, 995 F.Supp. 1394 (M.D. Fla. 1997).

<sup>120</sup> *Id.* at 1395.

<sup>121</sup> *Id.* at 1398.

requires is present.<sup>122</sup> Achieving equality through off-setting benefits to a women's team would escalate concerns over the practicality of this increased spending and would likely result in a failure to profitably operate an athletics department.

While Title IX affects allocation of booster club monies between men's and women's sports, Title IX does not affect the allocation of booster club funds *among* men's sports. Exacerbating an already difficult situation in which non-revenue men's sports often find themselves, football players can still receive superior funding and treatment over other men's sports without violating Title IX.

#### **B. Revenue generation as a factor in resource allocation among sports**

Critics claim the popularity and subsequent financial support of men's collegiate sports, realized through television contracts, merchandise revenue, and ticket sales results in a windfall for female athletes. Defending football as the way to fund women's sports makes parity in Title IX appear to be a gift and not an entitlement. It is clear that the athletic department revenues generated solely by football and men's basketball effectively fund many entire athletic departments, including every other sport for males and females. Amidst many headlines about the incredible amount of money in college sports, just seven athletic departments earned enough to finish in the black in each of the last five years.<sup>123</sup> Although women's athletics and other non-revenue men's sports survive on these revenue-generating sports, female student-athletes are still entitled to equitable treatment.

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<sup>122</sup> Favia, 7 F. 3d 332 (quoting Brown, 809 F. Supp 978, 994).

<sup>123</sup> Knight Commission on Intercollegiate Athletics, *Restoring the Balance: Dollars, Values and the Future of College Sports* 3 (June 2010).

Unfortunately, Title IX has been used as a scapegoat for colleges and universities with budgetary problems, who cite the law as a pretext to cut men's athletic programs.<sup>124</sup> If the requirements of Title IX are ever fully implemented, college football will be changed drastically.<sup>125</sup>

### **C. Disparity in Locker Rooms, Weight Training Facilities**

The United States' District Court for the Southern District of California recently held in favor of a group of female athletes in a Title IX class action lawsuit against the Sweetwater Union High School District. The judge determined the school district unfairly favored boys' sports over girls' sports at Castle Park High School by giving the boys better athletic facilities, resources, and opportunities.<sup>126</sup> Specifically, the court evaluated several aspects of the athletic department's provisions for its male and female athletes and found violations of Title IX. First, recruiting efforts for female athletes were not equal to those of male athletes, where head coaches for girls teams were appointed shortly before the season and therefore given little time to recruit, the athletic director went to feeder schools to talk about boys athletic programs, and boys and their parents were invited to watch football practice at CPHS while no efforts by coaches to recruit additional girls on the co-ed teams.<sup>127</sup> Second, locker rooms, practice, and competition facilities were unequal in that the quality, size, and location of the locker rooms were better for male athletes than female athletes at CPHS. Further, the male athletes had higher quality and better-maintained practice and competitive facilities.<sup>128</sup> Third, male athletes were provided with

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<sup>124</sup> Elisa Hatlevig, *Title IX Compliance: Looking Past the Proportionality Prong*, 12 SPORTS LAW. J. 87, 88 (2005) (discussing how the increasing budget and expenditures for revenue sports causes universities to cut smaller, non-revenue sports because of financial stresses).

<sup>125</sup> Robert C. Farrell, *Title IX or College Football*, 32 HOUS. L. REV. 993, 996 (1995).

<sup>126</sup> *Ollier v. Sweetwater Union High School Dist.*, 858 F.Supp.2d 1093 (S.D. Cal. 2012).

<sup>127</sup> *Id.* at 1110-11.

<sup>128</sup> *Id.* at 1111.

more and superior quality equipment, supplies, uniforms, and storage facilities.<sup>129</sup> Fourth, boys had greater access to premium game times and, because of the schools consistent failure to timely hire coaches for girls' sports, girls were provided with fewer competitive opportunities.<sup>130</sup> Fifth, the girls' teams' coaches were fewer in number, less experienced, and more overburdened than the boys' teams' coaches.<sup>131</sup> Sixth, male athletes were provided with greater access to athletic trainers and medical services.<sup>132</sup> Seventh, girls' athletic activities were provided with less coverage and promotion in yearbooks, fewer announcements in school bulletin, and less signage. The CPHS band and cheerleaders performed at more boys' sports than girls' sports.<sup>133</sup> Finally, the school failed to monitor athletic fundraising opportunities and did not review fundraising for gender equity.<sup>134</sup> In each of these aspects, the court found that the disadvantages to the girls were not negligible.<sup>135</sup>

While this case is still subject to appeal, it is instructive as to the courts analysis of differing accommodations for female and male athletes, and much of the analysis is centered on the facilities and premium services provided to the school's football program. Decided in February 2012, this case will likely encourage more litigation on the premium treatment of revenue generating programs.<sup>136</sup> Complaints and lawsuits regarding inequitable facilities have dominated the equal treatment cases, with most cases involving the inadequacy of softball facilities compared to the school's baseball facilities.<sup>137</sup>

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<sup>129</sup> *Id.* at 1110-11.

<sup>130</sup> *Id.* at 1111.

<sup>131</sup> *Id.* at 1111-12.

<sup>132</sup> *Id.* at 1112.

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

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

<sup>135</sup> Ollier, 858 F.Supp.2d 1093.

<sup>136</sup> Allison K. Sampite, *Sweetwater will appeal ruling*, THE STAR NEWS, Feb. 18, 2012.

<sup>137</sup> Buzuvis, *supra* note 20, at 441.

At the collegiate level, there is still work to be done. Although more than half of the students at NCAA schools are women, they receive only 44% of the athletic participation opportunities.<sup>138</sup> Additionally, “female athletes at the typical Division I FBS school receive roughly 28% of the total money spent on athletics, 31% of the recruiting dollars, and 42% of the athletic scholarship dollars.”<sup>139</sup> For every dollar spent on women’s sports, about two and a half dollars are spent on men’s sports.<sup>140</sup>

#### IV. Criticisms

Advocates and critiques alike applaud the law’s effect on the expansion of opportunities for female athletes. However, Title IX has been the topic of much criticism, especially by proponents of male athletes in non-revenue sports. “Athletes all across America are being hurt by the prejudice of insane feminist.”<sup>141</sup> Critics claim that since the passage of Title IX, the drafter’s best intentions “have been steamrolled by bureaucrats who have engineered a complex set of regulations that, in practice, incentivize school administrators to do just what the law forbids: deny the benefits of participation on the basis of gender.”<sup>142</sup> Commentators assume that the quota system that results from the application of the three-pronged participation requirement bestows on women opportunities that they did not earn, deserve, or even request.<sup>143</sup>

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<sup>138</sup> National Women’s Law Center, *The Battle for Gender Equity in Athletics in Colleges and Universities*, (June 2012), [http://www.nwlc.org/sites/default/files/pdfs/battle\\_for\\_gender\\_equity\\_in\\_college\\_athletics.pdf](http://www.nwlc.org/sites/default/files/pdfs/battle_for_gender_equity_in_college_athletics.pdf); National Collegiate Athletic Association (NCAA), 1981-82—2010-11 NCAA Sports Sponsorship and Participation Rates Report 69-60 (Oct. 2011).

<sup>139</sup> National Women’s Law Center, *supra* note 138; NCAA, 2004-10 Gender-Equity Report 28-36 (January 2012). All figures from the NCAA Gender Equity report exclude spending that is not specifically allocated by gender.

<sup>140</sup> National Women’s Law Center, *supra* note 138; NCAA, 2004-10 Gender-Equity Report 28-36, *supra* note 139.

<sup>141</sup> Perry Cook, *The Rights of Men in College Sport, College Sports Scholarships*, <http://www.collegesportsscholarships.com/title-ix-discrimination.htm> (last visited Jan. 9, 2013).

<sup>142</sup> Pearson, *supra* note 21.

<sup>143</sup> Buzuvis, *supra* note 20.

As of 2004, NCAA member institutions have eliminated more than 350 men's wrestling, gymnastics, track and field, tennis, and swimming teams.<sup>144</sup> Despite continued criticism, every appellate court since *Cohen v. Brown University* has continued to uphold the three-part test.<sup>145</sup> Commentators often blame Title IX for the “demise of ‘minor’ (non-revenue-producing) men’s sports,” when it is the arms race culture of football and men’s basketball that has created this status in the first place.<sup>146</sup>

One of the major points advanced by critics to explain the remaining gap between female college enrollment (around 55% female) and female scholarship allocation (around 40-44%), is that women care less about playing sports than men. Title IX forces institutions to create demand where it doesn't exist.<sup>147</sup> Marcia Greenberger, founder and co-president of the National Women's Law Center responds that to this assertion:

When women's (collegiate) participation went to 20 percent, people said, 'Well, that's as high as interest is going to go.' And then it went to 30 and they said the same thing. Now it's up to 40 and they're saying, 'Enough is enough.' The notion that 40 percent is enough is just as stereotypical and unfair as it was when the numbers were even lower.<sup>148</sup>

## V. Reduction in Football Scholarships

When a Division I FBS athletic department decides to cut men's scholarships in order to comply with Title IX, the NCAA maximum 85 men's scholarships allocated to football invariably remains unchanged. As a result, men's wrestling, soccer, and track and field programs are often completely eliminated. The finger pointing begins, and Title IX is frequently blamed for the elimination of men's sports. History has shown that schools will not, on their

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<sup>144</sup> Ryan T. Smith, note “*Bull’s Eye*”: *How Public Universities in West Virginia can creatively comply with Title IX without the targeted elimination of men’s sports teams*, 110 W. VA. L. REV. 1373, 1375 (2008); Levit *supra* note 56, at 114.

<sup>145</sup> Buzuvis, *supra* note 20, 449. See, e.g., *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930 (D.C. Cir. 2004); *Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91 (4<sup>th</sup> Cir. 2011).

<sup>146</sup> Buzuvis, *supra* note 20, at 450.

<sup>147</sup> Garber *supra* note 42.

<sup>148</sup> *Id.*

own initiative, risk the revenues generated by football and reduce the number of football scholarships by even five or ten. It is therefore left to the NCAA to mandate the reduction in order to even the playing field and include football in the Title IX substantial proportionality equation. Due to the effect that it would have on both women's athletics and non-revenue men's sports, this note proposes a reduction of ten scholarships, from 85 to 75, to football programs participating in Division I FBS.

Until the 1970s, there was no limit on the number of football scholarships that could be granted by a given institution. In 1973, the NCAA imposed a limit of 105 scholarships for football programs. This limit arose out of the NCAA's concern that schools were hoarding players by giving them financial aid.<sup>149</sup> The University of Pittsburgh head football coach reportedly gave scholarships to 90 freshmen in 1973, and in response the NCAA tried to ensure some equity.<sup>150</sup> Football scholarships were reduced again in 1978 to 95 and again in 1992 to the current maximum of 85.<sup>151</sup> Each reduction has been met with push back from college football coaches and administrators. After the 1978 reduction to 95 scholarships, the then-USC football coach said it was "a day of ruin for college football."<sup>152</sup>

So do FBS football programs really need 85 scholarships? Although they are allowed a maximum of 90 players at training camp, teams in the National Football League (NFL) must cut their roster down to 53 at the start of the NFL season. Each NFL team plays 16 regular season games over 17 weeks, plus up to four post-season games. College teams, with 85 scholarships and rosters frequently over 110 players, only play 12 regular season games over 14 weeks, with

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<sup>149</sup> Keating, *supra* note 75.

<sup>150</sup> Keating, *supra* note 75.

<sup>151</sup> Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 Rutgers L.J. 269, fn 208 (1994).

<sup>152</sup> Jon Solomon, *NCAA considers cutting football and women's basketball scholarships*, THE BIRMINGHAM NEWS, January 14, 2012.

the possibility of playing two additional postseason games.<sup>153</sup> These statistics beg the question: If the NFL, with their longer season and physically larger players only need 53 spots, why would college teams need an additional 32 scholarship spots? While college teams graduate part of their roster every year and NFL teams can essentially keep the same players from year-to-year, this does not affect the number of roster spots needed because a new crop of incoming freshmen replaces each graduating class. Further, in 2011, national champion the University of Alabama used 59 players per regular-season game, ranging from 49 to 69 participants.<sup>154</sup> Reallocating these extra 15-35 football scholarships would allow athletes in other sports to participate in their sport rather than allocating them to football players sitting on the bench.<sup>155</sup>

Some college coaches argue that at least 85 players are needed to field the different teams on a football squad (offense, defense, kick-off, kick-off return, field goal, field goal block, punt, and punt return) and to provide the opportunity to develop players.<sup>156</sup> When scholarships were reduced from 95 to 85 in the early 1990s, then-Florida State football coach Bobby Bowden claimed that the reduction would “water down” college football into an inferior product incapable of competing with the NFL for attention and money.<sup>157</sup> Yet long-time college coach Steve Spurrier argues that 75 scholarships would be enough.<sup>158</sup>

The Knight Commission on Intercollegiate Athletics<sup>159</sup> examined current NCAA scholarship limitations. As of 2010, it has been more than thirty years since the NCAA

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<sup>153</sup> This includes one conference championship game and one bowl game. Beginning in 2014, the BCS playoff system will enable two FBS teams to play an additional postseason game for the BCS National Title.

<sup>154</sup> Keating, *supra* note 75.

<sup>155</sup> Solomon, *supra* note 152.

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

<sup>157</sup> *Id.*

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

<sup>159</sup> The Knight Commission was formed in 1989 in response to highly visible scandals in college sports. The Commission focuses its efforts on advocating for better policies and practices that will ensure intercollegiate programs operate within the educational mission of their colleges and universities. Its co-chairs are William English

conducted a comprehensive examination of the appropriate number of scholarships permitted in each sport.<sup>160</sup> During that period, there have been drastic changes in the competitive sports landscape as well as advancement in injury data.<sup>161</sup> This data provides “more complete consideration of the actual numbers of players needed in relation to the playing opportunities available.”<sup>162</sup> The Knight Commission reiterated its 2001 recommendation to reduce the number of football scholarships at FBS schools by eight to ten scholarships.<sup>163</sup> They viewed this as a conservative reduction that would still provide a much higher ratio of scholarships to playing opportunities relative to other sports.<sup>164</sup>

### **B. Effect on Athletic Department Revenues and Expenses**

In order to curb spending by NCAA member athletic departments, the Knight Commission recently made several recommendations in response to escalated spending by institutional athletic departments, particularly the amount spent on coaching staffs.<sup>165</sup> Among them is limiting the number of allowable non-coaching staff personnel. For example, Division I FBS football programs are allowed 10 full time coaches, yet they also employ several more administrative personnel, such as directors of football operations, directors of recruiting, and strength and conditioning coaches for each on-field position. The Knight Commission recommends limiting the number of staff members assigned to a particular sport that do not involve academic support or health and safety.<sup>166</sup> Reducing the number of players on a football team would also reduce the number of coaches and support staff needed.

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Kirwan, Chancellor, University System of Maryland; and R. Gerald Turner, President, Southern Methodist University.

<sup>160</sup> Knight Commission, *supra* note 123, at 18.

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

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

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

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

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

In addition, it costs the University of Nebraska an average of \$1,000 to provided game day equipment for one player.<sup>167</sup> By shrinking the number of football scholarships and thereby reducing the number of football players that inevitably only stand on the sideline in their game day equipment, overall team expenses would immediately decrease. And this is only taking into account game day equipment. When factoring in weightlifting gear, practice equipment, travel gear, and off-season training gear, the effects are substantial. In addition, football teams, normally an athletic department's biggest spenders on recruiting, would be allowed to sign less players each year, effectively reducing their football recruiting budget. Travel costs would also decrease, including hotel and meal (per diem) expenses.

Little data exists on the effect of the reduction in football scholarships on the overall profitability of a football team. However, it is unlikely that a reduction to 75 scholarships would have any significant impact on a football team's ability to generate revenue in the form of television and media contracts, season tickets, and alumni donations. Conversely, expenses would inevitably decrease. But most importantly, the ten scholarships can be allocated to a different men's sport that would have been eliminated or reduced to keep up with Title IX's proportionality requirement. This fulfills one of the fundamental purposes of Title IX, which is to encourage participation in athletics.

### **C. Other Suggested Solutions**

A frequently advocated solution is to excuse football from complying with Title IX. This would require an act of Congress, and has not been met with much success.<sup>168</sup> The first such attempt was made in 1974 by the proposed Tower Amendment, which would have exempted

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<sup>167</sup> Cork Gaines, *It costs six figures to dress a college football team*, BUSINESS INSIDER (July 2, 2012).

<sup>168</sup> SPORTING EQUALITY, *supra* note 15.

revenue-producing sports from Title IX compliance.<sup>169</sup> This amendment was rejected and replaced by the Javits Amendment.<sup>170</sup>

Some proponents would argue that the Football v. Title IX problem could be alleviated by counting each football scholarship as only one half or two-thirds of a scholarship, and in exchange requiring specific portions of football revenue to go to different Olympic sports.<sup>171</sup> Others argue that the problem is the NCAA limiting the number of scholarships in any sport.<sup>172</sup>

Recent NCAA legislation proposed reducing the number of football scholarships from 85 to 80 and women's basketball scholarships from 15 to 13.<sup>173</sup> However, this measure was an effort to reduce the amount institutions are spending on athletics, rather than to provide more male scholarships to non-revenue sports.<sup>174</sup> The NCAA board of directors voted down this proposal.

This note does not propose reducing NCAA football *roster* size to fewer than 85 student-athletes, but does suggest there should be some limit on the number of walk-ons allowed. A football roster with 100 student-athletes, 75 scholarship and 25 walk-ons, should be more than sufficient to provide opportunities to non-scholarship players that are interested and capable of competing at the Division I level. In addition, 75 players plus walk-ons should be more than sufficient to meet the needs of practice drills and intrasquad scrimmaging.

## VI. Conclusion

The current NCAA scholarship limits protect and promote revenue sports.<sup>175</sup> Reducing the number of scholarships an FBS school is allowed to allocate to football from 85 to 75 would

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

<sup>170</sup> See Educational Amendments of 1972, *supra* note 23.

<sup>171</sup> Bobby La Gesse, *Solving the Title IX football dilemma*, AMES TRIBUNE, June 23, 2012.

<sup>172</sup> Keating, *supra* note 75.

<sup>173</sup> Solomon, *supra* note 152.

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

<sup>175</sup> Keating, *supra* note 75.

have a significant impact on the ability of a school to both comply with the participation requirement of Title IX and still provide opportunities to non-revenue men's sports. While revenue generation by football and men's basketball is key to funding many other women's and men's sports, it is irrelevant in meeting the equal participation and equal treatment requirements of the law. Title IX has been portrayed as a battle by non-revenue men's sports against women. A closer look reveals that it is really not a battle against women, but against the disproportionate allocation of opportunities and supreme treatment of NCAA football programs. An NCAA mandated reduction in football scholarships would be an appropriate and necessary step in requiring athletic departments with big-time football programs to take notice and start complying with Title IX.