1995

Title IX: What is Gender Equity

George A. Davidson

Follow this and additional works at: http://digitalcommons.law.villanova.edu/mslj

Part of the Civil Rights and Discrimination Commons, and the Entertainment, Arts, and Sports Law Commons

Recommended Citation

Available at: http://digitalcommons.law.villanova.edu/mslj/vol2/iss1/3

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
TITLE IX: WHAT IS GENDER EQUITY?

GEORGE A. DAVIDSON*
CARLA A. KERR**

I. INTRODUCTION

In the time since Congress enacted Title IX in 1972, women's sports programs developed from small, underfunded and nearly invisible afterthoughts into large and vital components of athletics programs at high schools and colleges. The participation rates of women in varsity athletics more than doubled, and at many institutions the number of varsity sports offered for women approached, reached or even exceeded the number offered for men.

Last year, when colleges and universities finally began to credit themselves for their hard work and investment in achieving a higher level of participation by women despite an increasingly difficult economic environment, everything changed. Three federal

* Brown University A.B. 1964; Columbia University LL.B. 1967; Partner, Hughes Hubbard & Reed, New York.

** Stanford University A.B. 1983; J.D. 1986; Associate, Hughes Hubbard & Reed, New York.


2. ROBERT C. BERRY & GLENN M. WONG, LAW & BUSINESS OF THE SPORTS INDUSTRIES: COMMON ISSUES IN AMATEUR & PROFESSIONAL SPORTS 211 (1986). Prior to 1972, only 15% of collegiate athletes were women and only 5% of high school athletes were women. By the mid-1980's, however, women represented more than 30% of athletes at both the high school and college levels. William E. Thro & Brian A. Snow, Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics, 84 EDUC. L. REP. 611 (1993).

3. Parity in the numbers of men's and women's teams offered has occurred on both the institutional and conference levels. Indeed, in June of 1993, the Southeastern Conference (SEC) passed gender equity legislation requiring member schools to provide two more women's sports than men's sports. Carol Herwig, SEC Schools Seek Gender Equity By Adding Two Women's Sports, USA TODAY, June 4, 1993, at 11C. See Favia v. Indiana Univ. of Pa., 7 F.3d 332, 335 (3d Cir. 1993) ("I.U.P. fielded nine male and nine female varsity athletic teams in intercollegiate competition."); Cohen v. Brown Univ., 991 F.2d 888, 892 (1st Cir. 1993) ("Brown fielded fifteen women's varsity teams — one fewer than the number of men's varsity teams."); OCR Letter of Finding University of Arkansas (1992) (offering seven men's teams and six women's teams); OCR Letter of Finding Mercer University (1991) (offering six men's teams and six women's teams); OCR Letter of Finding Loyola College (1990) (offering seven men's teams and seven women's teams); OCR Letter of Finding University of Nebraska (1989) (offering nine men's teams and eight women's teams).

4. See, e.g., Cohen, 991 F.2d at 898 ("[I]n an era of fiscal austerity, few universities are prone to expand athletic opportunities."); Gonyo v. Drake Univ., 837 F. Supp. 989, 992 (S.D. Iowa 1993) ("Cutting athletic budgets because of total school
courts of appeals’ decisions signaled a “monumental change” in the interpretation of Title IX that put the varsity athletics programs of virtually every college and university in violation of the law. These three decisions interpreted Title IX to require that colleges and universities provide varsity positions for male and female athletes in proportion to the enrollment of male and female students in the overall student body. Women currently comprise about 50% of college students and 36% of college varsity athletes.

In this era of tight budgets, achieving a varsity participation ratio that is proportionate to enrollment would require most institutions to eliminate men’s teams and to create women’s teams. Male athletes affected by such cutbacks have objected that a proportionality requirement would transform Title IX from a statute that forbids discrimination to a statute that requires it. Male athletes have argued that allocating 50% of college varsity slots to women and the other 50% to male athletes is blatant sex discrimination because women presently compose only 36% of varsity athletes graduating from high school. Male athletes argue that to construe parallel legislation prohibiting race discrimination as allocating varsity slots in proportion to the campus population of each race would provoke outrage.

As judicial interpretation of Title IX develops, the three decisions may prove to be harbingers of a new understanding of Title IX or they may prove to be missteps based on incomplete analyses of sympathetic facts under the pressures of preliminary injunction schedules.

The consequences of these recent decisions are not limited to the playing field. Title IX does not specifically deal with athletics.

---

6. Thro & Snow, supra note 2, at 619.
9. Id.
10. Title IX was adopted in conference without formal hearings or a committee report. See S. REP. NO. 798, 92d Cong., 2d Sess. 221-22 (1972). Sports were only mentioned twice in the congressional debate. 118 CONG. REC. 5807 (1972) (statement of Sen. Bayh) (personal privacy to be respected in sports facilities); 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh) (Title IX does not “mandate[ ] the desegregation of football fields. What we are trying to do is provide equal
Rather, it provides a general prohibition against sex discrimination in educational institutions. Therefore, the reasoning of these decisions could be applied to curricular as well as athletic opportunities. Will admission to limited-enrollment advanced seminars in English or physics be determined by academic standards and student preferences or by the mandates of federal discrimination law?

II. WOMEN IN COLLEGE ATHLETICS UNDER TITLE IX

When Congress enacted Title IX in 1972, women were an "inconspicuous part of the storied athletic past," principally because of the absence of opportunities for women athletes prior to the 1970s.11

Since then, Title IX has been a major impetus in putting women's athletics on the map. In the years after Title IX was enacted, participation in women's varsity athletics burgeoned.12 By 1984, the percentage of women's varsity athletics had more than doubled from 15% to 31%.13 A recent survey of 204 NCAA Division I colleges and universities showed that women generally comprise between 20% to 40% of a college's varsity athletes, with the average participation rate being about 36%.14

Even though the percentage of women participating in college varsity athletics has markedly increased in the last two decades, the growth rate appears to have slowed and the percentage has not approached 50%. At institutions offering men and women the same number of athletic teams, more males usually participate in athletics because football teams have four to five times the number of players as teams in other sports.15 Thus, on average, the women's enrollment rate in colleges and universities exceeds the participa-
tion rate of women in varsity athletics by more than 10%.\textsuperscript{16} The enrollment rate exceeds the participation rate in varsity athletics at 297 of the 298 Division I schools.\textsuperscript{17}

The participation rates in intercollegiate varsity athletics reflect the participation rates of boys and girls at the high school level, where students acquire the experience and skill necessary for college competition. Surveys show that about 36\% of high school varsity athletes are female,\textsuperscript{18} the same percentage of women who participate in collegiate varsity athletics.\textsuperscript{19} Accordingly, the probability that a female high school athlete will find a place on a college varsity team equals that of a male high school athlete. Thus, colleges and universities appear to be accommodating the interests and abilities of female athletes to the same extent as they accommodate the interests and abilities of male athletes.

To state that a smaller percentage of women than men have varsity interest and ability does not accurately compare men's abilities with women's. Ability in this context means only that individuals have the ability to compete at the varsity level against others of their own sex.\textsuperscript{20} For example, the percentage of women with varsity ability in sports which are played principally by women clearly exceeds the percentage of men with that ability, even though the level of interest and ability for athletic varsity competition overall is lower for women.

Overall differences in varsity interest and ability among college men and women may be explained either by different levels of interest or by differences in opportunities to receive the training nec-

\textsuperscript{16} Blum, supra note 15, at A48.

\textsuperscript{17} A state court decision which forced Washington State University to add two women's sports is the reason why that school's participation rate is the same as its enrollment rate. See Blair v. Washington State Univ., 740 P.2d 1379, 1381 (Wash. 1987) (affirming lower court order requiring university to increase female participation opportunities until proportional to female enrollment). As a result, Washington State University now provides nine women's varsity sports and seven men's varsity sports. See Mary Jordan, Only One School Meets Gender Equity Goal, WASH. POSR, June 21, 1992, at D1.

\textsuperscript{18} National Federation of State High School Associations, 1992 Sports Participation Survey.

\textsuperscript{19} Lederman, supra note 7.

\textsuperscript{20} The Athletics Regulation effectively requires that institutions offer separate men's and women's sports. 34 C.F.R. § 106.41(b) (1994). The Athletics Regulation compares the abilities of men and women only in the limited circumstance covered by section 106.41(b), which requires an institution that fails to offer a women's team in a non-contact sport to permit a woman with the requisite ability to try out for the men's team. Id.
necessary to develop varsity level skills. Except in certain sports rarely offered in high school, it is extraordinarily difficult for men and women who lack high school varsity experience to develop varsity skills in college. Given this difficulty, the interest and ability factor is essentially a combination of interest in sports, high school varsity experience and competitive competence at the college level. Accordingly, absent changes in the participation rate at the high school level, the ratio of men to women with varsity interest and ability at the college level will likely remain at or near sixteen to nine.

Other evidence suggests that a greater percentage of men have an interest in making athletic competition a part of their college experience. Unlike a varsity sports program, which requires athletes to try out for a limited number of positions, intramural sports are open to anyone. In contrast to varsity sports, intramurals provide students with opportunities to learn sports with which they may not have been familiar in high school. If women were interested in sports to the same extent as men, then women theoretically would participate in intramurals to the same extent. But at Brown University, evidence showed that the ratio of men to women participating in intramurals was eight to one. 21 Similarly, anecdotal evidence suggests that men make far greater recreational use of athletics facilities 22 for pick-up games and other forms of informal sport. 23

While increased opportunities have increased participation by women, one cannot assume that the same percentage of women as men have an interest in participating in varsity sports. Many activities in college involve different levels of interest among men and women. To propose that equal percentages of women and men want to participate in varsity athletics is no more valid than to propose that female and male athletes want to participate in precisely the same sports. The proportionality requirement test rests entirely

22. Women's participation in informal athletic activities may be undercounted because several types of athletic endeavor more popular among women, such as aerobics and dance, may not be classified as athletics.
23. The greater participation rates of men may be a result of biology. Studies show that male children are more prone to engage in rough and tumble play. E.g., Anthony D. Pellegrini, Rough & Tumble Play: Developmental & Educational Significance, 22 Educ. Psychologist 23 (1987); Janet A. Pietro, Rough & Tumble Play: A Function of Gender, 17 Developmental Psychol. 50 (1981). While these studies arguably reflect a lack of encouragement of female children, it is hard to foresee a day in which there will be comparable interest among women in "smash into people for the fun of it" sports such as football, boxing and wrestling.
on the unsupported assumption that the proportion of men and women interested in varsity competition equals the proportion of men and women enrolled at a college or university.

As a result, the proportional to enrollment test imposes an obligation on virtually every college and university either to add women's sports, cut men's sports, increase the number of participants on women's teams and reduce the number of participants on men's teams, or adopt some combination of these measures without regard to the current varsity interests and abilities of their students. Such additions and subtractions must be performed until the ratio of women varsity athletes to men varsity athletes is "substantially proportionate" to the ratio of women to men students. Without having a basis in students' interests and abilities, these additions and subtractions are not only arbitrary, but are in themselves discriminatory and contrary to the intent of Title IX. While the idea that equal percentages of men and women should participate in varsity athletics is seductively simple, Title IX's purpose is to identify discrimination in varsity athletics, a different and more complex task.

III. WHAT TITLE IX PROVIDES

A. The Statutory and Regulatory Framework

Title IX requires educational institutions to provide benefits both to men and women without discriminating against persons of either sex. The statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Additionally, the statute provides that Title IX may not be interpreted to require "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" that program or activity. Title IX makes no

24. Courts have not yet determined what is an acceptable difference in the percentage of women's varsity participation and their undergraduate enrollment. In Roberts v. Colorado State Board of Agriculture, the United States Court of Appeals for the Tenth Circuit stated that a 10.5% difference was not "substantially proportionate" but that a 1.7% difference was acceptable. 998 F.2d 824, 830 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993).


specific reference to athletics programs, and Title IX's sparse legislative history contains almost no discussion of Title IX's effect on athletics.

Title IX is applied to athletics in two regulations issued in 1975 by the Office of Civil Rights ("OCR") of the Department of Health, Education and Welfare ("HEW"), to which Congress delegated regulatory responsibility. The regulation implementing Title IX was signed by President Ford on May 27, 1975, and submitted to Congress for review pursuant to section 431(d)(1) of the General Education Provisions Act ("GEPA"). Congress held hearings on the regulation and did not disapprove the regulation during the 45-day period allowed under the GEPA. The more comprehensive regulation (the "Athletics Regulation") prohibits discrimination against athletes on the basis of sex within any "interscholastic, intercollegiate, club or intramural athletics" program and focuses on effective accommodation of athletes.

A separate regulation addresses athletic scholarships. The athletic scholarship regulation requires only that athletic scholar-
ships be allocated in proportion to the actual number of participants of each sex in athletics, stating the following: "To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." Thus, the regulation on athletic scholarships focuses exclusively upon the proportion of students of each sex actually participating in varsity athletics and does not require that the number of scholarships be proportional to the enrollment of each sex.

While the Athletics Regulation is not so explicit, neither does it provide any basis for a proportional to enrollment test. The Athletics Regulation applies the general statutory ban on sex discrimination to athletics by requiring both: (i) that opportunities to participate at each level of competition (varsity, club and intramural) be made available on a nondiscriminatory basis, and (ii) that there be no discrimination on the basis of sex in the treatment of the athletes competing within each level.

The Athletics Regulation sets forth ten non-exclusive factors to be considered. The first factor considers the provision of opportunities to compete at each level, while the remaining factors consider the support provided to athletes within each level. The

36. Id. (emphasis added).
37. 34 C.F.R. § 106.41(a) (1994). For the text of § 106.41(a), see supra note 34. The Athletics Regulation does not contemplate that comparisons will be drawn between varsity teams sponsored for one sex and club or intramural teams sponsored for the other. It is expected that a varsity team will receive more benefits than a club or intramural team. See Cook v. Colgate Univ., 992 F.2d 17, 18 (2d Cir. 1993) (recognizing that greater status and visibility of varsity teams justifies higher recognition, encouragement and financial support than for club teams).
39. 34 C.F.R. § 106.41(c) (1994). Section 106.41(c) states the following: Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
   1. Whether the selection of sports and levels of competition effectively accommodate the interests 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.
Athletics Regulation concludes by prohibiting the use of evidence of unequal expenditures for men's and women's teams as the basis for Title IX liability.40

Subsection (c)(1) requires that the interests and abilities of both sexes be accommodated with equal effectiveness.41 The recent Courts of Appeals' opinions, however, ignored this subsection of the Athletics Regulation and gave preference to regulatory policy pronouncements having a lesser legal status.42

B. The OCR Policy Interpretation

While the statute and the regulations form the law of Title IX, recent cases have elevated an earlier interpretive statement known as the "Policy Interpretation" to a status above that of the statute and the regulations.

Following numerous inquiries by institutions having difficulty achieving compliance with the July 1978 deadline in the Athletics Regulation,43 HEW issued a proposed Policy Interpretation in 1978.44 After a comment period in which 700 groups and institutions "reflecting a broad range of opinion" aired their views, HEW issued a final Policy Interpretation in 1979.45 The Policy Interpretation gave institutions that were moving toward compliance with the Athletics Regulation additional time to comply with the deadline

Id.

40. Thus, the fact that a university spends more money on its men's varsity program than its women's varsity program does not provide a basis for liability under Title IX. The Athletics Regulation expressly states, "[u]nequal aggregate expenditures . . . will not constitute noncompliance with this section." Id. Policy Interpretation, supra note 31, at 71,413, 71,416, 71,419, 71,422 (recognizing that unique characteristics of some sports, such as football, draw large numbers of spectators which necessitate extra expenditures and large budgets).

41. 34 C.F.R. § 106.41(c)(1) (1994). For the text of § 106.41(c)(1), see supra note 39.

42. The OCR has applied the Athletics Regulation as an entirety, weighing an institution's overall program to determine whether the institution is in compliance with Title IX. The courts, however, have looked at isolated elements of the Regulation and are prepared to find a violation of the statute solely on the basis of noncompliance with subsection (c)(1) of the Athletics Regulation.

43. 34 C.F.R. § 106.41(d) (1994). This section required that secondary or post-secondary institutions comply fully with the regulation's requirements within three years of the regulation's effective date. Elementary schools had to comply within one year. Id.


45. Policy Interpretation, supra note 31, at 71,413. The final Policy Interpretation reflected the views expressed during a public comment period and the results of HEW's visits. HEW intended the Policy Interpretation to explain the regulation and offer guidelines as to what constituted compliance with Title IX requirements for intercollegiate athletic programs.
established in the Athletics Regulation\textsuperscript{46} providing, among other things, a safe harbor for colleges showing a "history of program expansion."

In contrast to the statute and the Athletics Regulation which have the force of law,\textsuperscript{47} the Policy Interpretation is not entitled to any more deference than is warranted by whatever inherent persuasiveness it may have.\textsuperscript{48} In no event can the Policy Interpretation contradict the Title IX statute or the Athletics Regulation.

The Policy Interpretation established three "safe harbors" by which colleges and universities could avoid regulatory sanctions under Title IX:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers \textit{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 \textit{history and continuing practice of program expansion} which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that \textit{the interests and abilities of the members of that sex have been fully and effectively accommodated} by the present program.\textsuperscript{49}

\textsuperscript{46} 34 C.F.R. § 106.41(d) (1994). For a discussion of § 106.41(d), see \textit{supra} note 43.

\textsuperscript{47} The Athletics Regulation was submitted to Congress pursuant to 20 U.S.C. § 1292(d) (1988) and has the force and effect of law. "Rules enacted by an administrative agency pursuant to statutory delegation, called substantive or legislative rules, must be judicially enforced as if laws enacted by Congress itself." Drake \textit{v. Honeywell, Inc.}, 797 F.2d 603, 607 (8th Cir. 1986) (citations omitted).

\textsuperscript{48} The Policy Interpretation is an interpretive statement that was not submitted to Congress or enacted pursuant to statutory delegation. It was "issued merely to provide guidance to parties whose conduct may be governed by the underlying statute, and to courts which must construe it." \textit{Id}. It carries "no more weight on judicial review than [its] inherent persuasiveness commands." \textit{Id}. (citing \textit{Batterton v. Marshall}, 648 F.2d 694, 702 (D.C. Cir. 1980)); see \textit{Continental Training Servs., Inc. v. Cavazos}, 893 F.2d 877, 885 n.10 (7th Cir. 1990) (noting no deference due for informal agency interpretations); \textit{Pearce v. Department of Labor}, 647 F.2d 716, 726 (7th Cir. 1981) (stating that reasonable regulations have force and effect of law when promulgated pursuant to statutory authority); \textit{Class v. Norton}, 507 F.2d 1058, 1062 (2d Cir. 1974) (recognizing regulations have presumptive force of law).

\textsuperscript{49} \textit{Policy Interpretation}, \textit{supra} note 31, at 71,418 (emphasis added). Compliance with the Regulation was assessed by any one of the three safe harbors provided by the Policy Interpretation.
These safe harbors reflected the OCR’s enforcement priorities in 1979. As noted above, the second safe harbor gives protection to institutions moving toward compliance if they can show a history of program expansion. If an institution satisfies either the third safe harbor by fully accommodating women or the first safe harbor by providing places proportional to enrollment, then any Title IX violation would in all likelihood discriminate against men. This was a possibility the OCR was obviously prepared to overlook in an era of substantial non-compliance with respect to women athletes.\(^50\)

Thus, the Policy Interpretation provided safe havens for universities in the process of working toward Title IX compliance.

While they are defensible as a means to encourage opportunities for women and concentrate enforcement resources on the more egregious cases, the safe harbors make no sense as tests of Title IX liability. A university may fall within any of the three safe harbors and yet be in violation of Title IX:

- an institution that has participation proportional to enrollment under the first safe harbor is discriminating under Title IX if the ratio of men and women athletes with interests and abilities for varsity competition is different from the ratio of men and women in the school population;
- an institution that has a history of program expansion under the second safe harbor may nevertheless be well short of effectively accommodating its male and female athletes on an equal basis; and
- an institution that fully accommodates one sex under the third safe harbor is discriminating under Title IX if it does not also fully accommodate the other sex.

Indeed, as tests of liability, the safe harbors are in conflict with the statute and the Athletics Regulation:

Subsection (1), the “proportionate to enrollment” test, would require institutions to create positions for women students irrespec-

50. The proportional to enrollment test of subsection (1) and the full accommodation test of subsection (3) would be useful as safe harbors to a university which had only recently become coeducational and was beginning an athletics program for the sex that did not yet constitute a substantial percentage of the student body. Thus, it may be that OCR intended these two safe harbors for the benefit of universities that were becoming co-educational in the 1970’s. See What Is This Thing Called Coeducation?, MOUNT HOLYOKE ALUMNAE Q. 241 (Gale Stubbs McClung ed. 1972).
tive of their athletic interest or ability. This would be a form of affirmative action prohibited by the statute.\(^{51}\)

Subsection (2), the "program expansion" test, would impose requirements not imposed by the statute and Athletics Regulation on schools where no recent expansion was required to achieve equally effective accommodation of male and female athletes. Moreover, on its face, a "program expansion" test would penalize those institutions that added women's teams in the 1970's and 1980's, and would reward institutions that failed to follow Title IX's mandate until recently.\(^{52}\)

Subsection (3), the "interests and abilities" test, would require an institution to "fully" accommodate the athletes capable of varsity level competition in the "underrepresented" sex. Even when qualified by the independent requirements that there be sufficient numbers of athletes to form a team and a reasonable prospect of sufficient opportunities to provide intercollegiate competition,\(^{53}\) "full" accommodation of athletes of one sex clearly would not preclude discriminatory under-accommodation of athletes of the other sex.

Internal inconsistencies in the Policy Interpretation also detract from whatever inherent persuasiveness it might otherwise command. Several passages in the Policy Interpretation conflict with other passages in the document, reflecting the OCR's failure to reconcile a number of the competing positions reflected in the "broad range" of opinions expressed by the commenters.\(^{54}\) Other sections of the Policy Interpretation contradict the terms of the Athletics Regulation and in that regard merit no deference whatso-


\(^{52}\). Brown University, for example, was unable to take advantage of subsection (2), even though it had added 14 women's varsity teams between 1971 when it became coeducational and 1977, because it had added only one women's team since then. Cohen v. Brown Univ., 991 F.2d 888, 892, 903 (1st Cir. 1993).

\(^{53}\). Policy Interpretation, supra note 31, at 71,413, 71,418.

\(^{54}\). For example, although the Policy Interpretation repeatedly emphasizes that comparisons between the men's and women's varsity athletics programs must be made on an overall basis, it also suggests that if "some aspects of athletic programs" are not equivalent, then Title IX liability may exist. Id. at 71,415.

In contrast to the proportional to enrollment test, other sections concerned with proportionality consider the relevant pool to be athletes, not total enrollment. Compliance with the "levels of competition" requirement of the Athletics Regulation is assessed by examining, among other things, "whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities." Id. at 71,418 (emphasis added).
The document should be viewed with skepticism because the Policy Interpretation contradicts itself, as well as the Athletics Regulation. A test of liability must pass muster under the Title IX statute and the Athletics Regulation, according to recognized principles of discrimination law. However, this is not the direction the courts have taken to date.

IV. THE PROPORTIONAL TO ENROLLMENT TEST

A. Recent Court Decisions

Although Title IX was on the books for twenty years, case law was slow in developing. There are several explanations for this. The statute itself provided a three-year period for universities to comply. The Athletics Regulation extended the time for compliance to 1978, and the 1979 Policy Interpretation's "history of program expansion" safe harbor provided additional time for many institutions.

Prior to the Supreme Court's decision in Cannon v. University of Chicago, it was not generally recognized that private suits could be brought under Title IX. In 1984, the development of Title IX came to a temporary halt when the Supreme Court held in Grove City College v. Bell that Title IX did not apply to programs within colleges, such as athletics, which did not receive direct federal assistance. Grove City remained the law until the Civil Rights Restoration Act of 1987 was enacted, providing that effective March 22, 1988 all aspects of academic institutions receiving federal funds

55. For example, the Athletics Regulation expressly recognizes that colleges may sponsor some teams for men with no corresponding women's teams. 34 C.F.R. § 106.41(b) (1994). Subsection (c)(4) of the Policy Interpretation contradicts the Athletics Regulation, suggesting that if a men's varsity team is provided in a contact sport, a women's varsity team must also be provided.


57. Id. Title IX does not explicitly authorize a private cause of action. Id. at 696. In Cannon, the Court observed that Title IX was modeled after Title VI, which had been construed as creating a private remedy. Id. The Cannon Court concluded that the drafters of Title IX assumed that it would be construed like Title VI. Id.


59. Title IX only applies to programs that are federally funded or aided. 20 U.S.C. § 1682 provides, "Compliance with any requirement adopted pursuant to this section may be effected . . . by the termination of or refusal to grant or to continue assistance under such program or activity." See Grove City, 465 U.S. at 558 n.2. In Grove City, the Supreme Court held that Title IX applied only to programs which actually receive federal funds, placing virtually every collegiate athletic program outside the reach of Title IX. Id. at 574.

were subject to Title IX. Until recently, the OCR’s relatively lenient enforcement history provided further discouragement to private plaintiffs, and during the boom years of the 1980’s, institutions were substantially expanding their women’s varsity athletic programs. The stringent budget pressures of the 1990’s, however, have brought program cutbacks and the elimination of men’s and women’s athletic teams. This was the basis for the lawsuits in each of the three recent cases.

None of the three Title IX decisions — Cohen v. Brown University, Roberts v. Colorado State Board of Agriculture, and Favia v. Indiana University of Pennsylvania — considered the possibility that the three subsections of the Policy Interpretation may not be the fundamental tests of Title IX liability. All three courts simply assumed that these subsections stated the law and focused on whether their requirements had been met. Following these decisions, the proportional to enrollment test of subsection (1) has emerged as the only possible means of Title IX compliance when a university is cutting back on the number of sports offered to men and women. This is the case because by definition, a university that eliminates varsity teams cannot show a recent history of program expansion with which to satisfy subsection (2) or show full accommodation under subsection (3).

1. Cohen

In 1991, Brown University announced plans to drop four teams from its varsity athletics program as a “belt tightening measure”: men’s water polo and golf and women’s volleyball and gymnastics. Brown eliminated financial subsidies and support services for the teams but permitted them to continue competing as clubs.

Disappointed members of the two eliminated women’s teams brought a suit seeking the reinstatement of both teams and a pre-

62. 991 F.2d 888 (1st Cir. 1993).
63. 998 F.2d 824 (10th Cir.), cert. denied, 114 S. Ct. 580 (1993).
64. 7 F.3d 332 (3d Cir. 1993).
65. Two of the courts did note that subsection (1) constitutes a safe harbor in that it permits institutions to “stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup.” Cohen, 991 F.2d at 898; see also Roberts, 998 F.2d at 829. This observation did not prevent the courts from using the safe harbor as a test for liability.
66. Cohen, 991 F.2d at 892.
67. Id. Brown cut off services available to other varsity sports, such as coaching, prime facilities, practice time and trainers. Id.
liminary injunction. 68 Plaintiffs' case centered on the Athletics Regulation's reference to "equal athletic opportunity" for both sexes. 69 Plaintiffs argued that while Brown's undergraduate enrollment was approximately 52% men and 48% women prior to the cutbacks, Brown provided a ratio of 36.7% women's positions to 63.3% men's positions. 70 Although women retained virtually the same percentage of varsity positions after the cutbacks, plaintiffs asserted that the cutbacks adversely affected women by taking more dollars from the women's varsity budget than from the men's varsity budget. 71

Plaintiffs argued before the district court that a failure to provide "equal" participation opportunities for men and women within the meaning of the Athletics Regulation 72 automatically resulted in Title IX liability regardless of how the university supported athletes within each level of competition. 73 They further argued that the court should apply the Policy Interpretation's three subsections to determine whether Brown provided "equal athletic opportunity." 74

The district court agreed, adopting the three subsections of the Policy Interpretation as tests of liability. 75 The district court found that Brown failed to comply with any of the subsections: (1) the number of women and men athletes was not proportional to the number of women and men enrolled; (2) the University did not have a recent history of program expansion; and (3) the University was not fully accommodating women athletes, having dropped two

68. Id. at 892. Plaintiffs sued on behalf of a class 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." Id. at 893.
69. 34 C.F.R. § 106.41(c) (1994).
70. Cohen, 991 F.2d at 892.
71. Id. Abolishing the two women's teams saved the university $62,028; abolishing the two men's teams saved $15,795. Id.
72. 34 C.F.R. § 106.41(c)(1) (1994). If the Cohen court was correct in reading subsection (3) as requiring full accommodation of both sexes, subsection (1) is the only means of compliance, even for an institution that has maintained the status quo and has resisted budget pressures to cut teams. Cohen, 991 F.2d at 899 n.16.
73. 34 C.F.R. § 106.41(c)(2)-(10) (1994).
74. Cohen v. Brown Univ., 809 F. Supp. 978, 985 (D.R.I. 1992), aff'd, 991 F.2d 888 (1st Cir. 1993). Plaintiffs also asserted violations of Title IX in other aspects of Brown's athletics program, alleging disparities in training, coaching, equipment, publicity and recruitment. Id. at 986. In its defense Brown argued that its varsity athletics program had to be assessed as a whole, urging the court to consider not only § 106.41(c)(1) but the other nine factors listed in § 106.41(c) as well. Id. at 987.
75. The district court assumed that these subsections were tests of liability and considered only whether they were tests for measuring equal opportunities to participate, as plaintiffs argued, or whether they were tests for measuring whether the "levels of competition" effectively accommodated the interests and abilities of both sexes, as Brown argued.
varsity women's teams.\textsuperscript{76} The district court, therefore, ordered reinstatement of the two women's teams pending a trial on the merits.\textsuperscript{77}

Affirming the district court, the United States Court of Appeals for the First Circuit did not address the propriety of using the three subsections as tests of Title IX liability. The court confined itself to reviewing the district court's findings with respect to Brown's noncompliance with the three subsections of the Policy Interpretation.\textsuperscript{78}

2. \textit{Roberts}

In 1992, Colorado State University announced the elimination of its women's varsity softball team and its men's varsity baseball team.\textsuperscript{79} Although the elimination of both teams increased the percentage of varsity positions provided to women, there remained a difference of 10.5% between the percentage of female varsity athletes and percentage of females enrolled at Colorado State.\textsuperscript{80}

Colorado State's appeal from the district court's adverse judgment raised three principal issues: whether the opportunities provided were "substantially proportionate" to enrollment within the meaning of subsection (1) given the 10.5% difference, whether Colorado State's expansion of women's athletic opportunities in the 1970s constituted a "history and continuing practice of program expansion" within the meaning of subsection (2), and whether, in eliminating men's baseball and women's softball simultaneously, Colorado State was providing "full and effective accommodation" of the interests and abilities of its female athletes within the meaning

\textsuperscript{76} Cohen, 809 F. Supp. at 991-93. After the four varsity teams were converted to club teams, there were 63.4% men and 36.6% women athletes although the enrollment rates were 51.8% men and 48.2% women. Therefore, the court found that the ratio was not "substantially proportionate." \textit{Id.} at 991. Additionally, though there was some program expansion in the 1970s, evidence showed that Brown did not have "a continuing practice of program expansion for female athletes." \textit{Id.} Finally, the court found that Brown failed to accommodate the interests and abilities of women athletes because it had eliminated two women's varsity teams. \textit{Id.} at 992.

\textsuperscript{77} \textit{Id.} at 999-1001.

\textsuperscript{78} Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993).


\textsuperscript{80} \textit{Id.} at 831. The Tenth Circuit disagreed with the district court that a 10.5% discrepancy between athletic participation by women and enrollment by women was substantially proportionate. \textit{Id.} at 830.
of subsection (3). Following the First Circuit's reasoning in Cohen, the Tenth Circuit found that the University failed to meet the requirements of any of the three subsections.

3. Favia

The third case, Favia v. Indiana University of Pennsylvania, arose after Indiana University of Pennsylvania (IUP), citing "budgetary concerns," announced plans to discontinue four varsity athletic programs: men's tennis and soccer and women's gymnastics and field hockey. As in Cohen, disappointed members of the two women's teams brought a class action suit under Title IX, seeking a preliminary injunction ordering the University to reinstate both women's teams.

Relying on evidence that women comprised only 39% of the varsity athletes, but 55.6% of the student body, the district court issued the injunction. The University sought a modification of the order which would have allowed it to substitute women's soccer, a team with a greater number of varsity slots, for women's gymnastics. This substitution would have increased the percentage of varsity female athletes to 43%. The district court refused the University's request.

On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court's order, finding no abuse of discretion. The Third Circuit did not independently analyze Title IX, but simply relied on Cohen for the proposition that, in the absence

---

81. Id. at 829-32. Colorado State also argued on appeal "that the district court erred in holding that plaintiffs were not required to show discriminatory intent." Id. at 832. The Tenth Circuit rejected this argument.

82. In its brief analysis of the Athletics Regulation, the Tenth Circuit simply noted that "[a]lthough § 106.41(c) goes on to list nine other factors that enter into a determination of equal opportunity in athletics, an institution may violate Title IX simply by failing to accommodate effectively the interests and abilities of student athletes of both sexes." Id. at 828 (footnotes and citations omitted). For a discussion of Cohen, see supra notes 65-77 and accompanying text.

83. 7 F.3d 332 (3d Cir. 1993).

84. Id. at 335.

85. Id. The district court simultaneously granted the injunction and certified a class of "all present and future women students at I.U.P. who participate, seek to participate, or are deterred from participating in intercollegiate athletics at the University." Id.


87. Favia, 7 F.3d at 342. The addition of a women's soccer team would not have brought IUP into full compliance with Title IX. However, it would have raised the number of female athletes and would have brought IUP to the verge of compliance. Id.
of continuing program expansion, universities must meet either the proportional to enrollment test or the full accommodation test. 88

B. The Practical Implications of the Recent Court Decisions

1. Subsection (3): Fully Accommodated Interests and Abilities

If the "fully and effectively accommodated" language in subsection (3) is applied literally, every university being sued by members of a former women's team or by any group of women capable of varsity competition in any competitive sport, must necessarily fail the test. The universities in Cohen, Roberts and Favia argued that, consistent with other OCR discussions of subsection (3), 89 full and effective accommodation requires only that the women athletes at a school be accommodated to the same extent as male varsity athletes. 90 That is, a university must accommodate those with interest and ability in varsity athletics in an equally effective (or equally ineffective) way. For example, if a university with a student body containing an equal number of male and female students has 250 women and 500 men with the interest and ability for varsity competition, it must offer varsity positions in a ratio of one to two but need not offer any particular number of positions. 91 Thus, the university could provide 300 varsity positions, 200 for men and 100 for women — leaving 300 male athletes and 150 female athletes without varsity positions. 92

In the example just stated, the recent decisions would require the university to provide varsity positions for all 250 female varsity athletes, regardless of how many varsity positions were available for its male varsity athletes. The courts recognized that "the mere fact that there are some female students who express interest in a sport does not ... require the school to provide a varsity team." 93 and

88. Id. at 343-44.
89. Thro & Snow report that "OCR has found numerous institutions to be in compliance with respect to interests and abilities even though there is a gap between participation and enrollment. In at least five instances, OCR has found no compliance even though the gap exceeded twenty one percentage points." Thro & Snow, supra note 2, at 611, 614-15 n.23.
90. The OCR has read the Policy Interpretation in this manner in assessing compliance.
92. Id. Even the burden of relatively effectively accommodating female athletes may make the expense of continuing a men's program too great. The difficulty of complying with Title IX has led Brooklyn College to abandon its entire varsity athletics program. See Carol Herwig, Questions Linger in Wake of Brooklyn's Troubles, USA TODAY, June 10, 1992, at C2; Roger Rubin, Brooklyn Faces Big Decisions: Basketball Gone, But What Else?, NEWSDAY, June 12, 1992, at 163.
93. Cohen, 991 F.2d at 898.
that under the Policy Interpretation, there must be "sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team."\footnote{94} However, the courts held that because the plaintiffs had been members of a healthy women's varsity team that had been eliminated, there was no question that some women varsity athletes were not being fully accommodated. These holdings effectively foreclose resort to the interests and abilities test of subsection (3).\footnote{95}

2. \textit{Subsection (2): Recent Program Expansion}

The "program expansion" test of subsection (2) is effectively unavailable to any institution sued by members of women's teams that have been eliminated and probably unavailable to any university which has not expanded its women's program in the 1990's.\footnote{96}

3. \textit{Subsection (1): Proportional to Enrollment}

Ironically, compliance with a proportional to enrollment standard in times of economic difficulties may result in little or no gain for women athletes. As the Tenth Circuit recognized in \textit{Roberts}, "in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs."\footnote{97} The court stated: "Financially strapped institutions may still comply with Title IX by cutting athletics programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population."\footnote{98} The message is clear: Institutions should comply by cutting men's teams without regard to men's interests and abilities for varsity competition or

\footnote{94. \textit{Id.} (quoting \textit{Policy Interpretation, supra} note 31, at 71,418).}

\footnote{95. Under this stringent interpretation of subsection (3), an institution must provide a varsity sport if there are women who want to play the sport and have the ability to play the sport, regardless of the institution's ability to sustain a team in that sport. \textit{Thro & Snow, supra} note 2, at 624. If, for example, the United States Olympic Gymnastics team enrolled in an institution and wanted to compete, that institution would be legally obligated to create a varsity gymnastics program, even though it might lack the necessary equipment, facilities, coaching staff or expectation of being able to maintain a competitive team in the future. \textit{Id.} at 625 n.109.}

\footnote{96. While most colleges and universities can point to rapid expansion in the 1970's and 1980's, the \textit{Roberts} court denied the relevancy of these past efforts. \textit{Roberts} v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir.), \textit{cert. denied}, 114 S. Ct. 580 (1993). This logic forces universities to continue adding women's varsity teams until eventually either the proportional to enrollment test or the full accommodation test is met.}

\footnote{97. \textit{Id.} at 830; \textit{see also Cohen}, 991 F.2d at 898 n.15.}

\footnote{98. \textit{Roberts}, 998 F.2d at 830 (citation omitted).}
how short the men's program falls from equally accommodating the abilities and interests of male students.

The redistribution of varsity positions from men to women in accordance with enrollment rates would be especially difficult for those universities with football teams. An institution which provides the same number of varsity teams for women and men and provides a men's football team will inevitably provide more varsity positions for men because the size of the average football team is four to five times the size of other teams. To retain football, such an institution would have to eliminate about four men's teams or add four women's teams to meet the proportional to enrollment test.99 Thus, a university with a football program presently providing eleven teams for each sex could meet the proportional to enrollment test by providing seven men's teams and eleven women's teams100 or eleven men's teams and fifteen women's teams.101

Adding four additional women's teams would be problematic not only because of the expense but also because institutions already offering the most popular sports will find few other sports which have substantial interest among female athletes. There is a large decrease in popularity from the eleven or twelve most popular women's sports to the remaining women's sports.102 A university providing eleven women's teams, for example, will typically provide teams in popular women's sports such as soccer, basketball, softball, volleyball, field hockey, cross country, track, swimming, tennis and lacrosse. This leaves the university to choose among far more obscure sports — including sports primarily played by affluent persons such as equestrian competition — to add to its varsity program. Several universities have recently added crew teams, but few attractive choices exist beyond that.

99. While the regulation of squad sizes does have some impact on the distribution of varsity positions, it would be difficult to maintain a football team and satisfy the proportional to enrollment test without dropping men's teams, adding women's teams, or both.

100. To be eligible for membership in Division I, the NCAA requires a school to provide seven varsity sports. Thus, this approach would be unavailable to a school currently sponsoring fewer than 11 varsity teams.

101. A program with a significantly greater number of women's teams than men's teams would conflict with the Athletics Regulation's requirement that the selection of sports "effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c)(1) (1994); see Policy Interpretation, supra note 31, at 71,417 (stating that the Athletics Regulation requires "equal opportunity in the selection of sports . . . available to members of both sexes.").

102. See R. Vivian Acosta & Linda J. Carpenter, Women in Intercollegiate Sport: A Longitudinal Study - Thirteen Year Update 1977-1990 (1990). This sharp fall-off in popularity also occurs in men's athletics. Id.
C. Title IX and Other Major Civil Rights Acts Prohibit the Same Kind of Discrimination that the Proportional to Enrollment Test Requires

There is no obvious reason why the proportion of men and women in the student body as a whole should be important in determining whether there is discrimination in the provision of varsity athletic opportunities. Because the Athletics Regulation is implementing a discrimination statute, the relevant pools of individuals should be those students potentially subject to discrimination in athletics — the female and male student-athletes with the interest and ability to participate in varsity athletics.

A women's varsity program does not benefit women generally, but rather exclusively benefits some or all of the subgroups of women with the athletic ability and interest to compete. The analysis of discrimination in college athletic programs should focus on whether the program accommodates those women with the interest and ability to be varsity athletes to the same extent as it accommodates men with the interest and ability to be varsity athletes.103

An athlete's opportunity to obtain a varsity position when the athlete has the interest and ability should not be affected by the athlete's sex. Providing opportunities in proportion to the numbers of athletes of each sex with interest and ability avoids sex discrimination; providing opportunities in proportion to overall enrollment creates discrimination.

The proportional to enrollment test is difficult to reconcile not only with Title IX and the regulations under it but with the other major civil rights statutes applicable in the college and university setting, such as Title VI of the Education Amendments of 1972 and Title VII of the Civil Rights Act of 1964.

1. Title IX and its Regulations

The proportional to enrollment test appears inconsistent with Title IX in several ways. First, the test requires affirmative action while the statute only prohibits "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" that program or activity.104 Adding varsity positions for women until the percentage of women varsity athletes

103. A program with separate men's and women's teams in the same sports already favors women. A program that was sex-blind and provided a single set of teams for which both men and women could try out would largely favor men.
equals the percentage of women students is a form of affirmative action. Second, the use of proportionality as the sole basis of liability conflicts with Title IX’s athletic scholarship regulation. The athletic scholarship regulation expressly states that the relevant pool will consist of participants in varsity athletics and not enrolled students. The approach to proportionality taken in the scholarship regulation is also evident in other sections of the Policy Interpretation’s discussion of the Athletics Regulation. Thus, the Policy Interpretation states: “If women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby.” Third, and more importantly, the decisions overlook the fact that achieving proportionality requires discrimination on the basis of sex, a violation of the Title IX law in the statute and the Athletics Regulation. In their recent opinions, the courts of appeals inappropriately elevated a policy statement of administrators above the statute enacted by Congress and above the regulations that carry the force and effect of law.

2. Title VI

Title IX was modeled on Title VI of the Education Amendments of 1972, which prohibits racial discrimination by, among others, colleges or universities receiving federal financial assistance. Title VI provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Supreme Court has recognized that Title IX was patterned after Title VI, substituting “sex” for “race, color or national origin.” The Court stated that: “The drafters of Title IX explicitly
assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." The cases decided under Title VI make it clear that a proportional to enrollment test would be contrary to the statute.

Indeed, the application of a proportional to enrollment test under Title VI in the athletics context would be outrageous. To illustrate, consider a high school with an enrollment which is 50% African-American and 50% white and which has a track team with fifty available places. Tryouts show that 100 students have both the interest and ability to compete in varsity track, sixty-four of whom are African-American, thirty-six of whom are white. Under the proportional to enrollment test, Title VI would require that the high school allot twenty-five of the fifty places to the thirty-six white athletes, while the sixty-four African-American athletes would have to compete for the remaining twenty-five places. Such a result would constitute blatant discrimination based on race. Yet this is the result mandated by the proportional to enrollment test.

In Title VI litigation, the Supreme Court has rejected the notion that positions should be distributed proportionately on the basis of race without considering the qualifications of those available to fill them. In the landmark case of *University of California Regents v. Bakke*, the Court struck down the University's plan reserving sixteen of the 100 spots in each year's class for certain minority applicants. Rejecting the school's argument that the minority admissions plan was necessary to reduce the historic deficit of minorities in medical schools and the medical profession, a plurality of the Court found the plan fatally flawed. Justice Powell wrote:

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.

---

110. *Cannon*, 441 U.S. at 696; see also *Grimes v. Sobol*, 832 F. Supp. 704, 711 (S.D.N.Y. 1993) ("Courts have often noted the similarity in purpose and construction of Title VI and Title IX, and have found the Title VI Regulations instructive in interpreting Title IX . . . .").

111. See *infra* notes 112-17.


113. *Id.* at 309-10.

114. *Id.* at 307; see also *Davis v. Halpern*, 768 F. Supp. 968, 975 (E.D.N.Y. 1991) ("[I]t is quite possible that classifications favoring minorities or other groups his-
The Supreme Court revisited this issue in *City of Richmond v. J.A. Croson, Co.*, a Fourteenth Amendment case. Croson brought suit challenging a plan that required 30% of city construction contracts to be awarded to "minority business enterprises." The Court struck down the plan, holding that the quota rested "upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."

3. *Title VII*

In the context of employment discrimination claims under *Title VII* of the Civil Rights Act of 1964, the courts have recognized that a difference between the proportion of male and female workers in a particular position and their proportion in the general population is not proof of discrimination. In *International Brotherhood of Teamsters v. United States*, the Supreme Court made it clear that discrimination is not necessarily shown by evidence of a numerical disparity between percentages of particular groups in the employer's workforce and their percentages in the general population. Noting that *Title VII* "imposes no requirement that a work force mirror the general population," the Court held that "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would ... be relevant."

The Supreme Court also addressed this issue in *Wards Cove Packing Co. v. Atonio*, where it held that statistical evidence showing a high percentage of nonwhite workers in an employer's unskilled jobs and a low percentage of nonwhite workers in the similarly discriminated against are not benign at all but rather are injurious to otherwise innocent members of non-minority groups ... ")

116. The plan defined a "minority business enterprise" as a business at least 51% of which was owned and controlled by specific minority groups. *Id.* at 478.
117. *Id.* at 507; *see also* Hayes v. North State Law Enforcement Officers Assoc., 10 F.3d 207, 216 (4th Cir. 1993) (finding police department's racially based promotion practices violated Fourteenth Amendment; "[r]ather than treat all candidates individually and assess their specific qualifications, the City of Charlotte has chosen to make the color of the applicant's skin the sole relevant consideration in choosing among qualified candidates.").
118. Like *Title IX*, *Title VII* contains a congressional admonition against "preferential or disparate treatment to the members of one sex" based on proportionality with the larger population. 42 U.S.C. § 2000e-2(j) (1988).
120. *Id.* at 339-40 n.20.
121. *Id.* at 340.
employer's skilled jobs did not establish a *prima facie* case of employment discrimination. The Court explained that the relevant comparison was "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs." 

"If the absence of minorities holding such skilled positions was due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment practices cannot be said to have had a "disparate impact" on nonwhites." Similarly, in *Watson v. Fort Worth Bank & Trust*, a plurality of the Court noted that:

> It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.  

V. Conclusion

Whatever merits the proportional to enrollment test may have as a matter of social policy, the test awaits the analytical foundation which would give it legitimacy as an implementation of Title IX and the Athletics Regulations under it.

123. *Id.* at 650.
124. *Id.* at 651-52.
126. *Id.* at 992 (citation omitted); see also *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977) ("[W]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."); *Piva v. Xerox Corp.*, 654 F.2d 591, 596-97 (9th Cir. 1981) (holding that disparity between percentage of employer's regional sales representatives who were women and percentage of women in general workforce not highly probative; no evidence that most workers would be qualified to be sales representatives); *Grano v. Department of Dev.*, 637 F.2d 1073, 1078 (6th Cir. 1980) (stating "mere fact that a department is overwhelmingly male does not support an inference of discrimination where there are legitimate special qualifications for employment or advancement and no evidence is introduced as to the number and availability of qualified women.").