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## Note

### All Sports Are Not Created Equal: College Football and a Proposal to Amend the Title IX Proportionality Prong

Jay Larson\*

Title IX of the Educational Amendments of 1972 to the 1964 Civil Rights Act prohibits sex discrimination in educational programs and activities that receive federal funding.<sup>1</sup> Hailed as one of the great civil rights statutes in history,<sup>2</sup> Title IX has led to a profound increase in opportunities for women, especially in athletics. At the time Congress passed Title IX, women had very few chances to compete in organized athletics, but today women in athletics are thriving, with nearly three million high school girls<sup>3</sup> and more than 155,000 college women participating each year.<sup>4</sup> For all of its successes, however, there are signs that the Title IX regulations are increasingly leading to problems, including the elimination of men's sports. From 1981 to 1999, thirteen of the twenty-six men's intercollegiate sports experienced a decline in the number of teams.<sup>5</sup> While

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1. See 20 U.S.C. §§ 1681–1688 (2000).

2. See Joanna Grossman, *Saving Title IX: Recent Developments Spell Good News for the Federal Statute Prohibiting Sex Discrimination in High School and College Athletics*, Findlaw's Writ, at <http://writ.news.findlaw.com/grossman/20030715.html> (July 15, 2003).

3. Press Release, Nat'l Fed'n of State High Sch. Ass'ns, Participation Sets Record for Fifth Straight Year (Sept. 2, 2003), [http://www.nfhs.org/scriptcontent/va\\_custom/va\\_cm/contentpagedisplay.cfm?Content\\_ID=150](http://www.nfhs.org/scriptcontent/va_custom/va_cm/contentpagedisplay.cfm?Content_ID=150).

4. See Nat'l Collegiate Athletic Ass'n, 1981-82 to 2001-02 NCAA Sports Sponsorship and Participation Rates Report 59 (Apr. 2003) [hereinafter NCAA Sports Sponsorship Report], [http://www.ncaa.org/library/research/participation\\_rates/19822002/participation.pdf](http://www.ncaa.org/library/research/participation_rates/19822002/participation.pdf).

5. Gen. Accounting Office, *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams* 13 (2001) [hereinafter *Discontinuing Teams Report*]. Wrestling experienced the biggest decline, losing 171

there are a number of reasons why a sport may be eliminated,<sup>6</sup> many institutions cited gender equity concerns as a great influence on the decision.<sup>7</sup> Moreover, the problem seems to be getting worse: from 1995 to 2002, men's teams were eliminated at nearly twice the rate of women's teams.<sup>8</sup>

Most institutions feel the Title IX regulations force them to comply with one of Title IX's options for compliance—the proportionality test.<sup>9</sup> Under this test, an institution is in compliance if the proportion of its female student-athletes mirrors the proportion of females in its general student body.<sup>10</sup> Institutions that do not sponsor football programs, as a whole, have equal numbers of male and female student-athletes,<sup>11</sup> but because football teams carry far more team members than any female sport, institutions that do sponsor football programs often have a disproportionately higher number of male student-athletes.<sup>12</sup> In an effort to satisfy the proportionality test, these institutions are increasingly eliminating men's opportunities and adding

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intercollegiate teams and 2648 student-athletes over this period. *Id.* at 11.

6. Sports have been eliminated due to "institutional philosophy, program priorities, finances, infractions, safety, lack of conference opportunities, inadequate facilities, [and] insurance costs." Judith M. Sweet, Written Testimony of Judith M. Sweet, Vice-President for Championships/Senior Woman Adm'r, Nat'l Collegiate Athletic Ass'n, Before the Sec'y of Educ. Comm'n on Opportunity in Athletics (Aug. 27, 2002) [hereinafter Sweet Testimony], [http://www1.ncaa.org/membership/ed\\_outreach/gender\\_equity/resource\\_materials/upload/2002\\_sweet\\_testimony.htm](http://www1.ncaa.org/membership/ed_outreach/gender_equity/resource_materials/upload/2002_sweet_testimony.htm).

7. See Discontinuing Teams Report, *supra* note 5, at 18–20; see also Sec'y of Educ. Comm'n on Opportunity in Athletics, "Open to All:" Title IX at Thirty 24 (Feb. 28, 2003) [hereinafter Commission Report] (finding that Title IX's proportionality prong has been a factor in the decision to eliminate men's teams), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf#boards/athletics>.

8. See NCAA Sports Sponsorship Report, *supra* note 4, at 177 (noting that during this seven-year period, 1059 men's teams were eliminated, as compared to 583 women's teams). During the seven years prior to 1995, 836 men's teams and 692 women's teams were eliminated. See *id.*

9. See *infra* Part II.A.

10. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) [hereinafter Title IX of the Education Amendments] (describing the proportionality test); see also *infra* notes 28–33 and accompanying text (listing the three general areas of Title IX compliance for intercollegiate athletic programs).

11. See Nat'l Collegiate Athletic Ass'n, 2001–02 NCAA Gender Equity Report 62 (Jan. 2004) [hereinafter NCAA Gender Equity Report], [http://www.ncaa.org/library/research/gender\\_equity\\_study/2001-02/200102GenderEquityReport.pdf](http://www.ncaa.org/library/research/gender_equity_study/2001-02/200102GenderEquityReport.pdf).

12. See *id.* at 30, 46.

women's sports with large roster sizes instead of those with strong interest levels, solutions that conform to the letter of Title IX, but not to its spirit.<sup>13</sup> These problems warrant a reconsideration of an idea that has previously been discarded—giving special consideration to the unique size of football teams.<sup>14</sup>

This Note takes a practical look at the future of Title IX as it relates to intercollegiate athletics and argues that although the law has helped foster remarkable improvements for women in athletics, it can, and should, be improved. Part I of this Note provides a brief background on Title IX, including its underlying purpose and the regulations that apply specifically to intercollegiate athletics. Part II details how institutions comply with the law and describes problems that arise through compliance. Part III examines challenges to Title IX in the courts and efforts to reform the law in the legislature. Part IV analyzes the future implications of the Title IX regulations and details a proposal that would create a special exception for the unique size of football programs under the proportionality requirement, a move that would be consistent with the original framework of the law while reducing the perverse incentives inherent in the proportionality test. Part V examines the potential effects this proposal may have.

## I. THE TITLE IX PLAYBOOK: A BRIEF BACKGROUND

### A. HISTORICAL BACKGROUND AND ENSUING SUCCESSES

Title IX provides in relevant part: "No person in the United

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13. For example, schools have been adding women's sports with large rosters, even where no significant interest exists in a particular region for the sport, in an effort to offset the size of the football team. See *infra* Part II.C.

14. See *Gender Equity in Intercollegiate Athletics: Hearing Before the Subcomm. on Postsecondary Educ., Training, & Life-Long Learning of the House Comm. on Econ. & Educ. Opportunities*, 104th Cong. 200-07 (1995) [hereinafter *Neinas Testimony*] (statement of Charles M. Neinas, Exec. Dir., Coll. Football Ass'n), available at 1995 WL 269760; Philip Anderson, *A Football School's Guide to Title IX Compliance*, 2 SPORTS LAW. J. 75, 96 (1995) (stating that the NCAA Gender Equity Task Force had "entertained proposals to partially exempt football"); Charles P. Beveridge, Note, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 U. ILL. L. REV. 809, 840 (1996) (stating that "athletic directors have urged that football players not be included in the substantial proportionality test"); Deidre G. Duncan, Comment, *Gender Equity in Women's Athletics*, 64 U. CIN. L. REV. 1027, 1047 n.158 (1996) (stating the Title IX proponents' argument that under current regulations, football cannot be legally exempted from Title IX).

States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”<sup>15</sup> “Program or activity” refers to all operations of “a college, university . . . or a public system of higher education,” among other institutions.<sup>16</sup> Nearly every educational institution is a recipient of federal funds and thus must comply with Title IX or risk losing federal funding.<sup>17</sup>

For women in athletics, the law has been a resounding success. From 1971 to 2002, the number of girls participating in high school sports grew from about 294,000 to more than 2.8 million.<sup>18</sup> From 1981 to 2002, the number of female participants at NCAA intercollegiate institutions grew from 74,239 to 155,513, and the number of women’s intercollegiate teams grew from 4776 to 8920.<sup>19</sup> Today, there are 769 more NCAA intercollegiate women’s teams than men’s teams.<sup>20</sup>

Even though these gains for female athletes have come largely because of Title IX, Congress did not enact the statute with athletics in mind. Instead, Title IX arose out of congressional hearings that revealed clear patterns of discrimination

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15. 20 U.S.C. § 1681(a) (2000).

16. *Id.* § 1687(2)(A). The Civil Rights Restoration Act of 1988 restored Title IX’s application to intercollegiate athletics by superseding a Supreme Court decision holding that Title IX did not apply to those institutional programs that do not directly receive federal aid. *See* *Grove City Coll. v. Bell*, 465 U.S. 555, 573 (1984). *Grove City College* had effectively removed Title IX’s application to athletics because intercollegiate athletic programs do not receive direct federal funding. *See* Nat’l Collegiate Athletic Ass’n, *Achieving Gender Equity I-2* (2001) [hereinafter *Achieving Gender Equity Manual*], available at [http://www.ncaa.org/library/general/achieving\\_gender\\_equity](http://www.ncaa.org/library/general/achieving_gender_equity).

17. 20 U.S.C. § 1682 (2000) (stating that compliance with any Title IX regulation “may be effected . . . by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding . . . of a failure to comply with such requirement”). Private colleges that receive federal funding must also comply with the Title IX regulations. *See* *Cohen v. Brown Univ.*, 101 F.3d 155, 164 (1st Cir. 1996). As of 2000, not one educational institution had its federal funding suspended or terminated for noncompliance. Gen. Accounting Office, *Gender Equity: Men’s and Women’s Participation in Higher Education 23–24* (2000) [hereinafter *GAO Gender Equity Report*]. The threat itself, however, has been enough to force institutions to institute compliance procedures. *Id.*

18. *See* Nat’l Fed’n of State High Sch. Ass’ns, 2002–03 Participation Summary 47 (2003) [http://www.nfhs.org/scriptcontent/Va\\_Custom/SurveyResources/2002\\_2003\\_Participation\\_summary.pdf](http://www.nfhs.org/scriptcontent/Va_Custom/SurveyResources/2002_2003_Participation_summary.pdf).

19. *See* NCAA Sports Sponsorship Report, *supra* note 4, at 13, 59.

20. *See id.* at 59, 61.

against women in higher education.<sup>21</sup> In 1971, Senator Birch Bayh introduced an amendment to the Higher Education Act of 1965 seeking to guarantee that women would have the same educational opportunity that men had enjoyed, an opportunity that "every American deserves."<sup>22</sup> Despite the original amendment's defeat in conference committee, a modified version later became Title IX of the Education Amendments of 1972.<sup>23</sup>

## B. TITLE IX IMPLEMENTING REGULATIONS

In 1974, Congress passed the Javits Amendment, requiring the Department of Health, Education, and Welfare (HEW), which is now the Department of Education (DOE), to adopt regulations implementing Title IX, noting that they should include "reasonable provisions considering the nature of particular sports."<sup>24</sup> The final HEW regulations contained two sections specifically implementing Title IX in the area of intercollegiate athletics.<sup>25</sup> These regulations were quite broad, however, and institutions did not understand how to comply with them. Due to the uncertainty, the federal Office of Civil Rights (OCR)<sup>26</sup>

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21. See 117 CONG. REC. 30,155-56 (1971). From January 1970 to March 1971, sex discrimination charges were filed against over 250 colleges and universities, including the entire public university systems of Florida, California, and New Jersey. *Id.* at 30,155. College brochures stated that "[a]dmission of women on the freshmen level will be restricted to those who are especially well qualified." *Id.* at 30,156. At state universities, the ratio of men to women was two and one-half to one. *Id.*

22. *Id.* at 30,155. Senator Bayh stated that although over fifty percent of the population was female, there was no effective protection for them as they sought admission and employment in educational facilities. *Id.*

23. The amendment is codified at 20 U.S.C. §§ 1681-1688 (2000).

24. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) (codified at 20 U.S.C. § 1681 (2000)) [hereinafter Javits Amendment].

25. See Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 34 C.F.R. § 106.41 (1981) [hereinafter Nondiscrimination on the Basis of Sex] (detailing general provisions governing athletic programs); *id.* § 106.37(c) (dealing specifically with the awarding of athletic scholarships). Although a school is not required to operate an intercollegiate athletic program, when it does, it must provide equal opportunity for members of both sexes. *Id.* § 106.41(c); see also Nondiscrimination on the Basis of Sex, 45 C.F.R. §§ 86.37(c), 86.41, 86.41(c) (1984).

26. The OCR is a department within the DOE whose role is to "ensure that recipients of Federal financial assistance do not discriminate against students, faculty, or other individuals on the basis of race, color, national origin, sex, disability or age." *Gender Equity in Intercollegiate Athletics: Hearing Before the Subcomm. on Postsecondary Educ., Training, & Life-Long Learning of*

issued a Policy Interpretation to provide guidance on compliance in 1979.<sup>27</sup>

The Policy Interpretation established three general areas where intercollegiate athletic departments must comply with Title IX: scholarships, equivalence in other benefits and opportunities, and effective accommodation of interests and abilities.<sup>28</sup> First, if an institution awards athletic scholarships or grants-in-aid, it must provide them in proportion to the number of student-athletes of each sex participating in intercollegiate athletics at the school.<sup>29</sup> Second, male and female student-athletes must receive equivalent benefits and opportunities.<sup>30</sup> Benefits to each sex need not be identical, "provided the overall effect of any differences is negligible" or the differences result from nondiscriminatory factors.<sup>31</sup> Third, the selection of sports and levels of competition must effectively accommodate the interests and abilities of members of each sex.<sup>32</sup> The Policy Interpretation established a three-part test for schools to follow in complying with this "effective accommodation" area. Schools must show either (1) that intercollegiate participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; (2) a history and continuing practice of program expansion for the

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*the House Comm. on Econ. & Educ. Opportunities*, 104th Cong. (1995) [hereinafter Cantú Testimony] (statement of Norma V. Cantú, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ.), 1995 WL 269757.

27. See Title IX of the Education Amendments, 44 Fed. Reg. 71,413, 71,415-18 (Dec. 11, 1979).

28. See *id.* at 71,414.

29. *Id.* at 71,415 (codified at Nondiscrimination on the Basis of Sex, 34 C.F.R. § 106.37(c)(1) (1981); 45 C.F.R. § 86.37(c)(1) (1984)). For example, if an institution has fifty-two percent male student-athletes and forty-eight percent female student-athletes, the female student-athletes must receive forty-eight percent of the scholarship dollars. Dep't of Educ., Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) [hereinafter 1996 Clarification], available at <http://www.ed.gov/print/about/offices/list/ocr/docs/clarific.html>.

30. Title IX of the Education Amendments, 44 Fed. Reg. at 71,415 (codified at 34 C.F.R. § 106.41(c) (1981); 45 C.F.R. § 86.41(c) (1984)). "Equivalent" was clarified to mean "equal or equal in effect." *Id.*

31. *Id.* In determining if an institution is complying with this section, the DOE looks at all aspects of the athletic program, including equipment, scheduling of games and practice times, locker rooms, practice and competitive facilities, travel and per diem allowances, opportunity to receive coaching and tutoring, assignment and compensation of coaches and tutors, medical and training facilities, housing and dining facilities, and publicity. *Id.*

32. *Id.* at 71,417 (codified at 34 C.F.R. § 106.41(c)(1) (1981); 45 C.F.R. § 86.41(c)(1) (1984)).

underrepresented class; or (3) that the interests and abilities of the members of the underrepresented sex are fully and effectively accommodated by the present program.<sup>33</sup> These are commonly referred to as the three prongs of the three-part test.

By the mid-1990s intercollegiate institutions were still unsure of how to comply with the three-part test, and thus requested from the OCR specific guidance regarding the Title IX regulations.<sup>34</sup> In response, the OCR drafted a Clarification of the three-part test, which elaborated on the Policy Interpretation.<sup>35</sup> In the transmittal letter which accompanied the Clarification, Assistant Secretary for Civil Rights Norma Cantú stated that each of the three prongs was an effective way to comply with Title IX, but emphasized that the first prong was the "safe harbor."<sup>36</sup> Therefore, if an institution provided substantially proportional participation opportunities for men and women, it would be assured of compliance.<sup>37</sup> Cantú noted that institutions faced increasing budget constraints that made it difficult to add women's sports.<sup>38</sup> Thus, Cantú stated that eliminating or capping men's teams was an acceptable, though not required, means to comply with the proportionality prong.<sup>39</sup> Cantú emphasized that schools were given "flexibility and choice" in determining how to provide nondiscriminatory participation opportunities.<sup>40</sup> The extent of this "flexibility and choice," however, became questionable, and in the ensuing years men's teams were cut at a much higher rate than women's teams,<sup>41</sup> leading to lawsuits from male student-athletes and their coaches.<sup>42</sup>

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33. *Id.* at 71,418.

34. See Transmittal Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, accompanying Dep't of Educ., Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) [hereinafter 1996 Clarification Letter], available at <http://www.ed.gov/print/about/offices/list/ocr/docs/clarific.html>.

35. *Id.*

36. *Id.* The primary reason the proportionality prong was described as the "safe harbor" is because it is the only fully objective test of the three, thus making it the only test that assures schools they are in compliance. See *infra* Part II.A.

37. See 1996 Clarification Letter, *supra* note 34.

38. See *id.*

39. See *id.*

40. *Id.*

41. See *supra* note 8 and accompanying text (stating that from 1995 to 2002, men's teams were cut at nearly twice the rate of women's teams).

42. See *infra* Part III.A.



These events prompted the Bush Administration, in 2002, to create the Secretary of Education's Commission on Opportunity in Athletics whose goal was to investigate and to recommend how to improve the standards for measuring compliance with Title IX.<sup>43</sup> After extensively collecting and analyzing information,<sup>44</sup> the Commission presented twenty-three recommendations to the Secretary of Education.<sup>45</sup> The Commission determined, *inter alia*, that enforcement of Title IX should be updated to create more opportunities for women and to retain opportunities for men.<sup>46</sup> It found that colleges were not structuring their athletic programs to adequately respond to athletic participation at the high school level.<sup>47</sup> It heard testimony that the Title IX regulations encourage schools to add or to drop certain teams solely to come into compliance with proportionality, rather than in response to student interest levels.<sup>48</sup> While these practices "may help to create the impression of opportunity" for women, the Commission determined they are not necessarily the best way to serve the interests of high school students who will soon be in college.<sup>49</sup>

After considering some of the Commission's recommendations,<sup>50</sup> the Assistant Secretary for Civil Rights, Gerald Reynolds, issued a Further Clarification to intercollegiate institutions.<sup>51</sup> The Further Clarification did not make any changes to the Title IX regulations, noting instead that the three-part test has worked well.<sup>52</sup> While acknowledging that the "safe harbor"

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43. See Commission Report, *supra* note 7, at 2.

44. The Commission held four town hall meetings and heard testimony from more than fifty Title IX expert witnesses and numerous other parents, athletes, and school administrators. *Id.* at 4.

45. See *id.* at 33–40.

46. See *id.* at 22.

47. *Id.* at 27–28.

48. See *id.* at 28. Institutions with football programs are especially encouraged to do this because it helps offset the large size of the football team. See *infra* Part II.C.

49. Commission Report, *supra* note 7, at 28.

50. Instead of accepting all twenty-three of the Commission's recommendations, the Secretary only considered the fifteen that were unanimously approved by the Commission. See *id.* at 2; *Commission's Findings Do Little to Dim Controversial Nature of Title IX*, 4 NO. 5 LEGAL ISSUES IN COLLEGIATE ATHLETICS (Andrews Publ'n), Mar. 2003, at 1.

51. Gerald Reynolds, Dep't of Educ., Office for Civil Rights, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003) [hereinafter Further Clarification], <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html?exp=0>.

52. *Id.*

language of the 1996 Clarification letter led many schools to "erroneously believe" that they must use the proportionality prong, the Further Clarification reiterated that each of the three prongs is a sufficient means of complying with Title IX, and "no one prong is favored."<sup>53</sup> It stated that nothing in Title IX requires an institution to cut or to reduce teams to demonstrate compliance and eliminating teams is a "disfavored practice."<sup>54</sup> For many institutions, however, eliminating men's opportunities has been, and will continue to be, a favored method of complying with Title IX.

## II. INSTITUTIONAL GAME PLANS: HOW SCHOOLS COMPLY WITH TITLE IX

### A. THE PROPORTIONALITY PRONG IS FAVORED

Congress has expressed a preference for voluntary compliance with Title IX.<sup>55</sup> While athletic departments must comply in a number of areas,<sup>56</sup> much of the focus has centered on the three-part test.<sup>57</sup> Institutions are not required to demonstrate which of the three prongs they are attempting to comply with until a complaint is filed against them through the OCR,<sup>58</sup> but in order to be more proactive and to avoid having a complaint filed in the first place, most athletic departments choose one of the prongs when developing a Title IX compliance plan.<sup>59</sup>

In developing these plans, athletic directors are often advised that satisfying the proportionality prong is the only definite way to be in compliance.<sup>60</sup> There are a few reasons for this.

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53. *Id.* This Note will argue that this statement was made on the basis of misleading information and is not axiomatic. See *infra* Part IV.A.1.

54. Further Clarification, *supra* note 51.

55. See 20 U.S.C. § 1682 (2000) (explaining that no action shall be taken until the appropriate persons have been advised of the failure to comply, and been given the opportunity to comply by voluntary means). Compliance has been secured through "complaint investigations, compliance reviews, and the issuance of policy guidance." GAO Gender Equity Report, *supra* note 17, at 24.

56. See *supra* notes 28–33 and accompanying text (describing the three general areas of Title IX compliance for intercollegiate athletic departments).

57. See *supra* note 33 and accompanying text (describing the three-part test).

58. OCR complaints may be filed by individuals or groups, and investigations may also be initiated by the OCR itself. GAO Gender Equity Report, *supra* note 17, at 8–9.

59. The NCAA has emphasized the use of gender equity plans for its member institutions. Sweet Testimony, *supra* note 6.

60. Commission Report, *supra* note 7, at 23–24; Ted Leland & Karen Pe-

First, the proportionality prong is the only fully objective, quantifiable test of the three.<sup>61</sup> Since no clear standards have been developed for the second two prongs, they are not of meaningful use to many schools.<sup>62</sup> Moreover, the second prong, which requires a history and continuing practice of program expansion, is more of a temporary device than a permanent solution.<sup>63</sup> When institutions had few women's sports, this prong was readily attainable through expansion of women's programs. In fact, most schools do have a "history" of program expansion.<sup>64</sup> However, after the tremendous growth of women's sports at the intercollegiate level<sup>65</sup> and due to increasing budget shortfalls, it has become difficult for many institutions to add teams in order to satisfy the "continuing" element of the second prong.<sup>66</sup> The

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ters, *Title IX: Unresolved Public Policy Issues*, 14 MARQ. SPORTS L. REV. 1, 4 (2003) ("Listening to [other athletic directors], there's only one prong, and that's the first one."); David Klinker, Comment, *Why Conforming with Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J. SPORT L. 73, 82-83 (2003).

61. Although a school is assured of being in compliance if it is fully proportional, neither the courts nor the OCR have made it entirely clear how great of a disparity between enrollment and participation rates will be acceptable to satisfy "substantial proportionality." See Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993, 1040 (1995). One court suggested a 1.7% gap would be acceptable, *id.* at 1041, while another suggested a 3% gap would be adequate, see *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 636 (7th Cir. 1999). The OCR has stated that ideally there would be no disparity at all, see Farrell, *supra*, at 1041; *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 829-30 (10th Cir. 1993), but in the 1996 Clarification it noted that the test allows for "natural fluctuations in enrollment and participation rates" in a subsequent year. See 1996 Clarification, *supra* note 29. For example, if a school was fully proportional one year but the school's female enrollment increased by one percent the following year, it would still be in compliance. *Id.* Moreover, a school with a small athletic program that is within a few percentage points will be in compliance with prong one if "the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team." *Id.*

62. See Commission Report, *supra* note 7, at 38-40.

63. See Farrell, *supra* note 61, at 1043-44.

64. See, e.g., *Cohen v. Brown Univ.*, 101 F.3d 155, 163, 166 (1st Cir. 1996) (stating that Brown University had "an impressive history of program expansion" by adding fourteen teams between 1971 and 1977) (quoting *Cohen v. Brown Univ.* 879 F. Supp. 185, 211 (D.R.I. 1995)).

65. See NCAA Sports Sponsorship Report, *supra* note 4, at 59, 61 (showing that there currently are 769 more NCAA intercollegiate women's teams than men's teams).

66. See, e.g., *Cohen*, 101 F.3d at 175 (stating that Brown University did not meet the "continuing" element because it had not added a women's team since 1982); see also *Achieving Gender Equity Manual*, *supra* note 16, at II-7 (stating that currently, "few institutions meet this test"); Farrell, *supra* note 61, at 1043-44 (noting that no university has ever won an argument using this

third prong, which requires schools to fully and effectively accommodate the interests and abilities of women on campus, looks at whether there is an unmet interest in a particular sport at a school.<sup>67</sup> Thus, institutions believe that in order to comply with this prong, they must approve all requests to recognize new women's teams.<sup>68</sup> Without clearer standards from the second two prongs, the proportionality prong will likely continue to be utilized as the "safe harbor," despite the Further Clarification's language that "no one prong is favored."<sup>69</sup>

## B. FOOTBALL VERSUS NON-FOOTBALL SCHOOLS

Institutions that carry football programs, as a whole, offer substantially more opportunities for women to participate in intercollegiate athletics than schools without football.<sup>70</sup> However, football schools often have a more difficult time complying with the proportionality requirement because there is no women's sport equivalent to football in terms of roster size.<sup>71</sup> NCAA Division I-A<sup>72</sup> football teams carry an average of 118

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prong).

67. 1996 Clarification, *supra* note 29.

68. See *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (noting that the third prong sets a high standard, demanding "not merely some accommodation, but full and effective accommodation"); Commission Report, *supra* note 7, at 26 (noting that some Title IX expert witnesses argued that if a group of female student-athletes sues an institution for dropping or failing to add a women's team, this fact alone may show that the school is not fully and effectively accommodating female interests).

69. Further Clarification, *supra* note 51.

70. See NCAA Gender Equity Report, *supra* note 11, at 30, 46, 62 (showing that at the Division I level, non-football schools average 149 female student-athletes, but football schools carry from 200 to 250 female student-athletes).

71. See *Duncan supra*, note 14, at 1045-47; *Gender Equity in Intercollegiate Athletics: Hearing Before the Subcomm. on Postsecondary Educ., Training, & Life-Long Learning of the House Comm. on Econ. & Educ. Opportunities*, 104th Cong. 102-03 (1995) [hereinafter Jorns Testimony] (prepared statement of David Jorns, President, Eastern Ill. Univ.), available at 1995 WL 269758. "[I]f your institution plays football, coming into compliance is expensive and time consuming. Schools without football do not seem to have nearly the problem [that schools with football] have." *Id.* at 103.

72. The NCAA is divided into three divisions, which include subdivisions. Division I schools must carry at least seven sports for men and seven for women. See generally NCAA, What's the Difference Between Divisions I, II and III?, at [http://www.ncaa.org/about/div\\_criteria.html](http://www.ncaa.org/about/div_criteria.html) (last visited Mar. 4, 2004). Division I-A and I-AA schools carry football teams, and Division I-AAA schools do not. *Id.* Division II schools are regional colleges that are required to carry at least four sports for men and four for women and also are allowed to offer scholarships. *Id.* Division III schools must carry at least five

team members, far surpassing the roster size for any other sport.<sup>73</sup> NCAA Division I football schools have an average male-to-female student-athlete ratio of 330 to 250 (57% to 43%), and Division I-AA football schools have a respective ratio of 280 to 201 (58% to 42%).<sup>74</sup> Non-football schools, on the other hand, are closer to achieving proportionality—Division I-AAA (non-football) schools, for example, have an average male-to-female student-athlete ratio of 149 to 149 (50%).<sup>75</sup> Institutions without football are also closer to compliance with Title IX's other two general areas: scholarships and equivalent benefits and opportunities.<sup>76</sup>

Although the focus of Title IX compliance tends to be on Division I schools, the same problems occur for institutions with football programs at the Division II and III levels. At the Division II level, females at non-football schools make up 46% of total student-athletes, while at football schools they consti-

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sports for men and five for women and do not give athletic scholarships. *Id.* Division I-A schools are allowed to give eighty-five football scholarships, while I-AA schools may give only sixty-three. See Nat'l Collegiate Athletic Assoc., 2003-04 NCAA Division I Manual, art. 15 § 15.5.5, at 209, available at [http://www.ncaa.org/library/membership/division\\_i\\_manual/2003 - 04/2003 - 04\\_d1\\_manual.pdf](http://www.ncaa.org/library/membership/division_i_manual/2003 - 04/2003 - 04_d1_manual.pdf).

73. See NCAA Gender Equity Report, *supra* note 11, at 30. Rowing is the largest women's sport, with an average of sixty-six participants at the Division I-A level. *Id.* At the Division I-AA level, football teams average ninety-five participants, while women's rowing teams average forty-nine members. *Id.* at 46.

74. *Id.* at 30, 46.

75. *Id.* at 62. It is acknowledged that the non-football schools, as a whole, are not fully in compliance with the proportionality prong because the prong does not require a strict 50% ratio. Rather, it requires the percentage of female student-athletes to match the percentage of females in the undergraduate student body. See *supra* note 33 and accompanying text. Because the average female undergraduate enrollment at Division I-AAA schools is 58%, NCAA Gender Equity Report, *supra* note 11, at 11, Division I-AAA schools, as a whole, are still 8% from proportionality. See *id.* at 11, 62. However, these schools are still closer to achieving proportionality than football schools, which at the Division I-A and I-AA levels are 9% and 13% away from proportionality, respectively. See *id.* at 11, 30, 46. Moreover, because Division I-AAA schools have smaller athletic programs, it will be easier for them to make up an 8% disparity than it will be for larger schools to make up a 9% or 13% disparity. See 1996 Clarification, *supra* note 29.

76. See *supra* text accompanying notes 28-33 (listing the three general areas of Title IX compliance for intercollegiate athletic programs). Division I-A football schools spend \$11.7 million on men's programs and \$5.1 million on women's programs per year. See NCAA Gender Equity Report, *supra* note 11, at 38. In contrast, Division I-AAA (non-football) schools spend \$2.3 million on men and \$2.1 million on women per year. See *id.* at 71. As for scholarship expenses, Division I-AAA (non-football) schools spend more on scholarships each year for women (\$1 million) than for men (\$861,000). See *id.*

tute only 36%.<sup>77</sup> At the Division III level, females at non-football schools make up 49% of total student-athletes, while at football schools they comprise only 38%.<sup>78</sup> As one Division III athletic director stated, "We all have the same problem. More women students than men, more men participating in sports than women, and fairly large football teams."<sup>79</sup> These smaller institutions may be even more dependent on large football rosters than Division I institutions because they often use football as a device to increase the number of male students on campus.<sup>80</sup>

### C. SOLUTIONS THAT ARE CONTRARY TO THE SPIRIT OF THE LAW

An institution attempting to comply with the proportionality prong has three options: increase opportunities for women, reduce opportunities for men, or a combination of both.<sup>81</sup> Ideally, institutions would add programs for women, which was the goal of Title IX.<sup>82</sup> It is much less expensive, however, to cut a men's program than it is to add a women's program.<sup>83</sup> The OCR recognized in the 1996 Clarification that many institutions faced increasing budget constraints, but it thought it could work with institutions to find "creative solutions" to ensure equal opportunities in intercollegiate athletics.<sup>84</sup> The OCR's stated solutions included identifying national and regional interest levels for particular sports and adding women's teams or elevating club teams to varsity status based on these

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77. See DANIEL L. FULKS, REVENUES AND EXPENSES OF DIVISION III INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS-2001, at 10 (2002), [http://www.ncaa.org/library/research/iii\\_rev\\_exp/2002/d3\\_revenue\\_expenses.pdf](http://www.ncaa.org/library/research/iii_rev_exp/2002/d3_revenue_expenses.pdf).

78. See *id.*

79. Julia Lamber, *Intercollegiate Athletics: The Program Expansion Standard Under Title IX's Policy Interpretation*, 12 S. CAL. REV. L. & WOMEN'S STUD. 31, 52 (2002) (citation omitted).

80. *Id.*

81. See Farrell, *supra* note 61, at 1052-53.

82. See, e.g., *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 637 (7th Cir. 1999) (stating that "[a]bsent financial concerns, Illinois State University presumably would rather have added women's programs while keeping its men's programs" instead of eliminating two men's programs).

83. See, e.g., *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1044 (8th Cir. 2002) (explaining that when the athletic department faced both a \$95,000 shortfall and disparity in its proportionality figures, it chose to drop its men's wrestling program, thereby saving \$49,000).

84. See 1996 Clarification Letter, *supra* note 34.

interest levels.<sup>85</sup> While some schools have used these methods, others have adopted their own “creative solutions,” many of which conform to the letter, but not the spirit of Title IX.<sup>86</sup>

One creative solution institutions have used is the addition of a women’s sport that is relatively inexpensive to operate and carries a large number of participants, such as rowing, to help offset the large size of a football team.<sup>87</sup> While the approach may be commendable because it does indeed increase opportunities for women to participate in sports, it is problematic for two reasons. First, there often is not a strong interest in the particular region to field such a team.<sup>88</sup> The University of Minnesota, for example, recently added a women’s rowing team for Title IX purposes, but since no Minnesota high school sponsors a rowing team and only 2500 girls in the entire country compete on high school rowing teams,<sup>89</sup> the university must recruit students on campus with no rowing experience.<sup>90</sup> Second, other

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85. See 1996 Clarification, *supra* note 29.

86. See Kristin Rozum, Comment, *Staying Inbounds: Reforming Title IX in Collegiate Athletics*, 18 WIS. WOMEN’S L.J. 155, 168–71 (2003) (stating three unintended consequences created by the proportionality test: eliminating men’s sports, ignoring actual interest levels and capabilities of student-athletes, and hindering development of women’s sports by encouraging schools to add women’s sports with large rosters in an effort to offset the size of the football team).

87. See NCAA Sports Sponsorship Report, *supra* note 4, at 136 (showing that since 1995, the number of women’s rowing teams has increased from seventy-four to 140); see also Tom Farrey, *Football Grabs Stronger Hold on Purse Strings* (Feb. 25, 2003) (stating that although Kansas State University is in compliance with proportionality, its women’s teams are “artificially inflated” with a sixty-two-member equestrian team and a seventy-four-member rowing team), at <http://sports.espn.go.com/espn/print?id=1514457&type=story>. The Kansas State athletic director stated, “Both of those sports were added to offset our football numbers.” *Id.*

88. See Rozum, *supra* note 86, at 170–71.

89. See Nat’l Fed’n of State High Sch. Ass’ns, 2002–03 Participation Survey 60 (2003) [hereinafter NFHS Survey], [http://www.nfhs.org/scriptcontent/Va\\_custom/SurveyResources/2002\\_03\\_Participation.pdf](http://www.nfhs.org/scriptcontent/Va_custom/SurveyResources/2002_03_Participation.pdf). Only five states in the country have at least ten high schools that sponsor a girls’ rowing team. *Id.*

90. Nearly ninety percent of intercollegiate women’s rowers have no rowing experience before joining their college teams. Scott R. Rosner, *The Growth of NCAA Women’s Rowing: A Financial, Ethical and Legal Analysis*, 11 SETON HALL J. SPORT L. 297, 297–98 (2001). In another example, the OCR told Eastern Illinois University that it must add women’s field hockey, even though the sport was not played in Illinois high schools and no unmet interest had been displayed for it at the school. Jorns Testimony, *supra* note 71, at 102–03. When it refused to add this program and a women’s gymnastics program, the institution was forced to drop two men’s programs. *Id.* at 103.

sports that do have a strong interest at the high school level are not added simply because the sport does not require a large number of participants to help offset the football team. For example, although over 100 Minnesota high schools sponsor girls' cross-country ski teams and eighty sponsor girls' alpine skiing (for a total of nearly 3000 female skiing participants in Minnesota high schools alone), the university chose to add rowing and not skiing.<sup>91</sup> While on average, women's rowing teams carry forty-four participants, women's skiing teams carry only eleven.<sup>92</sup>

Another creative solution is roster management, where coaches of men's teams are forced to limit, or "cap," the size of their rosters, while coaches of women's teams are forced to increase their rosters.<sup>93</sup> This limits the ability of men to walk-on to teams,<sup>94</sup> while creating walk-on opportunities for women, despite evidence that women often are not as interested as men in walking-on.<sup>95</sup> Some schools have been aggressive with this approach—one school's plan included increasing its women's track team roster from fifty to 120 participants, while limiting its men's team to fewer than fifty members.<sup>96</sup> Moreover, roster management has caused coaches to treat female walk-ons unfairly. In determining proportionality figures, the OCR counts the number of student-athletes on a team as of the date of first competition.<sup>97</sup> This has resulted in women's teams keeping a number of walk-ons on the roster through the first competition,

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91. See NFHS Survey, *supra* note 89, at 57.

92. See NCAA Sports Sponsorship Report, *supra* note 4, at 167.

93. See Commission Report, *supra* note 7, at 30.

94. A walk-on is a student who is a member of an intercollegiate athletic team, but who does not receive a scholarship. Commission Report, *supra* note 7, at 30. Teams use walk-ons mainly as practice players, who often get only limited opportunities to compete in games.

95. See *id.* at 30–31; see also Michele Orecklin, *Now She's Got Game*, TIME, Mar. 3, 2003, at 59 (quoting Pat Babcock, senior women's sports administrator at the University of Connecticut: "We ask our women's coaches to carry a lot of players, but the five or six who don't get into an event are apt to go off and do other activities rather than stay on a team for which they don't get to participate."), available at 2003 WL 7739978.

96. Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. MICH. J.L. REFORM, 151, 209 (2001); Leland & Peters, *supra* note 60, at 5 ("Some schools are reporting female roster head counts so large that it's hard to imagine how these women athletes have a real collegiate competitive experience (i.e. access to coaching, travel with the team, access to locker rooms, etc.).").

97. 1996 Clarification, *supra* note 29.



leading these female student-athletes to believe they are on the team, only to cut them shortly thereafter.<sup>98</sup>

### III. CALLING AUDIBLES: EFFORTS TO REFORM TITLE IX

#### A. CHALLENGES IN THE COURTS

The Title IX regulations have been upheld in constitutional challenges in eight federal circuits.<sup>99</sup> The challenges have come in two forms. First, institutions have challenged Title IX regulations as a defense to suits filed by female student-athletes.<sup>100</sup> In these cases, the female student-athletes have been quite successful, as the courts have repeatedly upheld the regulations.<sup>101</sup> Second, male student-athletes have sued their institutions for eliminating their sports, arguing that the Title IX regulations cause their institutions to impermissibly discriminate against males because of their sex.<sup>102</sup> Specifically, males have argued that by cutting male sports to comply with Title IX, their schools violate both Title IX and the equal protection component of the Fifth Amendment.<sup>103</sup> The courts have held, however, that the regulations are consistent with equal protection<sup>104</sup> and with Title IX itself.<sup>105</sup> To date, male student-athletes

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98. See Leland & Peters, *supra* note 60, at 5 (stating that women are recruited off campus in order for coaches to put their names on the roster for the first game, so they count toward proportionality figures). The converse of this is that men's teams are allowed to keep players on the roster through the preseason, also leading them to believe that they will make the team, only to be cut right before the first competition so they do not count toward the proportionality figures.

99. See Nat'l Wrestling Coaches Ass'n v. United States Dep't of Educ., 263 F. Supp. 2d 82, 94–95 (D.D.C. 2003). The eight circuits are the 1st, 3d, 5th, 6th, 7th, 8th, 9th, and 10th. See *id.*

100. *Id.* at 95.

101. See, e.g., Cohen v. Brown Univ., 991 F.2d 888, 892, 906–07 (1st Cir. 1993) (holding that Brown University must reinstate two women's teams that it had eliminated along with two men's teams). The school had to reinstate the women's sports teams because the school was not in compliance with proportionality—females comprised forty-eight percent of the student population, but only received thirty-seven percent of the school's athletic opportunities. *Id.* at 892. The court stated that courts must defer to the OCR regulations because Congress explicitly delegated to the DOE the task of prescribing standards for athletic programs under Title IX. *Id.* at 895.

102. See, e.g., Boulahanis v. Bd. of Regents, 198 F.3d 633, 636 (7th Cir. 1999).

103. *Id.* at 636, 639.

104. *Id.* at 639 (stating that remedying past discrimination against women in higher education is an important governmental interest and that cutting

have been unsuccessful in these suits.<sup>106</sup>

Two recent lawsuits show that the likelihood of males succeeding in discrimination claims is not promising. In *Chalenor v. University of North Dakota*,<sup>107</sup> a group of male wrestlers argued that their program should not have been cut, in part because private money was available to fund it.<sup>108</sup> The Eighth Circuit held that the alleged availability of private funding did not make the elimination of the program discriminatory under Title IX.<sup>109</sup> Similarly, in *National Wrestling Coaches Ass'n v. United States Department of Education*,<sup>110</sup> a group of collegiate coaches associations took a novel approach by suing the DOE rather than a member institution, seeking to vacate the Title IX regulations and to compel the DOE to promulgate new regulations consistent with Title IX.<sup>111</sup> The court never reached the merits of the legal question, however, as the plaintiffs lacked standing to sue.<sup>112</sup> Since the courts have consistently deferred to the Title IX regulations, any change in Title IX policy likely will have to come through the legislature.

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men's sports is substantially related to this interest).

105. See, e.g., *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 765, 773 (9th Cir. 1999) (holding that the capping of roster spots available to male student-athletes did not violate Title IX because it was a move to remedy the imbalance between the proportion of females in varsity sports and the proportion of females in the student body); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272-73 (7th Cir. 1994) (holding that the university's decision to terminate the men's swimming program while retaining the women's swimming program did not violate Title IX or the Equal Protection Clause).

106. See *Nat'l Wrestling Coaches Ass'n v. United States Dep't of Educ.*, 263 F. Supp. 2d 82, 94-97 (D.D.C. 2003).

107. 291 F.3d 1042 (8th Cir. 2002).

108. *Id.* at 1043-44.

109. *Id.* at 1048. The court determined that a public university cannot avoid its legal obligation to comply with proportionality by substituting funds from private sources for funds from tax revenues. *Id.* The university had a forty-nine percent female student body, but females only received thirty-six percent of athletic opportunities. See *id.* at 1044.

110. 263 F. Supp. 2d at 95.

111. *Id.* at 97-99.

112. *Id.* at 124, 129. The court held that the plaintiffs did not meet the causation and redressibility requirements of standing. *Id.* at 121. Specifically, the plaintiffs failed to prove that the Title IX regulations were a substantial factor in the institution's decision to drop its wrestling programs, and they did not provide any evidence that striking down the Title IX regulations would cause their schools to reinstate their wrestling programs. *Id.* at 111, 114, 119.

## B. CHALLENGES IN THE LEGISLATURE

Many of the efforts to reform Title IX in the legislature have focused on football. College football is different from other sports in a few respects.<sup>113</sup> First, the roster size of football teams is much larger than other sports.<sup>114</sup> Second, football is much more expensive to operate than any other sport.<sup>115</sup> Third, at some schools, especially at the Division I-A level, football programs generate enough revenue to fund the rest of the athletic program.<sup>116</sup> Based on this third reason, the earliest proposals to reform Title IX attempted to completely exempt all revenue-producing sports, including football, from the Title IX regulations.

The football exemption proposal first arose in the debate over the Education Amendments of 1974.<sup>117</sup> At that time, Senator John Tower proposed an amendment that would exempt all revenue-producing sports from Title IX as long as the sport could support itself without university funding.<sup>118</sup> Senator Tower's rationale was that because revenue-producing sports often generate enough income to fund themselves as well as the non-revenue-producing sports in the athletic department, regulating the revenue producers would erode the financial base of the entire athletic program, thereby reducing opportunities for both men and women.<sup>119</sup> The Senate adopted this amendment, but it was defeated in conference committee and never became

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113. See Neinas Testimony, *supra* note 14, at 200, 203; Beveridge, *supra* note 14, at 837–39.

114. See NCAA Gender Equity Report, *supra* note 11, at 30.

115. See DANIEL L. FULKS, REVENUES AND EXPENSES OF DIVISION I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS–2001, at 37 (Nov. 2002), [http://www.ncaa.org/library/research/i\\_ii\\_rev\\_exp/2002/d1\\_d2\\_revenues\\_expenses.pdf](http://www.ncaa.org/library/research/i_ii_rev_exp/2002/d1_d2_revenues_expenses.pdf). NCAA Division I-A schools spend, on average, \$6.1 million per year on their football programs, \$1.9 million on their men's basketball programs, and \$396,000 on their men's wrestling programs. *Id.* At the Division II level, schools spend, on average, \$547,000 on their football programs, \$233,000 on their men's basketball programs, and \$124,000 on their men's wrestling programs. *Id.* at 90.

116. Roughly sixty percent of the 115 NCAA Division I-A schools reported a net profit in 2001. See FULKS, *supra* note 115, at 16. The football programs at these schools, on average, have net profits of \$4.7 million, while the entire women's departments, on average, lose \$3.2 million each year. See *id.* at 22.

117. See 120 CONG. REC. 15,322–23 (1974).

118. *Id.*

119. *Id.*

law.<sup>120</sup> Instead, Congress passed the Javits Amendment, which directed the HEW to adopt regulations that take into account the unique "nature of particular sports."<sup>121</sup>

Before and during the drafting of the 1979 Policy Interpretation,<sup>122</sup> there was continued discussion regarding exempting or at least according some form of special treatment to football and other revenue-producing sports.<sup>123</sup> The Policy Interpretation was unambiguous in dispelling the idea that a sport could receive special treatment under Title IX simply because it produced revenue, stating that "revenue producing' sports cannot be exempted from coverage of Title IX."<sup>124</sup> It based this assertion on an earlier HEW opinion, which stated that higher education institutions must comply with the Title IX regulations "in the administration of any revenue producing activity."<sup>125</sup>

Although the Policy Interpretation made it clear that football could not be exempted from Title IX coverage, it also supported holding football out as a special program by taking into account the unique costs of football for the equivalent benefits and opportunities area of Title IX.<sup>126</sup> Specifically, it stated that some sports have unique aspects, inherent to the basic operation of the sport, that may justify spending more on one gender than another.<sup>127</sup> This is permissible as long as women, as a whole, receive equivalent opportunities and benefits as men.<sup>128</sup>

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120. Nondiscrimination in Federally Assisted Programs, 43 Fed. Reg. 18,772, 18,774 (May 2, 1978).

121. See *supra* note 24 and accompanying text. For an explanation of why the Tower Amendment was not adopted, see *infra* Part IV.C.

122. See *supra* notes 27-33 and accompanying text.

123. Title IX of the Education Amendments, 44 Fed. Reg. 71,413, 71,421 (Dec. 11, 1979). In the years between the Javits Amendment and the Policy Interpretation, five more attempts were made to exempt revenue-producing sports from Title IX, all were unsuccessful. Nondiscrimination in Federally Assisted Programs, 43 Fed. Reg. at 18,774.

124. Title IX of the Education Amendments, 44 Fed. Reg. at 71,421.

125. *Id.*

126. *Id.* at 71,419 (stating that "[t]he size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports"). Moreover, "there were characteristics common to most revenue producing sports that could result in legitimate non-discriminatory differences in per capita expenditures." *Id.* at 71,421.

127. *Id.* at 71,415-16 (listing unique aspects including the rules of play, nature of equipment, rates of injury, nature of facilities required, and maintenance of those facilities). The Policy Interpretation stated that "[f]or the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men." *Id.* at 71,416.

128. *Id.* at 71,416 (stating that "[i]f sport-specific needs are met equiva-

During a 1995 Congressional Hearing on Gender Equity in Intercollegiate Athletics, the College Football Association (CFA) encouraged Congress to review the appropriateness of the Policy Interpretation, seeking "practical and reasonable interpretations and guidelines from OCR."<sup>129</sup> They argued that because schools with football programs were becoming "prisoners of strict proportionality," the unique size of football should be taken into account in order to prevent these programs from being eliminated.<sup>130</sup> Ultimately, the DOE responded with the 1996 Clarification,<sup>131</sup> and the push to exempt revenue-producing sports from Title IX consideration has since quieted.<sup>132</sup> While it is thus settled that revenue-producing sports do not warrant special treatment under Title IX, it is also apparent that schools without football programs are closer to complying with Title IX than schools with football programs.<sup>133</sup> This fact, coupled with the changing demographics of colleges, makes partially exempting football from the proportionality prong a reasonable and appropriate solution.

#### IV. A HALFTIME ADJUSTMENT: PARTIALLY EXEMPTING FOOTBALL FROM THE PROPORTIONALITY PRONG DUE TO ITS UNIQUE SIZE

To alleviate the problems that occur when schools are compelled to comply with the proportionality prong, the unique size of football teams should be taken into account. It is increasingly difficult for schools with football programs to comply with proportionality without eliminating male opportunities in other

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lently in both men's and women's programs . . . differences in particular program components will be found to be justifiable"). For a further discussion, see *infra* Part IV.B.

129. See Neinas Testimony, *supra* note 14, at 200, 202.

130. *Id.* The CFA did not identify any specific plan for accomplishing this goal. Opponents argued that if cost-cutting measures and roster management techniques were applied to football, schools would have fewer problems complying with Title IX. See *Gender Equity in Intercollegiate Athletics: Hearing Before the Subcomm. on Postsecondary Educ., Training, & Life-Long Learning of the House Comm. on Econ. & Educ. Opportunities*, 104th Cong. 187-99 (1995) [hereinafter Hilliard Testimony] (statement of Wendy Hilliard, President, Women's Sports Fed'n).

131. See *Nat'l Wrestling Coaches Ass'n v. United States Dep't of Educ.*, 263 F. Supp. 2d 82, 92-93 (D.D.C. 2003).

132. The Secretary of Education's Commission noted that it did not hear much support for exempting revenue-generating sports. See *Commission Report*, *supra* note 7, at 31.

133. See *supra* Part II.B.

sports.<sup>134</sup> Complying with the proportionality prong also leads to other unintended problems, such as the addition of women's sports based on Title IX compliance instead of student interest levels.<sup>135</sup> These problems are likely to be amplified in the future. While the Title IX regulations took into consideration the unique cost of football,<sup>136</sup> they did not take into account the unique size of football.<sup>137</sup> This may not have been necessary before,<sup>138</sup> but in today's climate, partially exempting football for proportionality purposes would be a reasonable way to eliminate the perverse incentives that the Title IX regulations create, while staying within the law's original framework and meeting the spirit of increasing athletic opportunities for both genders.

#### A. WITHOUT A PARTIAL EXEMPTION, MEN'S SPORTS WILL CONTINUE TO BE ELIMINATED

##### 1. The Proportionality Prong Will Continue to Be Favored

In developing their Title IX compliance plans, university administrators have favored the proportionality prong, primarily because it is a more objective and easily quantifiable method than the other two tests,<sup>139</sup> but also because of financial reali-

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134. See *infra* Part IV.A.2.

135. See *supra* Part II.C (suggesting that problems will include adding sports where there is little interest instead of sports with greater interest, eliminating men's opportunities, and unfairly treating walk-ons).

136. See *supra* notes 126–28 and accompanying text.

137. See Neinas Testimony, *supra* note 14, at 205 (“Perhaps the greatest fallacy . . . lies in the assertion that the unique size of college football programs was taken into account . . .”). The OCR stated that it took the unique size and cost of football into account in developing the Policy Interpretation. See Title IX of the Education Amendments, 44 Fed. Reg. 71,413, 71,419 (Dec. 11, 1979). However, size was at best indirectly taken into account, and only for the equivalent benefits and opportunities area. See *infra* Part IV.B. This Note argues that the size of football rosters should be taken into account for the effective accommodation area. See *infra* Part IV.B.

138. See Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 89–90 (1996) (arguing that football should not be treated differently because “[t]here is no shortage of sports for women to play to balance out the opportunities provided to male athletes by football” and “the three-part test is sufficiently flexible to take into account the different sizes of sports.”). This Note argues that the three-part test is no longer “sufficiently flexible,” and as history has shown, colleges are not adding women's sports to adequately respond to interest levels.

139. See *supra* notes 60–69 and accompanying text.

ties. For example, if a school attempts to comply with the second or third prong and an OCR complaint is later filed against it, the school would be required to go through a lengthy and expensive process of proving that it was in compliance, thereby wasting valuable resources.<sup>140</sup> Thus, the threat of litigation alone has caused institutions to disfavor the second two prongs and to use the more objective proportionality test.<sup>141</sup>

There is little reason to believe the proportionality prong will not continue to be favored in the future, as the Further Clarification did not give university administrators confidence that the second and third prongs are viable ways to comply. Although the Secretary of Education's Commission determined that the Title IX regulations should be updated so that athletic opportunities for males are preserved,<sup>142</sup> the Further Clarification only repeated the belief that each of the three prongs is a sufficient way to comply.<sup>143</sup> This belief stems from a 2000 United States General Accounting Office report that assessed seventy-four institutions' compliance with the three-part test and found that the proportionality prong was used by twenty-one of the schools, the continued expansion prong was used by four, and the accommodation of interests prong was used by forty-nine.<sup>144</sup> These figures, while technically accurate, are misleading and fail to provide an accurate reflection of the frequency of each prong's use, because the data came only from institutions where an OCR complaint had been filed.<sup>145</sup> Thus, the data does not indicate which prong was employed by the other 1000 institutions that had not received an OCR complaint.<sup>146</sup> Essentially, this data only indicates that of the few schools whose conditions for women were inadequate enough to warrant an official OCR complaint, two-thirds were attempting

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140. See, e.g., Jeff Miller, *Lawsuit Alleges Baylor in Violation of Title IX*, DALLAS MORNING NEWS, Mar. 17, 2004, at [www.dallasnews.com/cgi-bin/bi/gold\\_print.cgi](http://www.dallasnews.com/cgi-bin/bi/gold_print.cgi) (stating that although Baylor had been attempting to satisfy the third prong by monitoring the "interests and abilities" of its students, members of the school's crew team, which competes at the club level, have sued the school for not elevating their team to varsity status).

141. See Commission Report, *supra* note 7, at 25–27; Leland & Peters, *supra* note 60, at 6 ("Many institutions see the [proportionality prong] as the only safe harbor from legal liability or public embarrassment.").

142. See Commission Report, *supra* note 7, at 22.

143. See *supra* notes 50–53 and accompanying text.

144. See GAO Gender Equity Report, *supra* note 17, at 39–40.

145. See *id.*

146. *Id.*

to satisfy the third prong.

Because schools are not required to make their compliance plans public,<sup>147</sup> it is difficult to determine with precision the number of schools using each prong. Until schools are required to disclose this information, it is erroneous to generalize about how frequently each prong is used by examining only the data from schools that have received complaints. A more precise answer may be found from a recent study that examined fifty Title IX compliance plans from NCAA Division I schools.<sup>148</sup> Of these fifty schools, nearly all measured their compliance using the proportionality prong.<sup>149</sup>

## 2. Complying with the Proportionality Prong Will Result in the Continued Elimination of Men's Programs

Institutions with football programs, as a whole, have a more difficult time complying with the proportionality prong than those without football programs.<sup>150</sup> Moreover, there are a number of signs that it will become increasingly difficult for institutions with football teams to comply with the proportionality test without eliminating men's opportunities. First, the economic constraints faced by educational institutions are not likely to disappear soon. As NCAA President Myles Brand has stated, "[g]iven the economic circumstances in which both state and private institutions find themselves, the pressures to cap or cut programs will increase."<sup>151</sup> Under the current regulations, an institution attempting to satisfy the proportionality prong will need to either add women's opportunities or eliminate men's opportunities. If funding is not available to add a women's program, the choice has often been the latter, and since the courts have repeatedly determined that cutting male sports is acceptable,<sup>152</sup> there is no reason to believe this pattern will change.<sup>153</sup>

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147. See *supra* note 58 and accompanying text.

148. See Lamber, *supra* note 96, at 207.

149. See *id.* at 210; see also Leland & Peters, *supra* note 60, at 4 (stating that athletic administrators feel there is only one practical prong).

150. See *supra* notes 74–75, 77–78 and accompanying text.

151. See Myles Brand, Title IX Seminar Keynote Address (Apr. 28, 2003), at [http://www.ncaa.org/gender\\_equity/general\\_info/20030428speech.html](http://www.ncaa.org/gender_equity/general_info/20030428speech.html).

152. See *supra* notes 104–05 and accompanying text.

153. See, e.g., *Towson Cuts 4 Men's Sports Due to Title IX, Budget Woes*, WBAL CHANNEL.COM, Feb. 27, 2004, at <http://www.thewbalchannel.com/print/2882050/detail.html?use=print> (stating that Towson University recently cut four men's teams for financial reasons and also because its female student



Second, more women are expected to enter undergraduate institutions in the upcoming years. By 2009, women are expected to comprise 58% of undergraduate student bodies.<sup>154</sup> A hypothetical helps illustrate the impact this development could have. The University of Minnesota currently has 458 male student-athletes (51%) and 434 female student-athletes (49%),<sup>155</sup> with a student body consisting of 53% females.<sup>156</sup> If the proportion of females in the student body increases to 55% in the next few years, and the university wanted to keep its 458 male student-athletes, it would have to add nearly 125 female student-athletes to comply with proportionality, which would likely require the addition of at least four teams. Budget constraints at the University of Minnesota make this an impossibility,<sup>157</sup> so the university may have no choice but to cap and eventually to eliminate male sports.

Courts have stated that because Title IX is an anti-discrimination statute designed to achieve equality, eliminating men's teams is a justifiable way to comply with the proportionality prong.<sup>158</sup> However, other Title IX advocates have stated that the proper intent of the legislation was to expand, not limit, opportunities.<sup>159</sup> While eliminating men's opportunities may bring about equality in the short term, it will only limit opportunities for women in the long run.<sup>160</sup> The OCR made

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population was increasing); Calvin Watkins, *Track and Field Gets the Heave-Ho: Elimination of Men's Program Taken as a Cost-Cutting Measure*, DALLAS MORNING NEWS, Feb. 20, 2004, 2004 WL 69325224 (stating that Southern Methodist University cut its highly successful men's track and field program for Title IX and financial reasons).

154. See GAO Gender Equity Report, *supra* note 17, at 10.

155. See Dep't of Educ., Office of Postsecondary Educ., Equity in Athletics Disclosure Website [hereinafter EADA Website], at <http://ope.ed.gov/athletics/InstDetail.asp> (last visited Apr. 9, 2004).

156. See Nat'l Ctr. for Educ. Statistics [hereinafter NCES], at <http://nces.ed.gov/ipeds/cool/Enrollments.asp?UNITID=174066> (last visited Apr. 9, 2004).

157. See Chip Scoggins, *Maturi Concerned with More Walk-Ons*, STAR TRIB. (Minneapolis), Oct. 15, 2003, at C7 (quoting University of Minnesota Athletic Director Joel Maturi, "We don't want to drop a men's sport and we can't afford to add a women's sport.").

158. See, e.g., *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 639 (7th Cir. 1999).

159. See Cantú Testimony, *supra* note 26, at 40. Cantú quoted a Title IX expert as saying "I believe that philosophically in any case where you have a previously disadvantaged population that you're trying to bring up to snuff to the advantaged population, that it's a bad idea to bring the advantaged population down to the level of the disadvantaged population." *Id.* at 48.

160. See *supra* note 49 and accompanying text; see also *infra* Part V.B.2

it clear in the Further Clarification that eliminating teams was a "disfavored practice,"<sup>161</sup> but as the current regulations stand, institutions will most likely continue cutting men's teams, and this declaration will have little practical effect.<sup>162</sup> By taking into account the unique size of a football team, the OCR would be providing some credence to its words.<sup>163</sup>

#### B. A PARTIAL EXEMPTION DUE TO THE SIZE OF FOOTBALL IS JUSTIFIED UNDER THE JAVITS AMENDMENT

Giving a partial exemption to football for proportionality purposes not only will address the increasing difficulties that schools face in meeting the proportionality prong, it also is consistent with the original framework for Title IX. Senator Bayh explained that Title IX's purpose was to "provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved."<sup>164</sup> The Javits Amendment conveyed this message to the drafters of the Title IX regulations, requiring them to include "reasonable provisions considering the nature of particular sports."<sup>165</sup>

The Policy Interpretation followed this directive, but only with regard to the equivalent benefits and opportunities area.<sup>166</sup> It stated that the unique costs of certain sports, which were inherent to the basic operation of the particular sport, may justify spending more on one gender, as long as the levels of support were based on nondiscriminatory factors.<sup>167</sup> For example, a football team, because of its dangerous nature, high rates of injury, and need for large practice and game facilities, may require more spending in areas such as equipment, medical staff,

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(showing that preserving opportunities for men in the short term will allow room for women's sports to be added in the future).

161. See *supra* text accompanying note 54.

162. See Grossman, *supra* note 2 (stating that "[i]f a school chooses to comply with the first prong, and can only do so by cutting or capping teams, why should it care if OCR views this solution with 'disfavor?'"); see also *supra* note 153 (listing a few schools that have dropped men's sports after the Further Clarification was issued).

163. See *infra* Part IV.D (explaining how this Note's proposal will take the unique size of football into account for the proportionality test).

164. 117 CONG REC. 30,407 (1971).

165. See *supra* note 24 and accompanying text.

166. See Anderson, *supra* note 14, at 96-97; see also *supra* notes 28-33 (discussing the three general areas of Title IX compliance for intercollegiate athletic departments).

167. See *supra* notes 126-28 and accompanying text.

and facilities than women's teams.<sup>168</sup> Even though these differences will result in more money being spent on men, there will be no Title IX violation as long as women, as a whole, are receiving equivalent treatment.<sup>169</sup> The Policy Interpretation also noted that the activities associated with the operation of a particular sport may create unique demands or imbalances in certain areas.<sup>170</sup> For example, it is permissible for a school to spend more on event management for men's sports that draw large crowds, such as football or basketball, as long as the "levels of event management support available to both programs are based on sex-neutral criteria" and do not "limit the potential for women's athletic events to rise in spectator appeal."<sup>171</sup>

The underlying rationale of the Javits Amendment directive seems to be that ignoring the unique nature of particular sports leads to unreasonable results. Just because a football team may spend \$50,000 on necessary equipment or \$50,000 to operate a football game does not mean that the women's soccer team needs to spend the same amount to get equivalent treatment—such an interpretation would produce an unreasonable result because it would waste funds. This principle should also apply to the effective accommodation area.<sup>172</sup> While the cost of football makes it unique in the equivalent benefits and opportunities area, the size of football makes it unique in the effective accommodation area. If a competitive football team carries 100 team members, Title IX should not necessarily require institutions to add 100 female student-athletes to offset the football team, as long as females at the institution, as a whole, are being effectively accommodated by receiving equivalent opportunities to participate.<sup>173</sup>

A provision giving football special consideration for proportionality purposes would be a "reasonable provision[] considering the nature of particular sports" that the Javits Amendment

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168. See Title IX of the Education Amendments, 44 Fed. Reg. 71,413, 71,416 (Dec. 11, 1979).

169. *Id.*

170. *Id.*

171. *Id.*

172. See *supra* notes 28–33 (discussing the three general areas of Title IX compliance for intercollegiate athletic departments).

173. See Donald C. Mahoney, Note, *Taking a Shot at the Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 CONN. L. REV. 943, 974–76 (1995); see also *supra* note 30 (noting the Policy Interpretation definition of equivalent was "equal or equal in effect").

requires the drafters of the Title IX regulations to adopt.<sup>174</sup> Its reasonableness arises from the fact that it will reduce the perverse incentives created by the proportionality prong and will further the spirit of increasing opportunities for women without reducing opportunities for men. Therefore, considering the nature of football's unique roster size for proportionality purposes is consistent with the law, and the OCR could adopt this proposal without overstepping its authority under the Javits Amendment.

### C. A PARTIAL EXEMPTION IS APPROPRIATE TODAY

All previous attempts at exempting football and other revenue-producing sports have been unsuccessful,<sup>175</sup> and for valid reasons. Examining these reasons and the circumstances surrounding past reform efforts makes it apparent that although giving special consideration to football may not have been necessary or appropriate before, now it is the proper move. First, the initial attempts at exemption were advanced on a revenue theory—the idea that special treatment was warranted for certain sports because they produce enough revenue to support other sports.<sup>176</sup> It is clear, however, that there is no basis under Title IX for exempting revenue-producing activities.<sup>177</sup> Additionally, only a small percentage of the 1034 NCAA member institutions maintain a football team that produces enough revenue to fund the non-revenue-producing sports,<sup>178</sup> thus making this rationale an insufficient basis for an exemption.

A primary rationale offered by exemption advocates has been that without an exemption for revenue-producing sports, the viability of these sports would be threatened.<sup>179</sup> However,

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174. See *supra* note 24 and accompanying text.

175. See *supra* Part III.B.

176. See *supra* notes 118–19 and accompanying text (explaining Senator Tower's rationale that because revenue-producing sports fund non-revenue-producing sports, regulations on revenue producers will reduce funding available to non-revenue producers).

177. See *supra* notes 116–25 and accompanying text.

178. The only level that generates income as a whole is the Division I-A level. While NCAA Division I-A athletic programs make, on average, \$1.9 million each year, Division I-AA programs lose an average of \$1.2 million each year, Division I-AAA programs lose an average of \$430,000 each year, and Division II programs lose an average of \$440,000 each year. See FULKS, *supra* note 115, at 10, 56, 73.

179. See *supra* note 119 and accompanying text.

the viability of revenue-producing sports is no longer the worry; it is non-revenue-producing teams, including many teams at the Division II and III levels, that are threatened.<sup>180</sup> Giving a partial exemption based on the size of football teams is a solution that would help institutions at all levels, not just Division I, and because smaller schools often rely on a large football team to attract males to campus,<sup>181</sup> it may benefit them even more. This Note's proposal is advanced not on a revenue theory, but rather on an inherent nondiscriminatory characteristic of football teams: they have larger roster sizes than any other sport.<sup>182</sup>

Second, the Tower Amendment failed because in the original text of Title IX, Congress explicitly granted certain organizations, such as the Boy Scouts, an exemption, but was silent with respect to revenue-producing sports.<sup>183</sup> Thus, there was clear congressional intent that revenue-producing sports should be within the scope of Title IX.<sup>184</sup> The decision was appropriate because the conditions faced by women in athletics at that time did not warrant any type of exemption for male sports. In the early 1970s, few females had opportunities to compete athletically at either the high school or the college level.<sup>185</sup> Gender stereotypes were rampant, both inside and outside of sports.<sup>186</sup> Until Title IX passed, there were no NCAA championships for women, no scholarship opportunities, no media coverage, and few prospects for growth.<sup>187</sup>

The last thirty years, however, have witnessed great progress. Today, over 155,000 women compete at NCAA member institutions, and over 2.8 million compete at the high school

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180. From 1988 to 2002, 917 teams were dropped at the Division I level, 826 teams were dropped at the Division II level, and 1409 teams were dropped at the Division III level. See NCAA Sports Sponsorship Report, *supra* note 4, at 178–80.

181. See *supra* note 80 and accompanying text.

182. See NCAA Gender Equity Report, *supra* note 11, at 30 (stating that Division I-A football teams, on average, carry 118 participants, while the largest women's sport, rowing, carries an average of only sixty-six participants).

183. See Beveridge, *supra* note 14, at 841; 20 U.S.C. § 1681(a) (2000) (naming excluded organizations, including the Young Women's Christian Association, Boy Scouts, Girl Scouts, and father-son activities at school).

184. See Title IX of the Education Amendments, 44 Fed. Reg. 71,413, 71,421 (Dec. 11, 1979); Title IX of the Education Amendments of 1972; A Proposed Policy Interpretation, 43 Fed. Reg. 58,070, 58,075–76 (Dec. 11, 1978).

185. See *supra* notes 18–19 and accompanying text.

186. See *supra* note 21 and accompanying text.

187. Sweet Testimony, *supra* note 6.

level.<sup>188</sup> There is an equivalent female sport for just about every male sport, and there are more intercollegiate women's teams than men's teams.<sup>189</sup> Women's sports are even being added when there is a limited interest in participation.<sup>190</sup> These changed circumstances suggest that although there was no congressional intent to exempt male sports at the time Title IX was adopted, a partial exemption for football is currently both feasible and desirable.

Third, partially exempting football from the proportionality test was not necessary in the 1970s because the second prong—continued expansion—was a legitimate way of complying then. Because so few women's teams existed at that time, this prong was an attainable and a valid alternative to the proportionality prong.<sup>191</sup> Even through the 1990s, schools were able to add women's teams to satisfy the second prong, but for many schools today, continued expansion is simply not an option.<sup>192</sup> Moreover, because of the ambiguity of the third prong,<sup>193</sup> the proportionality prong is left as the only valid test. If an institution is "effectively accommodating" women's interests and abilities, but the institution is compelled to use the proportionality prong, and if the primary impediment to complying with proportionality is the size of its football team, then the unique roster size of the football team justifies a partial exemption to avoid unreasonable results.

#### D. HOW THE PROPOSAL WILL WORK

Under this proposal, for determining proportionality, the number of counted male student-athletes would be reduced by the difference between the number of football players and the number of student-athletes on the largest women's team. In effect, for proportionality purposes, the football team would be treated as the same size as the largest women's team. For example, if a hypothetical institution had a football team with

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188. See *supra* notes 16–19 and accompanying text.

189. See *supra* note 20 and accompanying text.

190. See *supra* notes 87–91 and accompanying text.

191. See *supra* notes 63–66 and accompanying text. Even through the 1995 hearing, this prong was attainable, as evidenced by the 1800 women's teams that were added from 1995 to 2002. See NCAA Sports Sponsorship Report, *supra* note 4, at 195.

192. See *supra* note 66 and accompanying text (explaining that few schools use this second prong).

193. See *supra* notes 67–68 and accompanying text.

100 team members, and its largest women's team, track and field, had forty team members, the number of males that would be counted for proportionality purposes would be reduced by sixty, so only forty football players would be counted toward the men's total. Thus, if the school had eight male sports for a total of 260 male student-athletes, and ten female sports for a total of 200 female student-athletes, the male figure would be reduced from 260 to 200. For proportionality purposes, the institution would effectively have a 50% male-to-female student-athlete ratio. If the general student body also had a 50% male-to-female ratio, the institution would be in compliance with the effective accommodation area of Title IX—no sports or opportunities would need to be cut.<sup>194</sup> If the student body's proportion of females was 55% or 60%, the school would still need to make some changes, but this proposal would allow the school more flexibility in making these changes, so that the objective could continue to be increasing opportunities for women instead of decreasing opportunities for men.

## V. THE TOUCHDOWN: POSITIVE EFFECTS OF PARTIALLY EXEMPTING FOOTBALL

### A. HOW THIS PROPOSAL WILL HELP

Giving special consideration to football under the proportionality prong will be beneficial in a few ways. First, it will preserve opportunities for males—institutions will not be forced to cut or to cap as many male sports. It is inevitable that some sports will need to be cut for justifiable reasons, including a lack of interest, money, facilities, or competition.<sup>195</sup> If a strong interest level and adequate funding for a male sport exist, however, the sport should not be eliminated because no women's team is comparable in size to the football team. Such a situation is exemplified by the University of North Dakota's decision to drop its wrestling team, even though outside sources were available to fund the team, and there was a strong interest in the sport at both the high school and collegiate level.<sup>196</sup> This proposal could have avoided the cuts and the litigation alto-

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194. See *supra* notes 28–33 and accompanying text (detailing the three general areas of Title IX compliance for intercollegiate athletic departments and explaining that the three-part test is used in complying with the third general area—effective accommodation).

195. See *supra* note 6 and accompanying text.

196. See *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1043–45 (8th Cir. 2002).

gether, since the university would have been closer to compliance with the proportionality prong. Although the athletic department still faced a budget deficit, the school could have given the wrestling team the option of raising private funds to support itself.<sup>197</sup> The current regulations did not allow this option, so the wrestling team had to be eliminated.

Second, this proposal will mitigate the problems that develop when schools resort to using "creative solutions" that are within the letter of the law, but contrary to its intent, and will allow interest levels, not the size of teams, dictate which women's sports are added.<sup>198</sup> For example, if football was partially exempted, the University of Minnesota could have added a smaller-participant sport with a strong regional interest, such as women's skiing, instead of women's rowing, a larger-participant sport with a slight regional interest.<sup>199</sup> It may be argued that adding skiing would be unreasonable because few schools in the Midwest offer skiing, and the Big Ten Conference does not sponsor the sport, so there would not be enough teams for Minnesota to compete against.<sup>200</sup> However, the primary reason to add rowing at many schools is because it is large enough to help offset the size of the football team, and the Big Ten only recognized this sport after more and more Big Ten schools took this approach. Had this proposal been in place earlier, institutions likely would not have felt the need to manufacture interest in a larger-participant sport like rowing to offset football,

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197. The University of Minnesota faced a similar dilemma in 2002. *See, e.g.,* Crissy Schluep, *Minnesota Program Goes from Exile to Worthwhile*, NCAA NEWS, Apr. 28, 2003, <http://www.ncaa.org/news/2003/20030428/awide/4009n06.html>. When the university faced a budget deficit, it gave three sports (two men's sports and one women's sport) the option of raising private funds to support itself. *Id.* The school was able to do this because unlike the University of North Dakota, which was thirteen percent from proportionality, Minnesota was already nearly compliant with proportionality. *See Chanelor*, 291 F.3d at 1044 (showing that 64% of the University of North Dakota's student-athletes were male, but only 51% of its general students were male, a 13% disparity). Had Minnesota not been complying with the proportionality prong, it likely would have been forced to eliminate the men's sports, as North Dakota did.

198. *See supra* Part II.C; *see also* Rozum, *supra* note 86, at 173 (arguing that "a Title IX compliance test that allows for the natural development of athletic interests and abilities of both men and woman should be adopted").

199. *See supra* notes 87-91 and accompanying text.

200. There are currently only forty-five NCAA universities in the country that sponsor women's ski teams, but 140 sponsor women's rowing (although the number of rowing teams has doubled since 1995). *See* NCAA Sports Sponsorship Report, *supra* note 4, at 136.



and instead, could have added a smaller-participant sport with an established interest level, such as skiing.

A similar scenario took place with women's ice hockey. In 1995, there were only twenty-one intercollegiate institutions in the country with women's ice hockey teams, for a total of only 414 female student-athletes.<sup>201</sup> Minnesota was one of the schools that took the lead in adding the sport in the Midwest because, like skiing, there was an interest among girls in Minnesota in playing ice hockey. Today, the sport has grown to sixty-nine women's collegiate teams, for a total of 1433 student-athletes.<sup>202</sup> Unlike rowing, however, women's ice hockey was not added solely for Title IX reasons, but rather for a more appropriate reason—to satisfy an unmet interest. The OCR, in its 1996 Clarification, placed an emphasis on adding women's sports in response to interest levels,<sup>203</sup> but the current Title IX regulations have discouraged schools from doing so. This proposal, however, would facilitate the addition of sports with unmet interests, instead of those with large rosters.

Third, this proposal will reduce the other unfortunate effects of complying with the proportionality prong. Women's coaches will no longer need to place female student-athletes on the roster for the first game for Title IX purposes, only to cut them shortly thereafter.<sup>204</sup> Men's coaches will not need to limit the number of walk-ons.<sup>205</sup> The Commission recommended that the number of walk-ons should not be artificially limited,<sup>206</sup> but under the current regulations, schools are often forced to do this as a means of complying with proportionality.<sup>207</sup> This proposal, however, will ensure that those who want the opportunity and have the ability are given the chance to walk-on. Ultimately, this proposal will preserve the spirit of Title IX by allowing women's opportunities to increase along with interest, without a reduction in men's opportunities.

## B. CONCERNS THAT MUST BE ADDRESSED

Despite the strong positive impact of this proposal, a major concern with it may be that it sends the wrong message—that

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201. See NCAA Sports Sponsorship Report, *supra* note 4, at 41.

202. *Id.* at 59.

203. See 1996 Clarification, *supra* note 29.

204. See *supra* notes 97–98 and accompanying text.

205. See *supra* notes 94–95 and accompanying text.

206. See Commission Report, *supra* note 7, at 38.

207. See *supra* notes 93–95 and accompanying text.

after many years of attempting to achieve equality in athletics, it is now acceptable to take a step in the opposite direction.<sup>208</sup> This proposal, however, will not hinder the great progress women have made in athletics. Instead, it is intended to assist those institutions that are already adequately distributing participation opportunities, so that all students with the interest and the ability to participate will get an opportunity. Moreover, by preserving male opportunities in the short term, this proposal will allow female opportunities to expand as interest in particular women's sports expands.

### 1. Who This Proposal Will Help

This proposal will be of most help to those institutions that are already giving women equivalent opportunities to participate—those institutions that “but for” having a football team, would be in compliance with Title IX. For example, the University of Maryland has twelve men's teams and thirteen women's teams, for a male-to-female student-athlete ratio of 363 to 323 (53% male to 47% female).<sup>209</sup> It offers every women's sport that is played in Maryland high schools other than badminton.<sup>210</sup> Though it arguably is “effectively accommodating the interests and abilities” of its female population, because its undergraduate ratio is 51% male to 49% female,<sup>211</sup> it is not fully in compliance with the proportionality prong. Moreover, because its undergraduate female population is increasing, it recently adopted its own “creative solution,” making women's cheerleading a varsity sport,<sup>212</sup> a move that has been criticized by Title IX supporters as an attempt to circumvent the law.<sup>213</sup> This pro-

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208. As NCAA President Brand stated, “Now is not the time to say, ‘Close enough,’ and watch all the hard work undone.” Brand, *supra* note 151.

209. See EADA Website, *supra* note 155.

210. See *id.*; NFHS Survey, *supra* note 89, at 60–61.

211. See NCES, *supra* note 156, at <http://nces.ed.gov/ipeds/cool/Enrollment.asp?UNITIC=163286> (last visited Apr. 9, 2004).

212. Beth Rosenberg, *Competitive Cheerleaders Stand Up and Holler to Be Varsity*, NCAA NEWS, Oct. 27, 2003 (stating that the university separated the competitive cheerleading team from the “spirit squad” that cheers at football and basketball games), <http://www.ncaa.org/news/2003/20031027/awide/4022n22.html>. Maryland also added women's water polo. *Id.* Dave Haglund, Maryland Associate Athletics Director, stated that while the university had been in compliance, “[t]he No. 1 reason for adding [these] sports was to ensure our future Title IX compliance.” *Id.*

213. See Pam Schmid, *In the Spirit of Title IX?*, STAR TRIB. (Minneapolis), Nov. 18, 2003, at C1 (quoting Donna Lopiano, Chief Executive of the Women's Sports Foundation, “For Maryland to make up [a team] for which there are no

posal, however, would have made Maryland's controversial measure unnecessary because the institution would have been in compliance with proportionality—it has 116 football players, and its largest women's team, track and field, has approximately fifty-five team members,<sup>214</sup> a difference of about sixty participants. For proportionality purposes under this proposal, the 363 male participants would be reduced by sixty, so the adjusted male-to-female student-athlete ratio would be 303 to 323 (48% male to 52% female).<sup>215</sup> Thus, as its women's enrollment continues to increase over time, Maryland would be able to add the women's sport that best corresponds to interest levels in its region.

As another example, the University of Minnesota has twelve men's teams and thirteen women's teams, and a male-to-female student-athlete ratio of 458 to 434 (51% male to 49% female),<sup>216</sup> but with a general student body consisting of 53% females, it is not fully proportional.<sup>217</sup> Consequently, its athletic director stated that he hopes to soon have a cap on male rosters.<sup>218</sup> Under this proposal, however, the university would not need to cap its male rosters because the school would already be in compliance. The football team has 121 team members, and its largest women's team, track and field, has sixty-three team members,<sup>219</sup> for a difference of fifty-eight participants. For proportionality purposes, the adjusted male-to-female ratio would be 400 to 434 (48% males to 52% females).<sup>220</sup> Thus, this proposal would give the university latitude so that men's opportunities would not have to be reduced.

In theory, the third prong—full and effective accommodation of women's interests and abilities—should insulate schools such as Maryland and Minnesota from Title IX suits even

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readily available tiers of competition . . . appears disingenuous”).

214. See EADA Website, *supra* note 155 (showing that 129 female track and field student-athletes are on the Maryland roster, which includes three different teams: indoor track, outdoor track, and cross-country).

215. See *supra* Part IV.D (describing how to apply the proposal).

216. See EADA Website, *supra* note 155.

217. See NCES, *supra* note 156, at <http://nces.ed.gov/ipeds/cool/Enrollment.asp?UNITID=174066> (last visited Apr. 9, 2004).

218. See Scoggins, *supra* note 157 (quoting University of Minnesota Athletic Director Joel Maturi, “If we don’t manage our roster numbers, soon we would eventually have to drop a men’s sport or add a women’s sport.”).

219. E-mail from Frank Kara, Director of Athletic Compliance, University of Minnesota, to Jay Larson, (Apr. 12, 2004) (on file with author) (showing estimates of the 2003–2004 participation rates).

220. See *supra* Part IV.D.

though they are not fully proportionate. Because of its vagueness, however, these institutions cannot rely on this prong, and until it is revamped to provide specific, concrete objectives, it will not be helpful to these institutions.<sup>221</sup> This proposal, in effect, is an alternative to revamping the third prong. It is an objective way for the schools that are "fully and effectively accommodating the interests and abilities" of females to be assured that they are in compliance.<sup>222</sup>

On the other hand, while this proposal will help schools that are close to complying with proportionality, it will not be of as much aid to schools with a disproportionately large number of male student-athletes. For example, if the previous hypothetical institution<sup>223</sup> had 260 male student-athletes and only 120 female student-athletes, this proposal will not be of as much assistance. Even if its football team had 100 members and its largest women's team had forty participants, reducing the male total by sixty will still leave a male-to-female ratio of 200 to 120, and major changes would still need to be made. However, this proposal would allow the school more flexibility in making these changes, thereby lessening the need to eliminate male opportunities.<sup>224</sup>

## 2. Allowing Women's Opportunities to Expand Correspondingly with Interest

Another concern may be that this proposal will limit equality from ever being achieved in intercollegiate athletics. In *Blair v. Washington State University*,<sup>225</sup> a trial court had permitted Washington State University to exclude football from its

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221. See *supra* notes 60-69, 140 and accompanying text.

222. See *supra* note 33 and accompanying text.

223. See *supra* Part IV.D.

224. Another potential concern with this proposal may be that it could give a school that is close to compliance with proportionality incentive to eliminate women's teams; a school could seemingly eliminate all of its women's sports that have large rosters in order to increase the difference between the football team and the largest women's team. However, this is unlikely to occur for a few reasons. First, since the NCAA sets a minimum number of teams that a school must carry to compete, see *supra* note 72, cuts could only be made to a certain point. Moreover, this practice would be politically untenable and contrary to the spirit of Title IX, thus discouraging a university's administration from doing so. Finally, women's undergraduate enrollments are increasing, see *supra* note 154 and accompanying text, thereby making it especially difficult for schools to eliminate women's programs and still comply with proportionality.

225. 740 P.2d 1379 (Wash. 1987).

calculations for participation opportunities, scholarships, and distribution of other funds.<sup>226</sup> The Washington Supreme Court reversed,<sup>227</sup> stating that excluding football would “perpetuate the . . . diminished opportunities for women” by guaranteeing that men always had “many more participation opportunities than women.”<sup>228</sup> However, this proposal is distinguished from the plan in *Blair* because this proposal is not based on revenues and it is not a complete exemption from all aspects of Title IX. Moreover, the court’s concern that men will always have many more participation opportunities than women is no longer reality, because as women’s undergraduate enrollment increases toward 60%,<sup>229</sup> the proportionality prong dictates that women’s athletic participation rates increase accordingly.<sup>230</sup> Thus, even if this proposal allows for more male opportunities in the short term, the disparity likely will decrease over time.

Advocates of Title IX have stated that it is not time to reduce the strength of Title IX.<sup>231</sup> This proposal, however, is not an attempt to reduce the strength or to defeat the strides made by women. Rather, it is an equitable solution that responds to current realities, one that preserves opportunities for men in the short term, and facilitates the addition of women’s sports in the long term. For example, suppose the hypothetical institution<sup>232</sup> had a male-to-female student-athlete ratio of 260 to 200 (57% male to 43% female), and an undergraduate female population of 55%. Under the current regulations, in order to keep its 260 men’s opportunities and still comply with proportionality, the school would need to add 115 female student-athletes.<sup>233</sup> More likely, male opportunities would be cut. Under this proposal, however, the school could comply by adding just forty

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226. See *id.* at 1381–82. The justification for excluding football was that it was unique from other sports because it was “operated for profit under business principles.” *Id.* at 1383.

227. The court struck down the injunction not on Title IX grounds, but rather as a violation of the state’s Equal Rights Amendment. *Id.* at 1381.

228. *Id.* at 1383.

229. See *supra* note 154 and accompanying text.

230. See *supra* note 33 and accompanying text (stating that the proportionality prong requires female student-athlete participation rates to mirror the female undergraduate enrollment).

231. See Hilliard Testimony, *supra* note 130, at 197.

232. See *supra* Part IV.D.

233. Adding 115 female student-athletes to the current 200 females would give the hypothetical institution a male-to-female student-athlete ratio of 260 to 315 (45% male to 55% female).

female student-athletes,<sup>234</sup> a much more realistic goal. Instead of a short-term objective of reducing men's opportunities to below 200, the long-term objective would be to continue increasing women's sports toward 300, thus allowing new women's sports (including those with small rosters) to be added in the future as interest in those sports continues to develop.

For example, women's football is a sport that is increasing in popularity. Some feel that adding this sport is the eventual answer to offset the large size of the men's football team.<sup>235</sup> The problem is that today, there are only approximately 1500 high school girls in the country participating on school-sponsored football teams,<sup>236</sup> so interest is not yet strong enough to support teams at the college level. Because football requires a large number of participants and is expensive to operate,<sup>237</sup> it will take a greater showing of interest at the lower levels before colleges will add this sport.<sup>238</sup> Under the current regulations, as men's teams continue to be cut, there will be less incentive for schools to add a sport like women's college football.

To illustrate, suppose the hypothetical institution with a 260 to 200 male-to-female student-athlete ratio and a female student body consisting of 55% females is in Iowa, which has only sixty high school girls playing organized competitive football.<sup>239</sup> Suppose also that to come into compliance, the institution chose to cut four men's teams and capped men's rosters, lowering the men's total to 190, and added a women's team, increasing the women's total to 230.<sup>240</sup> If and when women's foot-

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234. See *supra* Part IV.D. Under this proposal, the male figure, 260, would be reduced by the difference between the number of football players (100) and the number of student-athletes on the largest women's team (40), so 260 minus 60 would make the male figure 200 for proportionality purposes. If 40 females were added to the current 200 females, the total female figure would be 240. For proportionality purposes, the ratio of male-to-female student-athletes would be 200 to 240 (45% male to 55% female).

235. Rodney K. Smith, *Solving the Title IX Conundrum with Women's Football*, 38 S. TEX. L. REV. 1057 (1997).

236. See NFHS Survey, *supra* note 89, at 60. There are 3855 girls participating in school-sponsored flag football programs in Florida. *Id.*

237. See *supra* notes 114-15 and accompanying text.

238. See Title IX of the Education Amendments, 44 Fed. Reg. at 71,413, 71,418 (Dec. 11, 1979) (codified at Nondiscrimination on the Basis of Sex, 34 C.F.R. § 106.41 (1981); 45 C.F.R. § 86.41 (1984)) (explaining that if an institution sponsors a team for one sex, it must do so for the other sex only if there is a sufficient interest and ability to support the team, and a reasonable expectation of competition for the team).

239. See NFHS Survey, *supra* note 89, at 60.

240. Thus, the male-to-female ratio would be 190 to 230 (45% male to 55%

ball becomes popular enough to be added at the collegiate level, there will be less room to add it. On the other hand, providing football with a partial exemption would enable the school to be in compliance without reducing male opportunities, and would maintain the goal of increasing female opportunities. As the female student body grows along with the interest in women's football, there will be room to add the sport in the future, and men's sports will not have to be cut to accomplish this.

It may be argued that under this proposal, there would also be less incentive to add women's sports. In the short term, this may be accurate, but increases in female enrollment will bring about increases in women's sports. The difference between the current regulations and this proposal is that while the current regulations give schools an incentive to eliminate men's opportunities to come into compliance, this proposal promotes the goal of increasing women's sports without reducing men's opportunities.

### 3. Proposals to Limit the Size of Football Teams

A final concern with this proposal may be that it is taking the wrong approach to the dilemma faced by football schools. While initial proposals called for a complete exemption of football from Title IX,<sup>241</sup> others have argued that instead of exempting football, institutions should simply limit the number of participants on football teams.<sup>242</sup> This Note's proposal is a compromise between these competing views. While a full exemption is clearly not appropriate, neither is drastically limiting the number of football players, as it would be counter to the goals of Title IX.<sup>243</sup> A minor reduction in football scholarships

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female).

241. See *supra* notes 118–23 and accompanying text.

242. See Farrell, *supra* note 61, at 1056–57 (stating that “[a]n appropriate rule would limit each [football] team to fifty players”); Clark C. Griffith, *Comments on Title IX*, 14 MARQ. SPORTS L. REV. 57, 61 (2003) (arguing that because professional football teams “make do” with fifty-eight players, Division I football teams should be allowed only sixty full scholarships); Andrew J. Boyd, Comment, *Righting the Canoe: Title IX and the Decline of Men's Intercollegiate Athletics*, 37 J. MARSHALL L. REV. 257, 275–76 (2003) (proposing that football programs offer only twenty-three scholarships and rosters of forty-five players).

243. It has been argued that reducing the size of college football rosters may also jeopardize the safety of players. See Rozum, *supra* note 86, at 172; Sudha Setty, Note, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 352 (1999).

and small limits on football rosters may be practical,<sup>244</sup> but even if these measures were adopted, a reduction of ten scholarships or twenty participants will not diminish the value of this proposal. Football teams, even with twenty fewer participants, will still have much larger rosters than any women's sport,<sup>245</sup> and the perverse incentives would remain. Therefore, this proposal would still be warranted and would continue to be a rational way to lessen the problems football schools face in complying with proportionality, while bolstering the original intent of Title IX.

### CONCLUSION

The successes that have come to women in athletics due to Title IX are indisputable. Despite the strides that have been made in the last thirty years, there are concerns that the Title IX regulations are leading to a growing number of problems, notably the elimination of opportunities for male athletes and the addition of women's teams based on size of rosters instead of interest levels. Many schools are doing an exemplary job of distributing participation opportunities between the genders, and the third prong, in theory, should assure them of this, but because of its ambiguity, these schools feel using the proportionality prong is the only practical option. Institutions with football programs are not achieving proportionality, primarily because football teams carry a greater number of participants than any women's sport. In efforts to comply, these schools are eliminating men's sports and implementing other "solutions" that are contrary to the spirit of Title IX. To alleviate these problems, the unique size of football teams should be considered under the proportionality prong.

This proposal is a reasonable and practical resolution based on a legitimate sex-neutral factor—football's uniquely large roster size—making it within the original framework of the law. It is not intended as a panacea for all Title IX troubles;

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244. See, e.g., Sara A. Elliott & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS SPORT 1, 13 (2001) (stating that the NCAA could decrease the number of football scholarships at the Division I-A level from eighty-five to seventy-five).

245. See NCAA Gender Equity Report, *supra* note 11, at 14 (showing that at the Division I-A level, a reduction of twenty football participants would still leave football with, on average, thirty to fifty more participants than any female sport).



for various reasons, sports inevitably will still need to be cut. It will ensure, however, that if sports are cut, it will not be solely because the institution sponsors a football team. Moreover, this proposal will ensure that student interest levels, not size of teams, dictate which women's sports are added in the future. Participation in athletics has proved to be an invaluable learning tool for millions of Americans, and Title IX has given women the opportunity to share in this experience. However, the Title IX regulations can be improved. This proposal will assist both genders in getting the opportunities they deserve.