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TITLE IX AND INTERCOLLEGIATE ATHLETICS—THE FIRST CIRCUIT HOLDS BROWN UNIVERSITY NOT IN COMPLIANCE

SUE ANN MOTA*

INTRODUCTION

Title IX, which prohibits discrimination on the basis of sex in any education programs receiving federal assistance, reaches the quarter of a century mark on July 1, 1997.¹ On November 21, 1996, the Court of Appeals for the First Circuit held that Brown University was not in compliance with Title IX concerning intercollegiate athletics. This landmark decision sends a strong message to colleges and universities that Title IX must be reckoned with in athletic programs, as Brown University is among the top universities in the country for intercollegiate women’s sports.²

A class action lawsuit was filed against Brown University in 1991 for discrimination against women, a violation of Title IX of


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the Educational Amendments of 1972, when Brown reduced two women's and two men's varsity teams to intercollegiate club teams. In 1992, the district court held that a preliminary injunction restoring the women's teams to varsity status was warranted. The Court of Appeals for the First Circuit held that the trial judge did not abuse discretion by issuing the injunction.

Following the trial on the merits in 1995 the district court held that Brown violated Title IX, and was ordered to submit a plan to the court for complying with Title IX. In November, 1996, the First Circuit held that Brown violated Title IX, but remanded the case to the district court so that Brown could submit a further plan to bring itself into compliance with Title IX.

This article discusses the history of Title IX concerning intercollegiate athletics from its inception until the present, examines Title IX decisions in intercollegiate athletics leading up to Brown, analyzes the Brown decision and its ramifications, and concludes with recommendations on how universities can comply with Title IX's athletic regulatory regime. In an era of budget-cutting, athletic departments, universities, legislatures, conferences, and the NCAA must work together to find creative solutions to help universities reach compliance with Title IX concerning intercollegiate athletics.

**TITLE IX AND INTERCOLLEGIATE ATHLETICS**

Title IX prohibits discrimination on the basis of sex under any educational program or activity receiving federal assistance. On the basis of sex, no person may be excluded from participation in, be denied the benefits of, or be subjected to discrimination by any

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7. 20 U.S.C. § 1681(a) (1994), which states in part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." Title IX was modeled after Title VII of the Civil Rights Act of 1964. Diane Heckman, Women and Athletics: A Twenty Year Retrospective on Title IX, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9-10 n. 30 (1992).
educational institution receiving federal funds. In 1972, Title IX became law when Congress passed and President Nixon signed the Educational Amendments of 1972. Title IX further states that while educational institutions are not required to grant preferential or disparate treatment to members of one sex due to an imbalance, consideration may be given to statistical evidence tending to show an imbalance exists concerning participation or benefits concerning members of one sex.

8. 20 U.S.C. §1681(c) (1994) defines educational institutions as “any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.”

9. 34 C.F.R. § 106.2(g) defines federal financial assistance as any of the following:

   (1) A grant or loan of Federal financial assistance, including funds made available for:
   (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
   (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

   (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

   (3) Provision of the services of Federal personnel.

   (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

   (5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.


11. 20 U.S.C. § 1681(b) (1994) states:

   Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally
Title IX directed federal agencies that extend federal financial assistance to educational programs or activities to issue rules or regulations consistent with the objectives of the statute authorizing financial assistance. These rules and regulations must be approved by the President, according to Title IX. The Department of Health, Education, and Welfare (HEW) formulated regulations pursuant to this mandate in 1975. In 1979, Congress split HEW into the Department of Health and Human Services supported program or activity, in comparison with the total number of percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.


Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) 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 on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

13. Id.

14. 45 C.F.R. § 86 (1994). HEW received an unprecedented 9,700 comments on the proposed Title IX athletic regulations. Thomas A. Cox, Intercollegiate Athletics and Title IX, 46 GEO. WASH. L. REV. 34, 40 (1977). This prompted the HEW Secretary Casper Weinberger to remark, "I had not realized until the comment period that athletics is the single most important thing in the United States." Cox at 34.
(HHS) and the Department of Education. The Department of Education replicated HEW's regulations, and its Office for Civil Rights ("OCR") currently administers Title IX.

The 1975 regulations, as they pertain to intercollegiate athletics, state that no person, on the basis of sex, shall be excluded from participation in, be denied the benefit of, be treated differently from another person, or otherwise be discriminated against in any intercollegiate athletics offered by a recipient of federal funds. The regulations further require that if a recipient of federal funds awards athletic scholarships or grants-in-aid, reasonable opportunities for the awards for members of each sex must be granted in proportion to the number of students of each sex participating in intercollegiate athletics. The regulations state that a recipient of federal funds that operates intercollegiate or other athletics shall provide equal athletic opportunity for members of both sexes.

The following factors are to be considered, among others, in determining whether equal opportunities are available, according to the regulations:

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

18. 34 C.F.R. § 106.41(a) (1994). Discrimination in interscholastic, club, or intramural sports is also prohibited.
20. 34 C.F.R. § 106.41(c) (1994).
21. Id. This section further states that, "Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex." Id.
The regulations further state that athletics shall not be offered separately on the basis of sex, except separate teams may be sponsored for members of each sex where selection for each team is based upon competitive skill or the activity involved is a contact sport. Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports whose purpose or major activity involves bodily contact. In non-contact sports, if a team is sponsored for one sex in a particular sport, and the athletic opportunities for members of the other sex have previously been limited, then members of the excluded sex must be allowed to try out for the team.

In the three years following the issuance of the regulations, HEW received over one hundred discrimination complaints involving more than fifty schools. A few months before Congress split HEW in 1979, "emulating King Solomon," HEW published in the Federal Register a Policy Interpretation of the intercollegiate athletics provisions of Title IX and its implementing regulations. The self-stated purposes of the Policy Interpretation were to clarify the obligations of recipients of federal funds under Title IX, to provide equal opportunities in athletic programs, and to provide a means to assess an institution's compliance with the equal opportunity requirements. Although there appears to be no record that the Department of Education formally adopted the Policy Interpretation, and the Policy Interpretation has not been approved by either the President or Congress and thus does not have the full effect of a regulation promulgated under Title IX; nonetheless, courts have given substantial deference to the Policy Interpretation.

The Policy Interpretation is divided into three sections: athletic scholarship; other program areas; and effective accommoda-

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22. 34 C.F.R. § 106.41(a) (1994).
23. 34 C.F.R. § 106.41(b) (1994).
24. Id. The issue of contact sports was raised in Williams v. School District of Bethlehem, Pa., 998 F.2d 168 (3d Cir. 1993), where a boy wanted to try out for girl's field hockey when the school only had girl's field hockey. The issue of whether field hockey involved bodily contact was a fact issue that precluded summary judgment.
26. Id.
29. Cohen II at 896.
tion of student interests and abilities. The second section, other program areas, is further broken down into eleven areas, for a total of thirteen program components to be assessed for compliance. These eleven program areas are:

1. Equipment and Supplies
2. Scheduling of Games and Practice Time
3. Travel and Per Diem Allowance
4. Tutors
5. Coaches
6. Locker Rooms, Practice and Competitive Facilities
7. Medical and Training Facilities and Services
8. Housing and Dining Facilities and Services
9. Publicity
10. Support Services
11. Recruitment of Student Athletes

The Policy Interpretation added the last two program components, which were not in the regulations.

Concerning the first area—athletic financial assistance—the Policy Interpretation states that compliance will be primarily determined by comparing the amount of financial assistance which is available to men's and women's athletic programs. Compliance is achieved if the comparison shows that substantially equal amounts of financial aid are available to both groups, or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors.

32. 44 Fed. Reg. 71, 417 (1979). The program areas varied slightly from the 1975 regulations as OCR determined that the analysis of coaching was simplified by combining the opportunity to receive coaching and the assignment and compensation of coaches. Similarly, the opportunity to receive tutoring and the assignment and compensation of tutors was combined.

33. Id. Compliance is determined by dividing the amounts of aid available for members of each sex by the numbers of male or female participants in the program and comparing the results.

34. The 1990 TITLE IX INVESTIGATOR'S MANUAL requires a "Z" test and a "T" test to determine whether any differences in aid are statistically significant. OCR, TITLE IX INVESTIGATOR'S MANUAL 17 (1990).

35. The Policy Interpretation notes two possible nondiscriminatory factors which may explain differences in athletic financial assistance:

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

An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require spreading scholarships over as
The second program component in the regulations and the Policy Interpretation is the effective accommodation of student interests and abilities. The basic determination of this program component relies on a two-part analysis: equal opportunities to compete and levels of competition. The Policy Interpretation sets forth a three-prong test, only one prong of which must be complied with, for assessing equal opportunities to compete:

1. Whether intercollegiate [or interscholastic] level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of members of that sex have been fully and effectively accommodated by the present program.

In assessing the levels of competition, the Policy Interpretation sets forth a two-prong test, only one prong of which must be met:

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

much as a full generation (four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes. See supra note 27.


37. The Policy Interpretation defines participants as those athletes:
   a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
   b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
   c. Who are listed on the eligibility or squad lists maintained for each sport, or
   d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

2. Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex. 39

For each of the eleven program components, the benefits for men are compared with the benefits for women. The benefits must be equivalent. 40 If there are any differences in benefits which cannot be explained by nondiscriminatory factors, 41 resulting in a disparate impact on one sex, then compliance is not achieved in that program component.

The Policy Interpretation discusses what must be equivalent to achieve compliance in each of the program components. The Policy Interpretation states that equipment and supplies include uniforms and other apparel; sports specific equipment and supplies, instructional devices, and weight training equipment. These equipment and supplies are to be assessed in the areas of quality, amount, suitability, maintenance, replacement, and availability. The Policy Interpretation states that compliance in the scheduling of games and practice time is determined by assessing the following: number of competitive events per sport; number and length of practice opportunities; time of day competitive

39 44 Fed. Reg. 71, 418 (1979) The Policy Interpretation states that, "[i]n the selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women." Id., at 417-18. Since the regulations at 34 C.F.R. §106.41(b) (1994), see supra note 24 and accompanying text, differentiate between contact and non-contact sports, the Policy Interpretation states that where an institution offers a team in a contact sport for members of one sex, it must offer a team for members of the other sex when: (1) opportunities for members of the excluded sex have historically been limited, and (2) there is sufficient interest and ability to sustain a viable team and a reasonable expectation of intercollegiate competition. For non-contact sports, where a team is offered to students of one sex, a team must be offered to members of the excluded sex where: (1) opportunities for members of the excluded sex have historically been limited; (2) there is sufficient interest and ability to sustain a viable team and reasonable expectation of intercollegiate competition for that team; and (3) members of the excluded sex do not possess sufficient skill to be selected for a single integrated team or compete actively on such a team if selected.


41. Nondiscriminatory factors may include, according to the Policy Interpretation, disparities in recruitment to annual fluctuations in team needs; disparities in management costs for sports that draw large crowds; and, disparities in coaching salaries when a coach has an outstanding record of achievement to justify a high salary. Other nondiscriminatory factors include: rules of play; nature/replacement of equipment; rates of injury, and nature of facilities including upkeep requirements. The Policy Interpretation states, "[f]or the most part, differences involving such factors will occur in programs offering football." Id. at 413 et seq. (1979).
events are scheduled; time of day practice opportunities are scheduled; and opportunities to engage in available pre- and post- season competition. Compliance is determined in travel and per diem allowance by considering modes of transportation, housing furnished during travel, length of stay before and after competitive events, per diem allowances, and dining arrangements.

The Policy Interpretation requires that the availability of tutoring and the procedures and criteria for obtaining tutorial assistance be assessed to determine compliance for the opportunity to receive said tutoring. In determining compliance for the assignment of tutors, tutor qualifications, training, and experience are assessed.42

In the program component of opportunity to receive coaching assignment and compensation of coaches, the Policy Interpretation examines three areas to determine compliance: opportunity to receive coaching; assignment of coaches; and compensation of coaches.43 The following factors are to be assessed in determining compliance in locker rooms, practice and competitive facilities according to the Policy Interpretation: quality and availability of the facilities provided for practice and competitive events; exclusivity of the use of facilities provided for practice and competitive events; availability and quality of locker rooms; maintenance of practice and competitive facilities; and preparation of facilities for practice and competitive events.44

The Policy Interpretation lists five factors to be assessed in determining compliance with provisions of medical and training facilities and services: availability of medical personnel and assistance; health, accident and injury insurance coverage; availability and quality of weight training and conditioning facilities; and availability and qualification of athletic trainers.45 Two fac-

42. Id. The following factors are to be assessed in determining compliance for the compensation of tutors: hourly rate of pay by nature of subjects tutored; pupil load per tutor; tutor qualifications; experience; and other terms and conditions of employment.

43. 44 Fed. Reg. 71, 413 et. seq. (1979). The following three factors are assessed in determining compliance for the opportunity to receive coaching: relative availability of full time coaches, part-time and assistant coaches, and graduate assistants. In assignment of coaches, the training, experience and other professional qualifications, as well as professional standing, are to be assessed. The following are assessed to determine compliance for the compensation of coaches: the rate of compensation; the duration of contracts; the conditions relating to contract renewal; experience; the nature of coaching duties performed; working conditions; and other terms and conditions of employment. Id.

44. Id.

45. Id.
tors are to be assessed, according to the Policy Interpretation, in determining compliance for the provision of housing and dining facilities and services: the housing provided and other special services such as laundry facilities, parking space, or maid service.\(^{46}\)

In the area of publicity, the availability and quality of sports information personnel, the access to other publicity resources; and the quantity and quality of publications and other promotional devices are to be assessed. The Policy Interpretation states that in the area of providing support services, the administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, as the provided services may enable coaches to perform their coaching functions better.\(^{47}\) The amount of administrative, secretarial and clerical assistance provided to men's and women's programs are to be assessed to determine compliance. Finally, according to the Policy Interpretation, the following are to be assessed in determining compliance in the area of recruitment: whether coaches or others are provided substantially equal opportunities to recruit; whether resources, financial or other, available for recruitment are equally adequate; and whether the differences in benefits, opportunities, and treatment in recruiting student athletes have a disproportionately limiting effect on either sex.\(^{48}\)

The Supreme Court in 1984 in *Grove City College v. Bell* narrowly interpreted the “program or activity” language in the Title IX statute.\(^{49}\) The Court held that the “assumption that Title IX applies to programs receiving a larger share of a school's own limited resources as a result of federal assistance earmarked for use elsewhere within the institution is inconsistent with the program-specific nature of the statute.”\(^{50}\) This narrow reading of Title IX placed virtually all athletic departments out of Title IX’s reach.

In an effort to overturn the *Grove City* decision, Congress passed the Civil Rights Restoration Act of 1987.\(^{51}\) This act

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46. *Id.*

47. *Id.*

48. *Id.*

49. 465 U.S. 555, 573 (1984). In *Grove City*, however, the Court did hold that federal student aid granted to Grove City College students did subject the college's entire financial aid office to Title IX.


restored broad, institution-wide application to four civil rights acts, including Title IX, which now states in part that the terms “program or activity” or “program” encompass all of the operations of a college or university, other postsecondary institution, or a public system of higher education.

In 1995, the OCR circulated over 4,500 copies of a draft of the proposed Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (hereinafter “Clarification”). The OCR states that this Clarification does not change the standards for the effective accommodation of interests and abilities as set out in the Policy Interpretation. About half the comments were a version of a form letter urging OCR to enforce Title IX strongly. Most of these were from athletes and others at the University of Texas at Austin. Instead it provides further information on assessing compliance under the three-prong test. This Clarification confirmed that institutions need only comply with one prong of the three-prong test.

The first prong examines whether participation opportunities for male and female students in intercollegiate athletics are substantially proportionate to their full-time undergraduate enrollments. According to the Clarification, cutting or capping men’s teams is one way to comply with this first prong, the so-called “safe harbor,” but not the second or third.


54. UNITED STATES DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (1995) (hereinafter “OCR CLARIFICATION”). The clarification emerged from a House of Representatives hearing in May, 1995, that focused on complaints that the OCR unfairly applies the three-part test. In 1990, the OCR also published a Title IX Athletics Investigators Manual, which superseded two prior guidance documents issued by the OCR in 1980 and 1982. The manual states that separate investigations may be conducted for the three policy components. OCR, TITLE IX INVESTIGATOR’S MANUAL 7 (1990).

55. OCR CLARIFICATION at 1.

56. Id. at 4. The Clarification gives examples of compliance and non-compliance with this prong. Assume two institutions with 52% of the student body being female, but only 47% of the student athletes being female. At an institution with 60 student athlete participants, 28 would be women and 32 would be men. The 5% differential would be made up, assuming no men were dropped, by adding six female participants. Women would then make up 34 of the 66 participants, or nearly 52%. Since six participants are unlikely to support a viable team, this institution would be in compliance. At an institution with 60 athletes, however, approximately 62 women
The second prong requires a history and continuing practice of program expansion for the underrepresented sex. The Clarification states that the OCR will review the entire history of an athletic program, and will first assess whether the past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. Even though some participation opportunities for the underrepresented sex have been eliminated, the institution may still comply with the second prong if, overall, it has a history and continuing practice of program expansion for the underrepresented sex.

Finally, the third prong requires that an institution fully and effectively accommodate the interests and abilities of the underrepresented sex at the institution. Pursuant to the Clarification, this prong may be met even if there are disproportionally high athletic participation rates by the overrepresented sex, so long as the imbalance does not reflect discrimination. To make this determination, the OCR will consider the following: unmet interest in a particular sport; sufficient ability to sustain a team in the
and a reasonable expectation of competition for the team. After reviewing Title IX, its enforcing regulations, the Policy Interpretation, and the Clarification, the circuit courts of appeals' decisions applying Title IX to intercollegiate athletics leading up to Cohen v. Brown University will be reviewed.

Circuit Court Decisions on Title IX in Intercollegiate Athletics Before Cohen v. Brown University

Since May 1993, every circuit court decision leading up to Cohen v. Brown University on a Title IX claim of discrimination in athletics is in accord with the explication of the Title IX regime as it applies to athletics. It should be noted, however, that the intramural sports; interviews with students, admitted students, coaches, administrators and others regarding interests in particular sports; results of questionnaires of students and admitted students regarding interests in particular sports; and participation in particular interscholastic sports by admitted students. This assessment may involve straightforward and inexpensive techniques, such as student questionnaires or an open forum. OCR CLARIFICATION at 10. OCR will also look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues.

62. According to the Clarification, indications of ability include:

"the athletic experience and accomplishments—in interscholastic, club or intramural competition—of students and admitted students interested in playing the sports;

opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and

if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by institution's other athletes; however, is conclusive evidence of lack of ability." Id. at 11.

63. OCR examines the following in the geographic area that the institution's athletes primarily compete: competitive opportunities offered by other schools against which the institution competes; and competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete. Id. at 11-12.

64. Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (Cohen IV), citing Horner v. Kentucky High School Athletics Ass'n., 43 F.3d 265 (6th Cir. 1994); Kelley v. Bd. of Trustees, 35 F.3d 265 (7th Cir. 1994), cert. denied, 115 S. Ct. 938 (1995); Favia v. Indiana Univ. of Pa., 7 F.3d 332 (3d Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir 1993), cert. denied, 510 U.S. 1004 (1993). The date is not arbitrary; the date is from the First Circuit's prior decision in Cohen II. In a Title IX decision not involving intercollegiate athletics, the Court of Appeals for the Fifth Circuit in April, 1993 held that a female college professor did not establish a prima facie case of disparate impact sexual discrimination. Chance v. Rice Univ., 989 F. 2d
Court of Appeals for the Second Circuit, in *Cook v. Colgate University*, vacated a Title IX decision as moot in favor of female students in April 1993, as the students bringing action had graduated. Colgate had a male varsity ice hockey team and a female club hockey team. Members of the women's club ice hockey team followed Colgate's procedure to petition to upgrade a club team to varsity status. Refused four times, the members filed suit under Title IX. The district court ordered Colgate to upgrade the women's team and to provide equal athletic opportunities to the women ice hockey players. The Second Circuit, however, vacated and remanded with instructions to dismiss, because the ice hockey season ended and the last of the plaintiffs were graduating. To avoid dismissal for mootness, plaintiffs should bring a class action or sue in a representative capacity, as the plaintiffs

179, 180 (5th Cir. 1993); 984 F.2d 151 (15th Cir. 1993). Chance alleged that the district court did not apply the proper standard, but the First Circuit stated that under either standard, Chance would not prevail as there was no showing of statistically significant salary differentials.


66. *Cook v. Colgate Univ.*, 802 F. Supp. 737, 741 (N.D.N.Y. 1992). Claims of violations of the Fifth and Fourteenth Amendments were also raised, but the district court stated that Title IX can be violated without showing a specific intent to discriminate, but Fourteenth Amendment gender discrimination actions require intentional acts to be shown. The Supreme Court has stated that compensatory damages may be awarded in a Title IX action where intentional discrimination is established. *Franklin v. Gwinnett Co. Public Schools*, 503 U.S. 60 (1992). This non-athletics case involved a female student attending a public high school alleging sexual harassment. See, Jennifer Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. SPORT L. 133 (1995).

67. *Id.* at 751. In reaching this decision, the district court stated that "equal athletic treatment is not a luxury," and is "little enough to expect of a fine university." The court did not dictate what Colgate had to do to make the two teams equivalent, but encouraged Colgate to look at what other schools, such as Howard and Wesleyan, had done. The district court stated that many of Colgate's reasons for not elevating the women's teams, such as it is not played regularly on the secondary level and the NCAA does not sponsor a championship, and there is a lack of student interest and ability, are a pretext for discrimination. *Id.* at 749. While hockey is inexpensive, in 1990-91, Colgate spent about $655,000 on men's varsity sports and about $219,000 on women's, or 25% of the budget. *Id.* at 742. Further, Colgate University gave men's ice hockey fifty times the financial support that women's ice hockey received. *Id.* at 744. The district court stated that "[t]he men's (sic) ice hockey players at Colgate are treated as princes. The women's ice hockey players are treated as chimney sweeps." *Id.* at 745.

68. *Cook v. Colgate Univ.*, 992 F.2d 17, 20 (2d Cir. 1993). The court stated that these plaintiffs may not litigate the claims of students unnamed and underrepresented in this action.

69. In a class action, however, an order specifically requiring an institution to maintain a team may go further than necessary to correct a Title IX violation. In a class action, the more appropriate remedy might be to enjoin men's competition until a compliance plan is presented. *Roberts v. Colorado State Bd. of Agriculture*, 998
in *Cohen v. Brown University* did when they brought suit on behalf of "all present and future Brown University women students and potential students who participate and/or are deterred from participating in intercollegiate athletics funded by Brown."70

In July 1993, the Court of Appeals for the Tenth Circuit held that Colorado State University ("CSU") violated Title IX, when it discontinued women's varsity fast pitch softball, in *Roberts v. Colorado State Board of Agriculture*.71 The plaintiffs, CSU students and former members of the varsity fast pitch softball team, sued when the team was discontinued. The district issued a permanent injunction reinstating the team.72

The Tenth Circuit stated that the ultimate burden lies with the plaintiffs to show that they have been excluded from participation in, or denied benefits of, an athletic program on the basis of sex, under Title IX.73 The circuit court stated that an institution may violate Title IX's regulations by failing to effectively accommodate the interests and abilities of student athletes.74 The court then analyzed the Policy Interpretation's three-prong test and concluded that none of the prongs were satisfied.75 Therefore, the permanent injunction reinstating the program was upheld.76

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70. *Cohen v. Brown Univ.*, 991 F. 2d 888, 893 (1st Cir. 1993) (Cohen II). This case also was certified as a class action.

71. 998 F.2d 824 (10th Cir. 1993) *cert. denied*, 510 U.S. 1004 (1993). Colorado State University was the defendant, but not a party to the appeal. Colorado State Board of Agriculture, charged with the general control and supervision of Colorado State University, is in financial control of CSU and is apparently the only entity capable of being sued under state law. *Id.* at 826, note 1.

72. 814 F.Supp. 1507. (date?)

73. 998 F.2d at 831 (citing 20 U.S.C. § 1681 (a)). *See supra* note 7 and accompanying text.

74. *Id.* at 828 (citing 34 C.F.R. section 106.41(c)). *See supra* note 20 and accompanying text.

75. 998 F. 2d at 829, *citing* 44 Fed. Reg. 71, 418. *See supra* note 38 and accompanying text. The defendant could not take shelter in the safe harbor of substantial proportionality as the disparity between enrollment and athletic participation for women was 10.5%. The second prong, a history and continuing practice of expansion in women's athletics was not met, as three women's sports had been dropped and women's participation opportunities had dropped 34% in the last 12 years. *Id.* at 830. The heart of the controversy is the meaning of the third prong, full and effective accommodation of interests and abilities, but this was not met, either. *Id.* at 831-32.

76. 998 F.2d 824. The team does not need to be sustained indefinitely; however, (citing *Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993) and United States v. Swift & Co., 286 U.S. 106, 114 (1932)), *see supra* notes 64-67 and accompanying text, when all the plaintiffs have transferred or graduated, the defendant could return to court to
In October 1993, the Court of Appeals for the Third Circuit upheld a preliminary injunction requiring the reinstatement of women’s varsity field hockey and gymnastics in *Favia v. Indiana University of Pennsylvania*. When IUP announced plans to discontinue four varsity athletic programs—two men’s and two women’s—a class action lawsuit was brought on behalf of women athletic program participants and all present and future IUP women students or potential students who participate, seek to participate, or are deterred from participating in intercollegiate athletics. The plaintiffs claimed that the planned elimination of the women’s teams violated Title IX. The district court held that none of the Policy Interpretation’s three prongs was fulfilled, and “a cash crunch is no excuse.” A preliminary injunction was granted. IUP sought a modification to allow women’s soccer to replace gymnastics, but the district court denied this change.

In 1990-91, 56% of the IUP student population was female, while 38% of the student athletes were female. After the program cutbacks, 37% of the student athletes were female. Twenty-one percent of athletic scholarships were awarded to women, and for each $8.00 spent on men’s athletics, $2.75 was spent on women. According to the district court, “[t]he statistics speak for themselves and make a strong case for the women plaintiffs.” IUP argued that if it were allowed to add women’s soccer, which fields a larger team than gymnastics, women’s participation numbers would increase. Nevertheless, according to the Third Circuit, since soccer is a less expensive sport, the funding gap would actually increase and IUP still would not be in compliance. As the district court stated, “[y]ou can’t replace programs with promises.” Thus, the injunction was upheld.

have the injunction dissolved. Or, if the Title IX violation was remedied, then the defendant would no longer have to maintain its softball program. *Id.* at 834.

The Tenth Circuit also held that the district court exceeded its authority in mandating a fall exhibition season. *Id.* at 835.

77. 7 F.3d 332, 333 (3d Cir. 1993).

78. 812 F. Supp. 578, 579 (W.D. Pa. 1993). The cut backs in the men’s teams saved $35,000, while cutbacks in the women’s teams saved $110,000. *Id.*

79. *Id.* at 583-585.

80. *Id.* at 585.

81. *Id.* at 581. In addition, five males had paid memberships to a local county club, and several male coaches had courtesy cars. A drawing for a scholarship was conducted at halftime of the men’s basketball game. *Id.*

82. 7 F. 3d at 343. Adding the proposed soccer team would raise women’s participation to 43%, which is still not in compliance. *Id.*

83. 812 F.Supp. at 585.
The Court of Appeals for the Seventh Circuit decided in 1994 that the University of Illinois’s decision to terminate the men’s swimming program, while retaining the women's swimming program, did not violate Title IX, in *Kelley v. Board of Trustees*. In 1993, the university cut four varsity athletic program’s, men’s swimming, men’s fencing, and men’s and women’s diving. In 1982, the Office for Civil Rights had determined that the University of Illinois was not in compliance with Title IX concerning female student athletes’ opportunities, and the university represented that it would remedy the disparity within a reasonable time. A decade later, however, women comprised 44% of the student body but 23% of intercollegiate athletes. Therefore, according to the Seventh Circuit, the decision to cut the men’s swimming team while retaining the women’s team was a reasonable response to the regulation and the Policy Interpretation.

The Court of Appeals for the Sixth Circuit in 1994 reversed a summary judgment in the defendant’s favor when female high school student athletes sued the Kentucky State Board of Education and the Kentucky High School Athletic Association (KHSAA) alleging discrimination under Title IX. The KHSAA sanctioned 18 sports, 10 for boys and 8 for girls; boys’ baseball and girls’ slow pitch softball were both sanctioned. Plaintiffs filed suit, claiming that fewer sanctioned sports deny equal athletic opportunities, and that refusing to sanction girls’ fast pitch softball disadvantages their ability to compete for college scholarships, as only fast pitch, not slow pitch, is sanctioned by the NCAA. The Sixth Circuit held that under Title IX, the regulations, and the Policy Interpretation, there is a genuine issue of whether the defendants were in compliance. Thus, the summary judgment was reversed in *Horner v. Kentucky High School Athletics Association*.

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84. 35 F.3d 265 (7th Cir. 1994), cert. denied, 115 S. Ct. 938 (1995). Plaintiff’s Fourteenth Amendment equal protection claim also failed. *Id.* at 273.


86. *Horner v. Ky. High School Athletic Ass’n.*, 43 F.3d 265 (6th Cir. 1994). The plaintiffs also raised an equal protection claim, but the defendants’ summary judgment was upheld on that claim. *Id.* at 268.

87. *Id.* at 276, 277. The dissent stated that the burden is on the plaintiff to prove unmet interest. Since the record is silent on these issues, the dissent would affirm the summary judgment.
The district court in *Pederson v. Louisiana State University* found that LSU did not comply with Title IX in January 1996.\textsuperscript{88} The suit was initially filed in 1994 by female students requesting an affirmative injunction ordering LSU to field intercollegiate varsity women's fast pitch softball\textsuperscript{89} and soccer teams. A second case was consolidated, and the district court certified a class of those LSU female students who have sought to participate in varsity intercollegiate athletics since 1993 but were not allowed as LSU failed to field teams. All plaintiffs alleged unequal treatment of female varsity athletes, but the district court stated that the complaint fails to allege that any plaintiff participated in varsity sports at LSU. Therefore, these plaintiffs lack standing on this issue. The plaintiffs also alleged that they were ineffectively accommodated by their inability to participate.\textsuperscript{90} The district court found interest and ability to participate in fast pitch softball.\textsuperscript{91}

Perhaps the most interesting area of the *Pederson* case, which found LSU did not comply with Title IX,\textsuperscript{92} is the district court's reluctance to find the "safe harbor" in the first prong of the Policy Interpretation that the First Circuit in *Cohen v. Brown University*,\textsuperscript{93} the Tenth Circuit in *Roberts v. Colorado State Board of Agriculture*,\textsuperscript{94} and the Sixth Circuit in *Horner v. Kentucky High School Athletics Association*\textsuperscript{95} found. To use this safe harbor, one

\textsuperscript{88} Pederson v. Louisiana State University, 912 F. Supp. 892 (D. LA. 1996). According to the district court, the violations were not intentional, but rather the result of "arrogant ignorance," confusion regarding the law, and a remarkably outdated view of women and athletics. *Id.* at 913.

\textsuperscript{89} Women's fast pitch softball was added in 1979 but dropped in 1983. In 1993, two women's teams, fast pitch softball and soccer, were to be added in 1995, but have yet to be fully implemented. *Id.* at 901.

\textsuperscript{90} Trial on the merits on this issue was held in October 1995. *Id.* at 900.

\textsuperscript{91} *Id.* at 915-916. The court noted that the existence of one or two students with interest and ability would probably not be sufficient, but the plaintiffs in the consolidated case were able to show sufficient interests and abilities on campus to field a varsity women's fast pitch softball team. The original plaintiffs' did not have standing, so their claims were dismissed with prejudice. *Id.* at 908.

\textsuperscript{92} *Id.* at 913. The district court found that LSU presented no credible evidence to establish interests and abilities of its student body; LSU has been "ignorant of the interests and abilities of its student population." The district court, at note 61, set forth numerous ways that LSU or any institution could be added or elevated: participation in club or intramural sports, interviews, or questionnaires. LSU also failed to demonstrate a history and practice of expanding women's athletics under the second prong.

\textsuperscript{93} 991 F. 2d 888 (1st Cir. 1993).

\textsuperscript{94} 998 F. 2d 824 (10th Cir. 1993) cert. denied, 510 U.S. 1004 (1994). See infra notes 67-72 and accompanying text.

\textsuperscript{95} 43 F.3d 265 (6th Cir. 1994). See infra notes 82-83 and accompanying text.
must assume that interest and ability to participate in sports exists between all men and women on all campuses, according to the district court in Pederson, and the district court found no evidence of this. 96

In summary, the circuit court of appeals decisions leading up to Cohen v. Brown University 97 upheld Title IX's regulatory scheme. Only a district court decision in Pederson v. Louisiana State University, 98 while finding a Title IX violation, did not follow the regulatory interpretation of Title IX.

COHEN V. BROWN UNIVERSITY

In May 1991, Brown University reduced four teams, two men's and two women's teams, from varsity to intercollegiate club status. 99 Prior to this, Brown had thirty-one varsity teams, sixteen men's and fifteen women's. Before the cuts, 63% of varsity student athletes were men and 37% were women; 52% of the undergraduate students were male, while 48% were female. 100 After the cuts, the participation rates remained essentially the same.

Brown, like many universities, faced budget cuts. As a result, it proposed to cut funding for four varsity sports: women's volleyball, women's gymnastics, men's water polo, and men's golf. These teams were still able to participate in intercollegiate competition if they would raise the funds on their own. These cuts would have saved Brown $77,800 per year; however, 80% of the budget cuts came from the women's teams. 101

The plaintiffs are student members of the women's gymnastics and volleyball teams. They initiated a class action in Cohen I and charged Brown with discriminating against women in their intercollegiate athletics program, violating Title IX. 102 Plaintiffs asserted that since Brown receives federal financial assistance,

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97. 101 F. 3d 155 (1st Cir. 1996).
100. Id. at 981.
101. Id.
102. Id. at 979. The class consisted of all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown.

http://repository.law.miami.edu/umeslr/vol14/iss2/2
their athletic program is subject to Title IX.\textsuperscript{103} Pursuant to Title IX, plaintiffs allege that Brown's actions of demoting the women's teams exacerbated its discriminatory treatment of women, and failed to provide women with equal opportunities to compete, and to effectively accommodate the interests and abilities of one sex.\textsuperscript{104}

Plaintiffs requested a preliminary injunction to restore the two women's teams to full varsity status. Fourteen days of testimony was heard, including twenty witnesses. At the time of Cohen I in 1992, the district court judge stated that these were novel issues and that there was virtually no case law on point.\textsuperscript{105} Plaintiffs cited only the lower court decisions in \textit{Cook v. Colgate University}\textsuperscript{106} and \textit{Favia v. Indiana University of Pennsylvania},\textsuperscript{107} as these were the only cases on point at that time.

Plaintiffs allege that Brown met none of the prongs of the Policy Interpretation's three-part test.\textsuperscript{108} Under the first prong, at no time has the percentage of women participating in intercollegiate athletics been substantially proportionate to the percentage of women undergraduate students at Brown.\textsuperscript{109} Under the second prong, all of the women's sports except one were added between 1971, when Pembroke College merged with Brown University, and 1977. In 1982, winter track was added, and in 1994, after Cohen I, another women's sport was included. Notably, a request to elevate women's fencing to varsity status was denied two times. Thus, the plaintiffs allege that the second prong is not met either. Plaintiffs also contend that Brown fails the third prong—effective accommodation of interests and abilities.\textsuperscript{110}

In their defense, Brown asserted that the plaintiffs' interpretation of Title IX is too simplistic and that the statute, the implementing athletic regulations, and the Policy Interpretation must

\begin{footnotes}
\footnotetext[103]{20 U.S.C. § 1681 (a) (1994). \textit{See supra} note 7. Brown acknowledged that it receives federal assistance, but neither admits or denies that its athletic program is covered by Title IX. Cohen I at 982.}
\footnotetext[104]{Cohen I at 980, 985.}
\footnotetext[105]{Cohen I at 980.}
\footnotetext[106]{802 F.Supp. 737 (N.D.N.Y. 1992). \textit{See supra} notes 61-64 and accompanying text.}
\footnotetext[107]{812 F.Supp. 578 (W.D. Pa. 1993). \textit{See supra} notes 73-79 and accompanying text. The judge in Cohen I stated that the facts in Favia were striking similar to the facts in Cohen I. Cohen I at 986.}
\footnotetext[108]{\textit{See supra} note 38 and accompanying text.}
\footnotetext[109]{Cohen I at 985. The district court noted that this analysis assumes that participation rates accurately reflect opportunities. This is the same assumption that the district court judge in 1996 noted in Pederson v. Louisiana State University. \textit{See supra} notes 84-88 and accompanying text.}
\footnotetext[110]{Cohen I at 985-87.}
\end{footnotes}
be read as a whole. For example, all ten factors under the implement-menting regulation must be considered, not just equal opportu-nity.111 Brown asserted that opportunity, not participation, is the crucial factor for compliance, since the statute itself precludes preferential treatment to members of one sex.112 Brown's second argument is that it is effectively accommodating the interests and abilities of its students. For example, Brown offers one of the highest number of men's and women's teams at the NCAA and Ivy League level.113 Any disparities are not discriminatory, but rather, merely reflect varying interests and abilities. Finally, Brown alleges that the change in status is not legally significant as it affects more men than women.114

The district court stated at the outset that there are no simple tests to apply. The judge also recognized that the Policy Interpre-tation and the OCR Athletics Investigator's Manual do not carry the force of law or establish controlling standards, but the former, and to a lesser extent the latter, are important guides, and the dispute to a large extent revolves around differing interpretations of the documents.115

The court initially had to determine whether a Title IX viola-tion may be based upon the first of the ten components of the ath-letic regulation, or whether the analysis was program-wide as the defendants contend. The court stated that while the language is not conclusive, a violation of Title IX may be found under the first policy component only; to wit: effective accommodation.116 The court then applied the two parts of the test for this area, the three-prong test, and the two-prong test for levels of competition, and found that the plaintiffs were substantially likely to prevail on the

111. 34 C.F.R. § 106.41(c). See supra note 21 and accompanying text.
113. Cohen I at 988. Brown's athletic director claimed in 1995 that Brown was indisputably among the nation's half-dozen best universities for women's sports, and ranks in the top one percent of all intercollegiate programs in terms of women's participation. Marvin Lazerson and Ursula Wagemer, Missed Opportunities: Lessons from the Title IX Case at Browns, 28 CHANGE 46, 47 (1996).
114. Cohen I at 988.
115. Id. Due to the scarcity of case law at the time of Cohen I, both parties rely on both documents.
116. Cohen I at 989. The Manual itself states that an investigation may be limited to less than all three areas of the regulation. Also, not every institution may be evaluated in all areas. Brown, as other Ivy League schools, does not offer athletic scholarships.
merits.\textsuperscript{117} Since there was a strong likelihood of irreparable harm,\textsuperscript{118} the public interest is served by the court granting injunctive relief to restore women's gymnastics and volleyball to their prior fully-funded varsity status\textsuperscript{119} as well as to prohibit the elimination or reduction of any existing women's varsity team. If a violation of Title IX is found at the trial on the merits, the court would leave it up to Brown to devise a plan consistent with Title IX.\textsuperscript{120}

On appeal to the Court of Appeals for the First Circuit, the court in \textit{Cohen II} held that the trial judge did not abuse discretion by issuing the injunction in this "watershed case."\textsuperscript{121} The circuit court stated that equal opportunity to participate lies at the core of Title IX's purpose and agreed that this area of the regulation may be violated even if the other areas are met. Brown's view is wrong as a matter of law and public policy, as the Policy Interpretation draws its essence from the statute, and according to the court, the test as a whole is reasonably construed to implement the statute.\textsuperscript{122} The injunction was proper as plaintiffs have a likelihood of success,\textsuperscript{123} there is a potential for irreparable harm and

\textsuperscript{117} Cohen I at 995-997. The operating expenses for women's sports at Brown were 29% of the operating budget. Women's sports received 22% of recruiting money, and received 28% of coaches salaries. There was testimony that women's field hockey did not have enough uniforms while men's ice hockey got new uniforms every year or two; women's gymnastics didn't even have a sufficient budget to provide a leotard for each competitor. Locker rooms and publicity were not equivalent. Four men's teams had a total of eleven courtesy cars, and as of 1990, no women's team had a car, although one has been added subsequently. \textit{Id.} at 995-97.

\textsuperscript{118} The area of irreparable harm included recruiting, competition, and staffing. \textit{Id.} at 997-98.

\textsuperscript{119} This includes: funding the two teams at the 1990-91 level; providing coaching staff, uniforms, equipment, facilities, publicity, travel and other incidentals; and providing an on-campus office and support for the coaches. \textit{Id.} at 1001.

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} 991 F.2d 888, 891 (1st Cir. 1995) (Cohen II). At the time of Cohen II, the appeals courts had not yet ruled in Roberts v. Colorado State Univ., see supra notes 67-72 and accompanying text, and Cook v. Colgate Univ., see supra notes 61-64 and accompanying text.

\textsuperscript{122} Cohen II at 899-900. Brown is also incorrect, according to the court, in arguing that the test violates the Fifth Amendment's equal protection clause, citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). The court stated that Congress has broad powers under the Fifth Amendment to remedy past discrimination. Nor is the injunction affirmative action as argued by Brown, as the federal judiciary has power to grant any appropriate remedy pursuant to a federal statute. Cohen II at 901.

\textsuperscript{123} The district court, according to the circuit court, paid meticulous attention to this point. Under the first prong of the three-part test, Brown did not closely approach proportionality. While many universities struggle to meet this prong, Washington State had success in this area when so ordered by a court. Blair v.
balancing the harms, and it is in the public interest to grant injunctive relief to enforce Title IX.\textsuperscript{124}

A thirty day trial on the merits was held in December of 1994; during the trial the parties reached a settlement agreement which settled the plaintiffs' allegations that significant disparities existed in the relative financial support of and benefits given to men's and women's university-funded varsity teams.\textsuperscript{125} Between Cohen \textit{II} and Cohen \textit{III}, the Third,\textsuperscript{126} Sixth,\textsuperscript{127} Seventh,\textsuperscript{128} and Tenth\textsuperscript{129} Circuit courts of appeals rendered Title IX decisions in accord with the First Circuit's decision in Cohen \textit{II}.\textsuperscript{130}

The district court's decision in Cohen \textit{III} addressed whether Brown University effectively accommodated the interests and

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\textsuperscript{125} Cohen v. Brown Univ. 879 F.Supp. 185, 192-93 (D.R.I. 1995). The settlement agreement covered items 2-10 under the implementing regulation, 34 C.F.R. § 166.41(c) (2-10). See \textit{supra} note 21 and accompanying text.

\textsuperscript{126} Favia v. Indiana Univ. of Pa., 7 F.3d 332 (3d Cir. 1993). See \textit{supra} notes 73-79 and accompanying text.

\textsuperscript{127} Horner v. Ky. High School Athletic Ass'n., 43 F.3d 265 (6th Cir. 1994). See \textit{supra} notes 82-83 and accompanying text.

\textsuperscript{128} Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994), cert. denied, 115 S.Ct. 938 (1995). See \textit{supra} notes 80-81 and accompanying text.

\textsuperscript{129} Roberts v. Colorado State Bd. of Agriculture, 996 F.2d 824 (10th Cir. 1993), cert. denied, 510 U.S. 1004 (1993). See \textit{supra} notes 67-72 and accompanying text.

abilities of women students under the athletic regulation and the Policy Interpretation. Pursuant to the district court, in order to determine compliance with this factor, the subject of the lawsuit requires application of the three-prong test. 

The first prong of the test is substantial proportionality. To this end, during the latter part of 1993-94, the last complete season before Cohen III, women made up 38% of varsity athletes, a 13% disparity between athletic participation rates and female student enrollment. This "safe harbor" allows for the possibility of minor fluctuations in participation rates, but the gender balance was far from substantially proportionate to student enrollment.

The second prong of the test deals with the history and continuing practice of program expansion. In this regard, while Brown University has a history of program expansion, it does not have a continuing practice of intercollegiate athletic program expansion for women, the underrepresented sex. The third and final prong examines the full and effective accommodation of the underrepresented sex. The district court found that Brown failed to comply with this prong in two respects. First, Brown has failed to elevate a team with interest and ability from club to varsity

131. Cohen v. Brown Univ., 879 F.Supp. 185, 199 (D.R.I. 1995) (Cohen III). The district court first stated that it was not bound by factual determinations in Cohen I and II, but was bound by legal determinations of the First Circuit in Cohen II. This second point, raised by the defense, was merely academic, as the district court was in accord with the First Circuit. Id. at 193-94.

132. The district court further stated that it must abide by the Policy Interpretation unless it was clearly erroneous or inconsistent with the implementing regulation. The Policy Interpretation is not a rule or regulation, but rather a guideline to interpret a regulation. Id. at 199. The defense was incorrect in arguing that the Policy Interpretation contravenes the intent of Title IX, according to the court in Cohen III; the three-prong test does not mandate statistical balancing, as there are two other prongs which may be complied with. Id.

133. The First Circuit in Cohen II did not define participation opportunities, so the district court in Cohen III defined it as participation rates. Cohen III at 203.

134. Cohen III at 211. Defendants made numerous arguments concerning prong one. Defendants attempted to apply Title VII employment law. Under Title VII, the relevant population is the "qualified applicant pool," so under Title IX, according to Brown, the relevant population should consist only of those men and women who might be both interested and able to participate in varsity athletics. The district court disagreed, rejecting defendants' alternative interpretation of prong one. The court stated that each of the potential survey pools were inappropriate. The pool of matriculated students is not broad enough. The pool of actual Brown applicants is also inappropriate, because applicants interested in a sport not offered at Brown may not apply. Academically able potential varsity participants is also not the appropriate pool, according to the district court; athletic participants are to be measured. Cohen III at 201-207.

135. Cohen III at 211.
status. The second basis for a violation under the third prong is a new application which arises because Brown has two tiers of varsity sports: university-funded and donor-funded. This violation arises because the district court found that Brown maintains two women's sports at the donor-funded level, which keeps women from reaching their full athletic potential, when they have the interest and ability to operate as a university-funded varsity team. This tiered athletic program structure cannot be used to shield the university from liability for not effectively accommodating the women athletes on donor-funded teams.

Finding Brown University in violation of Title IX, the district court has the authority to mandate specific relief. The court stated that Title IX does not require an institution to provide any athletic opportunities to its students. However, if the institution does in fact provide opportunities, it must provide them equally. The judge reiterated that the court had no desire to micro-manage Brown's athletic program, declaring that the situation warranted judicial restraint. Brown was ordered to submit a comprehensive plan for complying with Title IX. The court held that there were several ways to achieve compliance: eliminate the athletic program altogether; elevate or create women's positions; demote or reduce men's programs; or a combination. The preliminary injunction would remain in effect in the meantime.

Brown submitted a plan to the district court which was rejected as not being comprehensive and not complying with

136. Women's water polo could have been elevated from club to varsity status, and women's gymnastics, although technically a donor-funded varsity sport, will cease to exist without university funding. Cohen III at 212.

137. Cohen III at 212-13. Brown argued that it could accommodate less than all of the interested and able women if, on a proportionate basis, it accommodates less than all of the interested and able men. The district court found this argument to be inconsistent with the law, poor policy, and a logistical quagmire. Id. at 200. This would make it more difficult to ensure that institutions have complied with Title IX, as more assessments and surveys would need to be done, an insurmountable task. Id. at 209-210.

138. Cohen III at 213. This also gives rise to additional grounds for a Title IX violation: the equal treatment factors under the regulation, 34 C.F.R. § 106.41(2) - (10). See supra note 21 and accompanying text. Far more male athletes at Brown are supported at the university-funded level than are female athletes, and there are qualitative differences between the two levels. Donor-funded teams are not provided with equivalent treatment in at least the following program components: equipment and supplies; travel and per diem; opportunity to receive coaching; assignment and compensation of coaches; and training services.


140. Id. at 214.
Cohen III. Brown’s plan stated that its sole goal was to achieve proportionality, but to do so, Brown must disregard advantages expressed of one gender while providing advantages to the other. Instead, Brown stated that it would prefer to keep its current program, and that plan is inconsistent with Brown’s proposed philosophy. The plan had numerous provisions, including minimum and maximum team sizes, and for new university-funded junior varsity women’s teams. However, no additional discretionary fund would be used. If this was not sufficient, one of the men’s teams could be eliminated. The district court found this plan to be fatally flawed for two reasons. First, the plan disregards donor-funded varsity teams. Second, the plan artificially boosts women’s numbers by adding junior varsity positions. Thus, the district court found that Brown had not made a good faith effort, and ordered Brown to elevate and maintain four women’s teams at university-funded varsity status. This was stayed pending appeal, but the preliminary injunction remained in effect.141

On appeal to the First Circuit in Cohen IV, the majority affirmed; specifically, the court found no error in the district court’s factual findings or in its interpretation and application of the law in determining that Brown violated Title IX in the operation of its intercollegiate athletics program. The appeals court, however, did find error in the district court’s award of specific relief, and remanded to allow Brown to submit a further plan; the preliminary injunction remained in effect.142

Brown’s appeal consisted of its previous statutory and constitutional claims, plus, due to a Supreme Court decision143 rendered between Cohen II and Cohen IV, the First Circuit was free to disregard the prior panel’s explication of the law. The First Circuit disagreed under the doctrine of the “law of the case,” where a deci-

142. Id. at 187-88, The First Circuit agreed that Brown’s plan fell short of a good faith effort to comply with Title IX. Indeed, “the plan is replete with argumentative statements more appropriate for an appellate brief.” The court of appeals stated that it is obvious that the plan was addressed to this court. The circuit court’s respect for academic freedom and reluctance to interject itself into the conduct for university affairs were factors in reaching this conclusion. In addition, two things had changed. First, the substantive issues have been decided and Brown is no longer an appellant. Second, the time constraints have been alleviated as an appeal is no longer pending.
143. Adarand Constr., Inc. v. Pena, 115 S.Ct. 2097 (1995). Brown’s argument that Adarand Controls assumes that Adarand is a contrary intervening authority on point that undermines the validity of Cohen II, which compels the First Circuit to depart from the law of the case doctrine, and mandates the appeals court to reexamine Brown’s equal protection claim. The First Circuit disagreed. See infra note 149 and accompanying text.
sion on an issue of law made by a court at one stage of a case becomes binding precedent to be followed in successive stages of the same litigation except in unusual circumstances. The exceptions to the “law of the case” are rare: the evidence at a subsequent trial was substantially different; the controlling authority has since made a contrary decision of law applicable to such issues; or the prior decision was clearly erroneous and would work a manifest injustice. The First Circuit concluded that no such exception applied and that Cohen II's holding controlled.

On appeal, Brown argued that the district court’s interpretation and application of the three-prong test was irreconcilable with the Title IX statute, the regulation, and the Policy Interpretation, and as a result, effectively rendered Title IX as an affirmative action statute. The First Circuit disagreed; Title IX is not an affirmative action statute modeled after another anti-discrimination statute, Title VI of the Civil Rights Act of 1964. Instead, like other anti-discrimination statutory schemes, Title IX and its enforcement regime permit, but do not require, affirmative action. The First Circuit reiterated that the regulation deserved controlling weight and that the Policy Interpretation warranted substantial deference. The court held that the three-part test was consistent with the statute. In any event, Brown's challenge was foreclosed by the law of the case doctrine.

On appeal, Brown also claimed that the district court erred in failing to apply Title VII standards. The appeals court disagreed.

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144. Cohen, 101 F.3d 167 (1st Cir. 1996) (Cohen IV) (citing 1B JAMES W. MOORE'S FEDERAL PRACTICE ¶0.404[1] (2d ed. 1993)).
145. Id. at 168, concluding that the First Circuit has narrowly limited this exception to Supreme Court opinions, en banc opinions of the First Circuit, statutory overrulings, or those rare situations where newly emergent non-controlling authority offers a convincing reason for believing that the earlier panel would change its course.
146. Id. at 169. The appeals court stated that Brown offered “remarkably little" analysis or authority to support its contention that an exception to the law of the case applies. In fact, according to the First Circuit, Brown argues as if the prior panel had not ruled on the law, which it did, and as if the district court's analysis was contrary to Cohen II, which it was not.
147. True affirmative action cases have historically involved a voluntary undertaking to render discrimination by means of specific group-based preferences or numerical goals, and a specific timetable for achieving those goals. Id. at 170, citing Adarand Constr., Inc. v. Pena, 115 S.Ct. 2097 (1995).
149. Cohen, 101 F.3d at 182-183 (Cohen IV). Brown's approach cannot withstand scrutiny on legal or policy grounds. Brown's interpretation of the three-part test, according to the Circuit Court, is a one-part test for strict liability.
however, stating that athletics, which has some gender-segregated teams, differs from admissions and employment, which are analyzed under Title VII. Concerning Brown’s contention that the disparity in athletic opportunities results from a gender-based differential in the level of interest in sports, the court stated that interest and ability rarely develop in a vacuum; rather, they are a function of opportunity and experience.

Brown’s equal protection challenge to the Title IX statutory scheme was also rejected by the court of appeals, despite the intervening Supreme Court decision in Adarand. The First Circuit stated that Adarand was limited to race-based classifications under legislative affirmative action schemes; Adarand does not even discuss gender discrimination.

Brown also claimed that the district court erred in excluding evidence of relative athletic interests. The Court of Appeals, however, stated that the evidence was before the trier of fact through expert testimony, and therefore any error was harmless.

The majority of the First Circuit concluded that there can be no doubt that Title IX has changed women’s sports, as well as society’s interest in and society’s attitude toward women athletes and women’s sports. The impressive performances of the United States women’s athletes in the 1996 Olympic Games was cited as an example of how Title IX had a dramatic and positive impact on the capabilities of women athletes.

The dissent in Cohen IV differed from the majority on several issues. First, under the “law of the case,” the intervening Supreme Court decision of Adarand is irreconcilable with

150. Cohen IV., at 177.
151. Id. at 179. Brown’s argument was viewed by the court “with great suspicion”, and was deemed “of no consequence.” Id. at 178-9. This argument ignores the fact that Title IX was enacted in order to remedy discrimination resulting from stereotyped nations of women’s interests and abilities. The tremendous growth in women’s participation in sports since Title IX disproves Brown’s argument that women are less interested in sports, according to the court in Cohen IV. Id. at 180.
152. See supra note 118 on Brown’s equal protection claim in Cohen II.
154. Cohen, 101 F.3d at 183 (Cohen IV). Brown’s equal protection challenge rests upon at least two erroneous assumptions, according to the court. First, Adarand is controlling authority that compels the court to apply strict scrutiny. Second, the application of the law by the district court in Cohen III is inconsistent with Cohen II. Therefore, Brown’s equal protection claim again failed.
155. Id. at 185.
156. Id. at 188. The athletes themselves have acknowledged the beneficial effect that Title IX has had on women’s sports.
157. Id. at 188 (Torruella, J., dissenting).
Cohen II and must be followed in Cohen IV. At the time of Cohen II, the standard intermediate scrutiny test for discriminatory classification based on sex required that a statutory classification be substantially related to an important government objective. Under intermediate scrutiny before Adarand, courts sometimes allowed benign gender classifications as a reasonable means of compensating women as a class for past discrimination. This was done under the 1990 Supreme Court decision of Metro Broadcasting, Incorporated v. FCC, a case based upon racial classifications. Metro Broadcasting, however, has been overruled, at least in part, by Adarand, according to the dissent in Cohen IV. The Supreme Court in Adarand held that all racial classifications must be analyzed under strict scrutiny, as it may not always be clear that a preference is benign. Thus, the dissent argued that the court in Cohen IV should follow Adarand, subjecting all gender-conscious government action to the same inquiry.

A second 1996 Supreme Court decision, United States v. Virginia, also required the First Circuit to review its decision in Cohen II according to the dissent in Cohen IV. In Virginia, a gender-based case, the Supreme Court applied a more searching “skeptical scrutiny” standard, instead of the traditional test that gender classifications be “substantially related” to an important government objective. Therefore, because Adarand and Virginia, were not followed, the dissent argued that Cohen II was flawed.

The binding authority of Cohen II is also lessened because it is only an appeal from a preliminary injunction, which examines probable outcomes, rather than the ultimate law of the case. Thus, according to the dissent in Cohen IV, the First Circuit must review the findings of fact under a clearly erroneous standard and the findings of law de novo.

159. Cohen, 991 F.2d at 901 (Cohen II).
162. Id. at 190. Absent a judicial inquiry into the justification for such race-based measures, there is simply no way of determining which classifications are benign and which classifications are, in fact, motivated by illegitimate notions of racial inferiority or simple rational politics. Adarand, 115 S.Ct. at 2112-3.
163. 116 S. Ct. 2264 (1996). In this case, the Supreme Court held that the Virginia Military Institute, a state-sponsored all-male institution, must admit women.
164. Id. at 2274.
165. Cohen IV at 192.
Reviewing the district court's construction of the three-prong test, the dissent in Cohen IV states that the interpretation by the district court of prongs one and three creates an Equal Protection problem. First, the district court's interpretation constitutes an affirmative action, quota based scheme. Second, even assuming that the quota scheme is otherwise constitutional, there is no "exceedingly persuasive justification" of the scheme under Virginia.

Under the first prong, due to the regulation on contact sports, the dissent would remove contact sports from the calculation of participation ratios. These contact sports field very large teams, and by removing these numbers, Brown might be in compliance. The district court's interpretation of the second prong, according to the dissent, implies that an institution must not only demonstrate that the proportion of women in their program is growing over time, but it must also show that the absolute number of female participants is increasing. A school facing budgetary cuts must still increase women's opportunities, even if it cannot afford to do so. The dissent stated that the purpose of the regulations is to protest against discrimination, not increase athletics. It is not for the courts or the legislature to mandate programs of a given size. The third prong, according to the dissent, is subject to at least two interpretations. To fully accommodate the interests and abilities of the underrepresented sex under the district court's definition is an extraordinarily high, perhaps impossibly high, standard. The dissent agrees with Brown's interpretation, that the institution must meet the underrepresented sex's unmet reasonable interest and ability as fully as it meets those of the overrepresented sex.

166. Id. at 197.
167. Virginia at 2274.
169. Cohen at 192 (Cohen IV). This assumes that participation rates are a reasonable measure of participation opportunities, which the dissent also does not agree with.
170. Cohen IV at 194. In addition, 20 U.S.C. §1681 (1994), see supra note 7-13, casts doubt on the district court's interpretation of the third prong, as the statute contains language that prohibits the ordering of preferential treatment on the basis of sex. Reviewing the three prong test, the first prong mandates statistical balancing. The second prong requires the institution to show that it is moving in the direction of the first prong, and thus also requires balancing. The third prong dispenses with statistical balancing only because it accords zero weight to one side of the balance. This goes farther than the quota of the first prong and requires complete accommodation of the underrepresented sex, according to the dissent. Id. at 196.
The dissent also questioned the majority's refusal to accept surveys of interest levels as evidence of unmet interest. The majority, however, offers no guidance to an institution seeking to assess interest level.

The dissent concluded that Brown is a private institution with a constitutionally protected First Amendment right to choose its curriculum, including athletics. Although the First Amendment cannot be used to justify discrimination, the majority straight-jackets college athletic programs by curtailing their freedom to select sports. Virtually every other aspect of college life is entrusted to the institution except athletics, and the university is no longer in full control of its programs.

**Conclusion**

*Cohen v. Brown University* sends a strong message that colleges and universities must comply with Title IX's requirements concerning intercollegiate athletics. Courts of appeals have consistently applied and upheld Title IX's regulatory regime in intercollegiate athletics. Numerous settlements, including those at the University of Oklahoma, Temple University, William and Mary College, the University of Bridgeport (Connecticut), Amherst, the University of New Hampshire, the University of California System, the University of Texas at Austin, Cornell, and others.

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171. Id. at 197. Brown was not allowed to introduce the NCAA Gender Equity Study and the results of an undergraduate poll on student interest in athletics. The majority did not accept this as it might just reflect the result of past discrimination. See supra note 151 and accompanying text.

172. Id. at 198.

173. No. 95-2205 (1st Cir. Nov. 21, 1996) (Cohen IV). See supra notes 139-169 and accompanying text.

174. See supra note 60. At the time of this article, however, the Fifth Circuit Court of Appeals has not ruled in Pederson v. Louisiana State University, 912 F.Supp. 892 (M.D. La. 1992). See supra notes 84-92 and accompanying text. It is possible that the Fifth Circuit may take a different approach over to Title IX's enforcement in intercollegiate athletics as the district court in Pederson did.


176. Sanders v. Univ. of Texas at Austin, Civil No. A-92-CA-405 (W.D. Tex. Oct. 24, 1993). In settling this Title IX class action suit, the university agreed to raise women's participation in varsity athletics from 232 to 447 within three years; women's undergraduate enrollment is 472.

177. Schuck v. Cornell University, Civil No. 93-CV-756 FJ5-GJD (N.D.N.Y. Dec. 8, 1993). The parties settled this suit when Cornell agreed to restore two women's teams that had been terminated, and not to take action that would adversely affect other women's teams.
Auburn University, 178 and Pennsylvania 179 have been favorable to women. Therefore, athletic departments should review the statute itself, 180 its implementing regulations signed by the President, 181 and the Policy Interpretation 182 and its Clarification, 183 which are given deference by courts. This district court judge noted in Cohen I that the judge was rather surprised at Brown's apparent indifference towards Title IX. Brown's athletic director and associate athletic director testified that while they were cognizant of Title IX, they did not review the Title IX statute or implementing regulations when deciding to reduce the four teams. They both further stated that they had not even heard of the Policy Interpretation. 184 Whether an institution or athletic program agrees with the current interpretation or not, 185 Title IX's regulatory scheme is being strictly enforced by the federal courts of appeals. Brown University raised numerous challenges to the current enforcement mechanism for Title IX, and was not successful.

While universities do not have to sponsor intercollegiate athletics, 186 if they do, it is clear after Cohen IV that they must comply with Title IX. To comply, schools may cut men's opportunities,
or elevate women's opportunities. Many institutions have cut or capped men's teams to move towards compliance; since 1982, 99 colleges have eliminated wrestling and 64 have eliminated swimming, and men's gymnastics has dropped from 133 teams to 32 currently.\textsuperscript{187} This author, however, recommends that women's opportunities be expanded to each compliance.\textsuperscript{188} This fulfills the underlying principle of Title IX—increasing opportunities to women.

Noncompliance with Title IX after \textit{Cohen v. Brown University} is not an advisable option for a university sponsoring intercollegiate athletics, as Brown is considered to be among the top universities in the nation for women's sports opportunities.\textsuperscript{189} While some state that the cost of reaching compliance by increasing women's opportunities is expensive, the cost of non-compliance may be more expensive. Brown reportedly spent over half a million\textsuperscript{190} to one million\textsuperscript{191} litigating the case, even though Brown's major outside counsel reportedly represented Brown at half his usual fee,\textsuperscript{192} although this is not confirmed.\textsuperscript{193} It would have cost Brown $62,000 per year to correct the problem when the suit was filed.


\textsuperscript{188} Dr. Lopiano's testimony in Cohen III at 214 states:

\textit{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.} \textit{[T]he whole idea [of Title IX] is to add participation opportunities for women. And it's unfortunate that across the country that in the name of maintaining the standard of living of football team[s] or the standard of living of one or two special men's sports, that men's sports are being cut and women's gender equity under Title IX [is] being blamed for that.}

\textsuperscript{189} See supra note 109. This district court in Cohen III notes, however, that other universities more clearly violate Title IX, and it does not exonerate an institution that provides unequal opportunities for men and women. Cohen III at 189, n. 5.

\textsuperscript{190} Donna Lopiano, \textit{Title IX: It's Time To Live Up to the Letter of the Law}, \textsc{Chronicle of Higher Ed.} 37 (1996). Lopiano states that the Brown lawsuit began after Brown spent $250,000 to buy out the football coach's contract.


\textsuperscript{192} Marvin Lazerson and Ursula Wagener, \textit{Missed Opportunities: Lessons From the Title IX Case at Brown}, 28 \textsc{Change} 46, 48-9 (1996).

according to the plaintiffs' attorney.\textsuperscript{194} Also, universities would normally prefer to develop a plan to bring the university into compliance rather than be under court order to do.

Finally, universities with football programs are usually out of compliance, at least under the first prong of the Policy Interpretation of proportionality.\textsuperscript{195} A partial solution to this problem, although it may not be popular, is for the NCAA to take an active role to help institutions by reducing the maximum football squad size to help with proportionality. The dissent in \textit{Cohen IV} stated that contact sports could be reduced from the equation for proportionality,\textsuperscript{196} although the majority disagreed. The NCAA or conferences could reduce men's squad sizes and grants-in-aid for football and other large squad size contact sports to make reaching compliance easier for athletic programs.\textsuperscript{197}

\textsuperscript{194} This is according to plaintiffs' attorney Arthur Bryant. \textit{Id}. Instead, according to Bryant, Brown has spent a million dollars upgrading women's teams, on top of attorneys' fees. The vice-president for university relations at Brown states that the university is now in compliance, as 48\% of athletes are female, as compared to 52\% of the student body. Jim Naughton, \textit{Appeals Court Confirms Ruling That Brown v. Discriminated Against Female Athletes}, CHRONICLE OF HIGHER ED. A41 (1996).


\textsuperscript{196} See supra note 165 and accompanying text.

\textsuperscript{197} For example, in a cost-cutting move, the Big Sky Conference cut each school's allotment of football grants-in-aid to 45, but the Big Sky presidents rescinded this action.