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CUT ATHLETES' INJUNCTION HAIL MARY: COVID-19 AND
THE UNVEILING OF TITLE IX NONCOMPLIANCE
IN COLLEGIATE SPORTS

I. INTRODUCTION: TITLE IX, COLLEGIATE
ATHLETICS, AND COVID-19

Title IX of the Education Amendments of 1972 states 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 educational program or activity receiving Federal financial assistance.”¹ While the statute does not expressly mention intercollegiate athletics, “it has long been interpreted to apply to all aspects of an institution’s operations, including athletic programs.”² Regulations promulgated by the Department of Education provide that no person, on the basis of sex, be discriminated against in any athletic program.³ This regulation requires that all students, regardless of gender, be provided with equal opportunity to participate in athletic programs and that schools “effectively accommodate” the interests and abilities of both sexes.⁴

Almost fifty years following the ratification of Title IX, the COVID-19 pandemic has exposed flagrant issues of noncompliance with Title IX amongst collegiate sport programs.⁵ By October of 2020, “twenty-six colleges and universities, from Stanford to Dartmouth College, [had] cut more than 90 sports programs.”⁶

1. 20 U.S.C.A § 1681(a) (West 1972) (prohibiting discrimination based on sex under any program or activity receiving federal financial assistance).

2. *See* Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085, 1088 (S.D. Iowa 2020) (stating Title IX protections apply to athletic opportunities provided by educational institutions receiving federal funding), *appeal dismissed*, No. 21-1203, 2021 WL 3174982 (8th Cir. Feb. 26, 2021).

3. *See* 34 C.F.R. § 106.41 (2020) (extending Title IX protections to include protections in athletic programs).

4. *See id.* (providing courts with standard for educational institutions to show Title IX compliance).

5. *See* Molly Hensley-Clancy, *Colleges Cut Sports to Save Money Amid the Pandemic. Then Came the Title IX Lawsuits*, WASH. POST (Mar. 25, 2021), <https://www.washingtonpost.com/sports/2021/03/25/college-sports-cuts-title-ix/> [<https://perma.cc/62WX-VHR6>] (documenting influx of Title IX litigation following several universities cutting female sports teams due to coronavirus-related budget cuts).

6. *See* Matt Marshall et al., *College Sports Cuts in the Wake of Covid-19 are Clouding the Future of Olympics Participation*, NBC NEWS (Oct. 17, 2020), <https://>

From the period between March 2020 and November 2020, more than three hundred and fifty National Collegiate Athletic Association (“NCAA”) sport programs were cut.⁷ In the wake of these cuts to sports programs, several high profile Title IX lawsuits were filed or threatened by students seeking to force their schools to reinstate their eliminated sports programs.⁸ In some instances, universities reversed course and reinstated athletic teams following threats of class-action lawsuits alleging Title IX violations by the school.⁹ In other instances, these lawsuits proceeded and courts had to address whether it was appropriate to issue preliminary injunctions reinstating cut sports programs.¹⁰

This Comment evaluates these lawsuits and the ramifications of coronavirus-related sports cuts to Title IX compliance.¹¹ In Section II, this Comment provides a brief history of Title IX and the three-prong test created to analyze Title IX compliance by educational institutions.¹² Section III analyzes the effectiveness of recent Title IX settlement agreements and the ramifications that COVID-19 related sports cuts have on the future of collegiate athletics’ Title IX compliance.¹³

www.nbcnews.com/news/sports/college-sports-cuts-wake-covid-19-are-clouding-future-certain-n1243803 [<https://perma.cc/UE3W-NU2N>] (describing widespread sport cuts made by universities in wake of COVID-19 pandemic and repercussions these cuts will have on United States Olympic teams).

7. See Aishwarya Kumar, *The Heartbreaking Reality — and Staggering Numbers — of NCAA Teams Cut During the Pandemic*, ESPN (Nov. 6, 2020), https://www.espn.com/olympics/story/_/id/30116720/the-heartbreaking-reality-staggering-numbers-ncaa-teams-cut-pandemic [<https://perma.cc/8DBF-NDV8>] (detailing staggering number of coronavirus-related cuts to collegiate sport programs).

8. See Hensley-Clancy, *supra* note 5 (discussing several Title IX suits filed by female athletes whose teams were cut following COVID-19 budget cuts).

9. See Daniela Allee, *Dartmouth College Reinstates Five Previously Cut Sports Teams, After Threat of Lawsuit*, N.H. PUB. RADIO (Jan. 29, 2021), <https://www.nhpr.org/nh-news/2021-01-29/dartmouth-college-reinstates-five-previously-cut-sports-teams-after-threat-of-lawsuit> [<https://perma.cc/V4YU-4J6E>] (detailing Dartmouth College’s decision to reinstate five athletic teams that were cut in July 2020, following threats of class-action lawsuits alleging Dartmouth was violating Title IX).

10. See Hensley-Clancy, *supra* note 5 (discussing Title IX litigation started by COVID-19 budget cuts that led to successful attempts for preliminary injunctions).

11. For further discussion of recent Title IX lawsuits, see *infra* notes 78-171 and accompanying text.

12. For further discussion of Title IX history and its relation to collegiate athletics, see *infra* notes 14–162 and accompanying text.

13. For further discussion of the effectiveness of recent Title IX settlement agreements and the ramifications of coronavirus-related sport cuts, see *infra* notes 163–229 and accompanying text.

II. TITLE IX HISTORY AND LITIGATION BACKGROUND

The Supreme Court has recognized that “our Nation has had a long and unfortunate history of sex discrimination.”¹⁴ As the women’s civil rights movement gained momentum in the 1960s and 1970s, focus shifted to inequalities in education that inhibited the progress of women.¹⁵ The first legislative step toward the enactment of Title IX occurred when Representative Edith Green first introduced an education bill with provisions regarding sex equity and held hearings devoted to the topic.¹⁶ Congressional activity on the issue continued to increase and several education bills were introduced that included anti-sex discrimination proposals.¹⁷ Eventually a House-Senate Conference Committee reviewed all of the proposals and created the final legislation that became Title IX.¹⁸

On June 23, 1972, Congress passed Title IX of the Education Amendments of 1972, which barred sex discrimination in education programs and activities by any institution that receives federal financial assistance.¹⁹ At this time, Congress had two main objectives in effectuating Title IX: (1) to avoid the use of federal resources to support discrimination in education based on sex, and (2) to provide citizens with protection against such discriminatory practices.²⁰

14. See *United States v. Va.*, 518 U.S. 515, 517 (1996) (holding Commonwealth of Virginia failed to show exceedingly persuasive justification for excluding women from citizen-soldier program offered at Virginia’s military college in violation of equal protection).

15. See Iram Valentin, *Title IX: A Brief History*, 2 HOLY CROSS J.L. & PUB. POL’Y 123, 124 (1997) (tracing Title IX’s legislative origins to Executive Order 11246, which prohibited federal contractors from discriminating against employees, and noting Title IX was later amended to include discrimination based on sex).

16. See *id.* (explaining Representative Edith Green’s introduction of higher education bill with provisions regarding sex equality, plus subsequent hearings devoted to topic).

17. See *id.* (detailing increase of educational bills including anti-sex discrimination proposals).

18. See *id.* (explaining months of debate culminating in agreed legislation protecting against sex discrimination, which became Title IX).

19. See 20 U.S.C.A § 1681(a) (West 1972) (stating “[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”).

20. See Ann K Wooster, Annotation, *Sex Discrimination in Public Education Under Title IX—Supreme Court Cases*, 158 A.L.R. Fed. 563, §2 (1999) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)) (“Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.”).

Section II(A) below discusses Title IX's extension to collegiate athletics.²¹ Subsection II(B) evaluates the Department of Education's three-pronged analysis for determining compliance.²² Sections II(C)–(G) address the injunctive relief standard and how courts in varying jurisdictions have applied it in recent Title IX lawsuits.²³

A. Applying Title IX to Athletics

At the time Congress passed Title IX, “the breadth of Title IX’s application to athletics was unclear and the subject of some debate.”²⁴ Through Section 1687, Congress amended Title IX by providing further interpretation of the term “program or activity.”²⁵ Section 1687 clarified that the phrase “program or activity” in Title IX extended to all the operations of “a college, university, or other postsecondary institution, or a public system of higher education.”²⁶ Further, it was promulgated by the Department of Education that “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against” within athletic programs.²⁷ This provision of the Code of Federal Regulations further orders that there be equal opportunity for members of all sexes in available athletic opportunities.²⁸

Throughout the years, Title IX’s application to athletics has developed through various regulations and court decisions.²⁹ In gen-

21. For further discussion of the application of Title IX to athletics, see *infra* notes 24–36 and accompanying text.

22. Title IX compliance analysis, see *infra* notes 37–72 and accompanying text.

23. For further discussion of the injunctive relief standard and its application by courts in recent Title IX suits, see *infra* notes 73–162 and accompanying text.

24. See JANET P. JUDGE, TITLE IX AND ITS APPLICATION TO INTERCOLLEGIATE ATHLETICS, 11 (Mass. Continuing Legal Educ., Inc., 2012) (describing application of Title IX to intercollegiate athletics).

25. See 20 U.S.C.A. § 1687 (West 2016) (defining, in relevant part, “program or activity” as “all the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education”).

26. See *id.* § 1687(2)(A) (defining “program or activity” to mean “a college, university, or other postsecondary institution, or a public system of higher education”).

27. See 34 C.F.R. § 106.41(a) (2020) (prohibiting exclusion on basis of sex from participation in “any interscholastic, intercollegiate, club or intramural athletics”).

28. See *id.* § 106.41(c) (providing equal athletic opportunity for members of all sexes while listing factors to consider in determining whether equal opportunities have been provided, such as equipment, scheduling, travel allowance, coaching opportunities, availability of locker rooms, and competitive facilities).

29. See Paul Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS SPORT 127, 127 (2008) (detailing history of Title IX litigation).

eral, there are three basic parts of Title IX as it applies to athletics: (1) equal opportunity to participate in sports, (2) proportionality in athletic scholarships awarded to all athletes, and (3) equal treatment in athletics programs.³⁰ Within these three parts, Title IX claims of sex discrimination in athletics fall into two broad categories based on Section 106.41(c) of the Code of Federal Regulations addressed above.³¹ First, claims can focus on effective accommodation claims.³² Second, Title IX discrimination claims in athletics can focus on disparate treatment.³³

The law governing effective accommodation claims is covered by a series of published policy interpretations.³⁴ In 1979, the Department of Health, Education, and Welfare published “Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics.”³⁵ This policy interpretation articulated the three ways in which a school’s compliance with Title IX’s effective accommodation requirement may be assessed:

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

tion in addition to changes made to judicial review on Title IX claims, stating “[Title IX’s] application to athletics has come through various regulations, interpretations, and clarifications as well as numerous lawsuits brought by individuals and groups who have felt excluded, denied or discriminated against within these educational programs and activities”).

30. See *Title IX Frequently Asked Questions*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> [https://perma.cc/5KEN-GAE6] (last visited Apr. 3, 2022) (addressing frequently asked questions regarding Title IX in sports).

31. See RODNEY A. SMOLLA, 1 FED. CIV. RTS. ACTS § 8:29 (3d ed. 2022) (detailing specific Title IX applications to athletics).

32. See § 106.41(c)(1) (stating one factor in determining whether equal opportunities are available is “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes”).

33. See §§ 106.41(c)(2)–(10) (listing other factors for determining whether equal opportunities are available: “(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”).

34. See Judge, *supra* note 24 (explaining increased Title IX complaints led to published additional guidance for policy interpretation).

35. See *Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413 (Dec. 11, 1979) [hereinafter *Policy Interpretation*] (clarifying Title IX’s application in athletic context).

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

(3) Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.³⁶

B. Understanding the Three-Prong Test

In determining whether to grant injunctive relief, courts must address the question of whether an educational institution is effectively accommodating the interests and abilities of both sexes in compliance with Title IX.³⁷ In order for an institution to show that it is effectively accommodating athletes of both sexes, and therefore maintain compliance with Title IX, the Department of Education's Office of Civil Rights requires athletic programs to meet a three-prong test.³⁸ In general, the three-prong test assesses whether an institution is effectively accommodating the athletic interests and abilities of all students regardless of their gender.³⁹

First, institutions are in compliance with Title IX if opportunities for male and female students are provided in "numbers substantially proportionate to their respective enrollments."⁴⁰ Second, if members of one sex are underrepresented, an institution can show compliance by showing a "history and continuing practice of program expansion" that is responsive to the interests and abilities

36. *See id.* (detailing three ways schools' compliance with Title IX's effective accommodation requirement may be assessed).

37. *See Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1089 (S.D. Iowa 2020) (detailing preliminary injunction standard courts apply in Title IX cases).

38. *See id.* (introducing three-prong test for Title IX cases).

39. *See Berndsen v. N.D. Univ. Sys.*, 7 F.4th 782, 793 (8th Cir. 2021) (explaining general purpose of three-part test that was created by Department of Education's Office for Civil Rights to examine Title IX compliance within educational settings).

40. *See Policy Interpretation*, 44 Fed. Reg. at 71413 (providing regulatory guidance for Title IX compliance).

of the underrepresented sex.⁴¹ Third, where an institution cannot meet the burden of the first two prongs, it can show compliance if it can demonstrate that the interests and abilities of the underrepresented sex have been fully accommodated by the present program.⁴²

In 1996, the U.S. Department of Education's Office of Civil Rights published further clarification of the three-prong test listed above.⁴³ The clarification memorandum elaborated that the three-part test furnishes an institution with three individual avenues to provide nondiscriminatory athletic opportunities.⁴⁴ This memorandum clarified that institutions only need to meet one of the three prongs to prove compliance with Title IX.⁴⁵ With regard to the first prong, showing substantial proportionality, the memorandum clarified that exact proportionality satisfies this criteria.⁴⁶ The memorandum further stated that exact proportionality may not always be achieved, and proportionality should depend on the institution's specific circumstances and size of its athletic program.⁴⁷

In 2003, the U.S. Department of Education's Office of Civil Rights published yet another clarification on the three-prong test.⁴⁸ The 2003 clarification reiterated that the three-pronged test is the

41. *See id.* ("Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex.").

42. *See id.* ("Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.").

43. *See Clarification of Intercollegiate Athletics Policy Guidance*, U.S. DEP'T OF EDUC. (Jan. 16, 1996), <http://www.ed.gov/ocr/docs/clarific.html> [<https://perma.cc/52VY-M9GT>] (clarifying use of Title IX in intercollegiate athletics policy).

44. *See id.* (confirming three possible avenues for compliance with Title IX).

45. *See id.* (establishing institutions need to comply with only one part of three-part test to provide nondiscriminatory participation opportunities for individuals regardless of sex).

46. *See id.* (stating one way to achieve proportionality is if there is "no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment").

47. *See id.* (clarifying circumstances will exist when institutions are unable to achieve exact proportionality due to natural fluctuations in enrollment or participation rates).

48. *See Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, U.S. DEP'T OF EDUC. (July 11, 2003), <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> [<https://perma.cc/7RPB-K8H3>] (providing further clarification plus guidance regarding three-prong standard for Title IX compliance).

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standard for determining whether an educational institution has accommodated the interests of all students, and that an institution may choose which of the three criteria it intends to pursue.⁴⁹ When evaluating Title IX claims, courts must use the three-prong analysis promulgated by the U.S. Department of Education's Office of Civil Rights controlling deference.⁵⁰

Courts have differed in their opinions as to exactly what burden students must meet to show that institutions fail to comply with the three-pronged analysis.⁵¹ In *Ohlensehlen v. University of Iowa*,⁵² the court granted injunctive relief after finding that Plaintiffs could establish that the University of Iowa did not effectively accommodate female athletes.⁵³ Conversely, in *Balow v. Michigan State University*,⁵⁴ the court denied injunctive relief after finding that Plaintiffs were not likely to show that Michigan State University ("MSU") was noncompliant with Title IX.⁵⁵

1. *Prong One: Substantial Proportionality*

The first prong of the three-prong test states that an institution is in compliance with Title IX when athletic participation opportunities for both male and female students are substantially proportionate to their respective full-time enrollments.⁵⁶ Courts have been reluctant to assign an exact percentage difference that would

49. *See id.* (affirming three-part test as standard for reviewing Title IX compliance).

50. *See Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1089 n.1 (S.D. Iowa 2020) (citing *Chalenor v. Univ. N. Dakota*, 291 F.3d 1024, 1047 (8th Cir. 2002)) (stating court applies deference to U.S. Department of Education's Office of Civil Rights).

51. *See Ohlensehlen*, 509 F. Supp. 3d at 1088 (granting preliminary injunction); *see also Balow v. Mich. State Univ.*, No. 1:21-CV-44, 2021 WL 650712, at *1 (W.D. Mich. Feb. 19, 2021) (denying preliminary injunction and finding Plaintiffs failed to show substantial likelihood of success given "MSU's participation gap appears to be lower than 2%. Plaintiffs have not cited, and the Court is not aware, of any case where a gap lower than 2% failed to satisfy the test for substantial proportionality").

52. *Ohlensehlen*, 509 F. Supp. 3d at 1089 (detailing Plaintiffs' request for preliminary injunction relating to University of Iowa's cuts to women's athletic teams).

53. *See id.* at 1088 (granting injunctive relief after holding Plaintiffs were likely to succeed on Title IX claims).

54. *See Balow*, 2021 WL 650712, at *1 (analyzing plaintiffs request for injunctive relief in Title IX case).

55. *See id.* (denying injunctive relief in Title IX case because Plaintiffs failed to show they were likely to succeed on Title IX claims).

56. *See Policy Interpretation*, 44 Fed. Reg. 71413 (Dec. 11, 1979) (interpreting Title IX's application to intercollegiate athletics).

meet or fail to meet the substantial proportionality requirement.⁵⁷ If an institution is able to show substantially proportionate athletic participation opportunities, the institution has satisfied a “safe harbor” in establishing compliance with Title IX.⁵⁸ As the court in *Cohen v. Brown University*⁵⁹ stated, “a university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup.”⁶⁰

2. *Prong Two: Program Expansion*

When an institution is unable to satisfy prong one of the test, it can establish Title IX compliance by showing a history and continuing practice in developing athletic programs to the interests and abilities of the discriminated sex.⁶¹ The second prong, as well as the third prong, recognize that there are circumstances where proportionality is unattainable.⁶² An institution may satisfy the second prong by showing that it historically increased the percentage of opportunities for the underrepresented sex compared to the other sex, and that the expansion is continuing.⁶³

According to the U.S. Department of Education’s guidance, this prong requires a review of the entire history of the athletic program with a focus on the participation opportunities provided to the underrepresented group.⁶⁴ In assessing whether an institution

57. See Judge, *supra* note 24 (discussing *Biediger v. Quinnipiac University*, where court stated 2% would meet test but disparity of 3.62% did not); see also *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 111 (D. Conn. 2010) (“A 3.62 percent difference represents, in strictly numerical terms, a borderline case of disproportionate athletic opportunities for women.”).

58. See *Ohlensehlen*, 509 F. Supp. 3d at 1090 (reiterating first prong of three-prong test promulgated by U.S. Department of Education).

59. See *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (reviewing Title IX noncompliance claims).

60. See *id.* (reiterating compliance with prong one leads to safe harbor for Title IX compliance).

61. See *Policy Interpretation*, 44 Fed. Reg. 71413 (Dec. 11, 1979) (providing clarification on Title IX as applied to intercollegiate athletics).

62. See *Cohen*, 991 F.2d at 898 (detailing reason U.S. Department of Education provided prong two and prong three of three-prong test for institutions where substantial proportionality is not feasible or attainable).

63. See Judge, *supra* note 24 (evaluating application of Title IX to intercollegiate athletics).

64. See *Clarification of Intercollegiate Athletics Policy Guidance*, U.S. DEP’T OF EDUC. (Jan. 16, 1996), <http://www.ed.gov/ocr/docs/clarific.html> [<https://perma.cc/VM9D-4M8M>] (stating second prong analysis depends on “whether 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. Developing interests include interests that already exist at

has a history of program expansion, evidence courts consider includes the institution's record of adding intercollegiate teams or upgrading teams to intercollegiate status for the underrepresented sex.⁶⁵ Further, while determining whether an institution has a continuing practice of program expansion, evidence courts consider is the institution's implementation of a program expansion plan and procedures for requesting additional sport teams.⁶⁶ Both showings would be further bolstered by introducing evidence that the institution makes an effort to collect assessments of interests to take action in response to those results.⁶⁷ If an institution can show that it has a history and continuing practice of expanding its athletic program in response to the developing interests and abilities of the underrepresented sex, it will be considered compliant with Title IX.⁶⁸

the institution. There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex”).

65. *See id.* (listing several factors indicating history of programs expansion including “an institution’s record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex; an institution’s record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and an institution’s affirmative responses to requests by students or others for addition or elevation of sports”).

66. *See id.* (listing factors indicating continuing practice of program expansion: “an institution’s current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and an institution’s current implementation of a plan of program expansion that is responsive to developing interests and abilities”).

67. *See id.* (“[The Office of Civil Rights] would also find persuasive an institution’s efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.”).

68. *See id.* (analyzing several scenarios intended to illustrate prong-two principles—for example “[i]n the mid-1970s, Institution E established five teams for women. In 1979 it added a women’s varsity team. In 1984 it upgraded a women’s club sport with twenty-five participants to varsity team status. At that time it eliminated a women’s varsity team that had eight members. In 1987 and 1989 Institution E added women’s varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women’s team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women’s varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests”).

3. *Prong Three: Effective Accommodation*

Finally, prong three of the test allows an institution to remain in compliance with Title IX if, despite being unable to show substantial proportionality or program expansion, it can establish that the interests and abilities of the members of the underrepresented sex are fully accommodated by the current athletic program.⁶⁹ To satisfy this prong, the institution bears the burden of showing that the school took reasonable steps to ensure that the interest and abilities of the underrepresented group were met.⁷⁰ If the institution has shown reasonable attempts to ensure that the interests and abilities of students were met, the institution will be in compliance with Title IX despite gaps in gender participation.⁷¹ This prong will require more than surveys standing alone, but rather, the use of multiple tools implemented at a constant rate to provide accurate insight into student interest.⁷²

C. COVID-19 Cuts and Requests for Preliminary Injunctions

In response to budget constraints following the COVID-19 pandemic, several colleges made cuts to their athletic programs.⁷³ In an attempt to reinstate their sport teams, women affected by the cuts began filing Title IX lawsuits and requesting courts to enter injunctions forcing schools to reinstate their teams.⁷⁴ These law-

69. See *Policy Interpretation*, 44 Fed. Reg. at 71413 (Dec. 11, 1979) (stating compliance can be assessed through showing “that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program”).

70. See Judge, *supra* note 24 (discussing third prong of Title IX compliance analysis).

71. See *id.* (explaining provision excusing noncompliance if institution can establish reasonable attempts to ensure interests and abilities of students were met).

72. See at 137-38 (explaining “a school should not hope to satisfy the Third Part by merely providing statistics purporting to show a lack of interest in the area traditionally recruited by the school” given *Cohen* Court’s fear that “there exists the danger that, rather than providing a true measure of women’s interest in sports, statistical evidence purporting to reflect women’s interest instead provides only a measure of the very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports. Prong three requires some kind of evidence of interest in athletics, and the Title IX framework permits the use of statistical evidence in assessing the level of interest in sports. Nevertheless, to allow a numbers-based lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX” (footnote omitted)).

73. See Marshall, *supra* note 6 (detailing sport cuts made following COVID-19 pandemic).

74. See Hensley-Clancy, *supra* note 5 (discussing Title IX lawsuits filed in response to cut sports programs).

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suits argue that institutions were already in violation of Title IX due to disproportionate representation of both sexes in athletic offerings, and that continued team cuts furthered that imbalance, or at least kept it disproportionate.⁷⁵ In some cases, the threat of lawsuits caused institutions to reverse course and reinstate cut teams.⁷⁶ Other lawsuits proceeded, and courts issued differing opinions on whether the standards for an injunction were met.⁷⁷

To remedy these cuts, many plaintiffs sought injunctive relief, which the court in *Ohlensehlen* stated, “is an extraordinary remedy that is not issued lightly.”⁷⁸ In determining whether to issue a preliminary injunction for a Title IX claim, courts generally weigh four factors: (1) plaintiff’s probability of success on the merits of their Title IX claim; (2) the threat of irreparable harm to plaintiffs absent relief; (3) the balance of weighing the harm suffered by plaintiff against the harm suffered by the institution resulting from an injunction; and (4) the public interest.⁷⁹ These factors are not a rigid formula and instead require courts to weigh each of the particular circumstances of each case.⁸⁰ Of these factors, no one factor is determinative and plaintiffs bear the burden of showing that these factors weigh in favor of granting an injunction.⁸¹

75. *See id.* (detailing Plaintiffs’ decisions to file Title IX lawsuits given historical and continued noncompliance).

76. *See* Chris Burt, *Title IX: Dartmouth Reverses Course, Reinstates Women’s Athletic Teams*, UNIV. BUS. (Feb. 1, 2021), <https://universitybusiness.com/title-ix-dartmouth-reverses-course-reinstates-womens-athletic-teams/> [<https://perma.cc/N2S7-SRPN>] (writing enrollment of women at Dartmouth College was 49.06% while percentage of women athletes was 46.23%).

77. *See* Hensley-Clancy, *supra* note 5 (discussing several Title IX suits filed by female athletes whose teams had been cut following COVID-19 budget cuts).

78. *See* *Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1093 (S.D. Iowa 2020) (discussing high standard of preliminary injunction showings that must be met for such extreme remedy).

79. *See* Anna Majestro, *Preparing for and Obtaining Preliminary Injunctive Relief*, A.B.A. (June 4, 2018) <https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2018/preliminary-injunction-relief/> [<https://perma.cc/9ND7-3BES>] (indicating while tests for obtaining injunctive relief may vary slightly across jurisdictions, generally four factors are weighed in determining whether injunctive relief is appropriate in given case: “(1) that he or she is likely to succeed on the merits of his claims; (2) that he or she is likely to suffer irreparable harm without preliminary relief; (3) the balance of equities between the parties support an injunction; and (4) the injunction is in the public interest.”).

80. *See* *Ohlensehlen*, 509 F. Supp. 3d at 1094 (stating balancing of factors requires court to “flexibly weigh the case’s particular circumstances to determine “whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined”” (citing *Calvin Klein Cosmetics Corp. v. Lenox Lab., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987))).

81. *See id.* (stating burden of proof shifts to plaintiffs in preliminary injunction requests).

D. Touchdown in *Ohlensehlen* for Plaintiffs

Ohlensehlen is a case that stems from COVID-19 related athletic cuts where the court granted injunctive relief to Plaintiffs.⁸² The Defendant, the University of Iowa, is a public institution of higher education in the State of Iowa.⁸³ Therefore, the University receives federal funding and is subject to Title IX.⁸⁴ In August 2020, citing the financial burdens following the COVID-19 pandemic, the University announced that the school's ability to support athletic programs was no longer viable.⁸⁵ In turn, the University made the decision to eliminate the women's swimming and diving team.⁸⁶ In December 2020, Plaintiffs, members of the women's swimming and diving team, filed a class action lawsuit alleging that the University would be noncompliant with Title IX and requested an injunction prohibiting the University from eliminating the women's swimming and diving team.⁸⁷

The court started by evaluating the first injunctive relief factor, finding that Plaintiffs were likely to succeed in a Title IX action.⁸⁸ In evaluating this factor, the court applied a "fair-chance" standard, meaning that Plaintiffs' burden of proof was that they had a fair chance in succeeding on the merits of their Title IX claims.⁸⁹ The question before the court then became "whether the University of Iowa will comply with Title IX under Prong One of the Three-Part Test in 2021–22, after eliminating women's swimming and diving teams alongside three men's teams."⁹⁰

Prong one of the three-prong test is fact-specific and requires that institutions provide athletic participation opportunities sub-

82. *See id.* at 1090 (finding University announced cuts to sports programs citing financial constraints imposed by COVID-19 pandemic fallout).

83. *See Institutions, Bd. of Regents*, <https://www.iowaregents.edu/institutions> [<https://perma.cc/6G66-T6FJ>] (last visited Mar. 13, 2022) (reinforcing Title IX is applicable because as state institution, University of Iowa receives federal funding).

84. *See Ohlensehlen*, 509 F. Supp. 3d at 1090 (reiterating Title IX's application to University of Iowa given its receipt of federal funds).

85. *See id.* at 1092 (detailing University of Iowa's decision to cut sport programs due to COVID-19 pandemic's effect on finances).

86. *See id.* at 1088 (explaining University of Iowa's swimming and diving team was one of sport programs cut due to budgetary concerns).

87. *See id.* (describing Plaintiff's request for preliminary injunction based on University of Iowa's noncompliance with Title IX).

88. *See id.* at 1094 (reiterating first prong of three-prong standard).

89. *See id.* (explaining application of burden of proof on plaintiffs to prove likelihood of success on Title IX claims).

90. *See id.* (analyzing questions court needs to address in approaching Title IX noncompliance claim, turning first to merits of allegations, then to three-prong analysis).

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stantially proportional between sexes.⁹¹ This prong is usually met “when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team.”⁹² In *Ohlensehlen*, the court relied on Plaintiffs’ expert, Dr. Lopiano’s report, which used information provided under the Equity in Athletics Disclosure Act (“EADA”).⁹³ The court found that EADA reports always overstate women’s participation in intercollegiate athletics, and therefore, despite the fact that they were not absolutely accurate projections, they would be sufficient to evaluate Title IX compliance.⁹⁴

The most recent EADA data available to the court showed that there was a 2.8% disparity that reflected forty-seven fewer athletic opportunities for women than there would be if participation were substantially proportionate to their representation on campus.⁹⁵ Further, Dr. Lopiano’s testimony revealed that the University had a more consistent and persistent gender gap greater than she had ever seen before.⁹⁶ Relying on this data, the court held that Plaintiffs demonstrated a fair chance that the University does not pro-

91. *See id.* (categorizing first prong as “fact-specific inquiry” usually met “when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team”).

92. *See Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, U.S. DEP’T OF EDUC. (July 11, 2003), <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> [<https://perma.cc/4KEQ-C9NJJ>] (detailing methods of compliance with Title IX encouraging “schools to take advantage of [the three-prong test’s] flexibility, and to consider which of the three prongs best suits their individual situations”); *see also Ohlensehlen*, 509 F. Supp. 3d at 1095 (citing *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 974 (D. Minn. 2016)) (“The most recent data from the University’s 2018–19 EADA report discloses a 49.2%-50.8% male-female student athlete ratio despite a student body consisting of only 46.4% men and 53.6% women—a 2.8% disparity that reflects 47 fewer athletic opportunities for women than there would be if participation were substantially proportionate to their representation on campus”).

93. *See Ohlensehlen*, 509 F. Supp. 3d at 1095 (detailing Plaintiffs’ expert testimony finding “[p]ublic data created by the University through its website rosters reflects a participation gap of 92 athletic opportunities for last year (2019–20), and for the current academic year (2020-21), anticipates an athlete gap of 141. And according to the expert testimony of Dr. Lopiano, the female participation gap reflected in this data is considerably understated”).

94. *See id.* at 1099 (analyzing controversy in applying Plaintiffs’ expert’s methods).

95. *See id.* at 1094 (indicating lack of proportionality in athletic opportunities).

96. *See id.* at 1098 (concluding gender gap was at least 2.8%).

vide female students with athletic opportunities substantially proportional to their enrollment.⁹⁷

The court then held that Plaintiffs would suffer irreparable harm if injunctive relief were denied.⁹⁸ The court found that the harm faced by Plaintiffs is “not only irreparable” but “it is existential.”⁹⁹ The court found that Plaintiffs would suffer harm in their athletic development, financial positions, and emotional well-being absent relief.¹⁰⁰

Next, the court evaluated the balance of equities and held that the setbacks suffered by Defendant do not outweigh those suffered by Plaintiffs.¹⁰¹ The court acknowledged that the COVID-19 pandemic caused financial strain on the University.¹⁰² However, the court reiterated that financial hardship was not a defense to sex discrimination.¹⁰³ Finally, the court considered the public’s interest in the case.¹⁰⁴ The court held that since the University is a public institution that is funded by public money, the public has an interest in the University refraining from discrimination on the basis of sex.¹⁰⁵ Weighing all of the above factors, the court granted injunctive relief to Plaintiffs and enjoined the University from eliminating the women’s swimming and diving teams or any women’s athletic team.¹⁰⁶

E. Same Questions, Different Outcome in *Balow*

While the court in *Balow v. Michigan State University* faced a similar issue to the court in *Ohlensehlen*, it denied Plaintiffs’ request for

97. *See id.* at 1101 (finding Plaintiffs’ expert had shown gender gap in athletic opportunities provided to women).

98. *See id.* at 1101–02 (holding Plaintiffs would suffer irreparable harm if injunction was not granted).

99. *See id.* at 1102 (discussing existential harm Plaintiffs would endure due to importance of collegiate sport programs for young athletes).

100. *See id.* (holding Plaintiffs would face irreparable harm in athletic, professional, financial, and emotional well-being if injunction was not granted).

101. *See id.* at 1104 (turning to next factor in determining whether Plaintiffs meets preliminary injunction standard by weighing costs associated on both sides against injunction along with expected effect of such costs).

102. *See id.* (analyzing cost associated with reinstating team on University).

103. *See id.* (stating ultimately, financial hardship is never defense to Title IX noncompliance (citing *Mayerova v. E. Mich. Univ.*, 346 F. Supp. 3d 983, 998 (E.D. Mich. 2018))).

104. *See Ohlensehlen*, 509 F. Supp. 3d at 1104 (turning to fourth factor in evaluating whether burden of showing need for preliminary injunction was met).

105. *See id.* (finding University’s public status implied more of burden to weigh public interest).

106. *See id.* at 1106 (granting injunctive relief for Plaintiffs).

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injunctive relief.¹⁰⁷ MSU announced in October of 2020 that due to COVID-19 related budget constraints, it would discontinue its men's and women's swimming and diving teams.¹⁰⁸ Plaintiffs, members of the women's swimming and diving team, claimed that MSU is in violation of Title IX and the elimination of their team would exacerbate the problem.¹⁰⁹ Accordingly, like the plaintiffs in *Ohlensehlen*, Plaintiffs here requested a preliminary injunction requiring MSU to maintain the women's swimming and diving team.¹¹⁰

Weighing the same factors that the *Ohlensehlen* court did in deciding whether to grant injunctive relief, the *Balow* court found that Plaintiffs failed at the first factor regarding likelihood of success.¹¹¹ This difference in outcome, however, is mostly attributable to the *Balow* court's heightened standard of review.¹¹² The court specifically declined to follow the standard applied by the *Ohlensehlen* court in evaluating the level of likelihood a plaintiff must show to succeed on the merits of a Title IX case.¹¹³ The court stated that unlike courts in the Eighth Circuit, the United States District Court for the Western District of Michigan applies a higher standard.¹¹⁴ This standard requires showing that the Plaintiffs have more than a "fair-chance" of prevailing on their Title IX claim but that they are "likely to" prevail.¹¹⁵

Interestingly, Plaintiffs in *Balow* relied on a report and testimony of Dr. Lopiano, who is the same expert in the *Ohlensehlen*

107. *See* *Balow v. Mich. St. Univ.*, No. 1:21-CV-44, 2021 WL 650712, at *2 (W.D. Mich. Feb. 19, 2021) (denying injunctive relief to Plaintiffs, who sued following dissolution of athletic team due to COVID-19 budget cuts).

108. *See id.* (detailing events leading to announcement of cut athletic programs at MSU).

109. *See id.* (explaining Plaintiffs' position regarding need for injunctive relief).

110. *See id.* at *1 ("Plaintiffs believe that the elimination of their team would exacerbate this problem; accordingly, they have asked the Court for a preliminary injunction requiring MSU to maintain its varsity women's swimming and diving team for the duration of this lawsuit.").

111. *See id.* at *4 ("Plaintiffs' request for an injunction falters on the first, and most important, factor. Plaintiffs have not shown a strong or substantial likelihood of success on the merits of their claim.").

112. *See id.* at *5 (analyzing Plaintiffs' request under heightened likely-to-prevail standard).

113. *See id.* (addressing Plaintiffs' reliance on *Ohlensehlen* while rejecting Eighth Circuit's evaluation for preliminary injunctions under fair-chance standard).

114. *See id.* (abiding by Sixth Circuit's established heightened likely-to-prevail standard).

115. *See id.* (applying heightened standard but recognizing duty to balance Plaintiffs' likelihood of success against other factors).

case.¹¹⁶ Here, however, the court held that Dr. Lopiano's report and projection of the gender gap had several shortcomings and flaws.¹¹⁷ Even still, the court found that the projections indicated that MSU was in violation of Title IX.¹¹⁸ Next, the court held that Plaintiffs met their burden in demonstrating irreparable harm.¹¹⁹ The court next found that an injunction would pose a significant burden on MSU.¹²⁰ Finally, the court held that Plaintiffs did not demonstrate that they are likely to succeed in their claim, and that there would be no benefit to the public's interest.¹²¹ In accordance with these findings, the court denied injunctive relief to Plaintiffs.¹²²

F. *Lazor Falls in line with Ohlensehlen*

In *Lazor v. University of Connecticut*¹²³, Plaintiffs moved for a temporary restraining order enjoining the University of Connecticut ("UConn") from eliminating the women's rowing team.¹²⁴ In June 2020, UConn announced that due to budget concerns the women's rowing team would be cut.¹²⁵ Plaintiffs argued that the decision to eliminate the women's team violated Title IX and a temporary restraining order was needed to maintain the status quo pending judicial resolution.¹²⁶ The court first clarified that in the

116. *See id.* at *5–6 (stating Plaintiffs' reliance on analysis conducted by Donna Lopiano, who uses publicly available data to offer opinion of institution's participation gap).

117. *See id.* at *7 ("Lopiano's analysis contains several shortcomings and flaws that taint her conclusions. First, as she acknowledges, she does not possess the data necessary to accurately count participant numbers. She is forced to guess the number of participants based on EADA reports that are inconsistent with the definition of participant under Title IX, and web rosters that she speculates are more in line with that definition.").

118. *See id.* (relying on Lopiano's analysis of participation gap).

119. *See id.* at *12 (holding Plaintiff's met their burden in showing irreparable harm through discontinuation of team, leading to significant impacts on athletic experience, ability to compete, and transfer costs).

120. *See id.* (stating "an injunction would require MSU to allocate significant resources to the women's swimming and diving team that MSU could use elsewhere").

121. *See id.* (finding absent showing of succeeding on claim of discrimination in athletic opportunities, requested injunction would not serve public interests).

122. *See id.* (denying Plaintiffs' motion for preliminary injunction).

123. *Lazor v. Univ. of Conn.*, No. 3:21-CV-583 (SRU), 2021 WL 2138832 (D. Conn. May 26, 2021).

124. *See id.* (stating cause of action for Plaintiffs seeking to enjoin Defendants from eliminating women's sports teams).

125. *See id.* (reporting University announced on June 24, 2020 it would cut women's rowing, plus two men's sports teams).

126. *See id.* (reiterating Plaintiffs' argument of irreparable harm without injunctive relief and substantial likelihood of success on Title IX claims).

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Second Circuit, the same legal standard governs motions for both temporary restraining orders and preliminary injunctions.¹²⁷ To prevail on a motion for a temporary restraining order, a plaintiff must demonstrate that she is likely to succeed on the merits, she is likely to suffer irreparable harm in the absence of relief, the balance of equity tips in her favor, and the injunction serves the public interest.¹²⁸

The court proceeded to find that Plaintiffs established they would suffer irreparable harm in the absence of relief and that there was a substantial likelihood of success on their Title IX claim.¹²⁹ Particularly, the court held the participation gap between genders in athletic programs was noncompliant with Title IX.¹³⁰ This gap, the court held, was also not attributable to natural fluctuation in enrollment or drops in female participation and interest.¹³¹ Strikingly, the court stated that evidence regarding UConn's historical data showed that UConn was not, and has not, been compliant with Title IX requirements since 2008.¹³² Given gender gaps in athletic opportunities available, the decision to further cut women's programs was held to only exacerbate noncompliance by magnifying UConn's gender disparity in athletic programs.¹³³

In evaluating the other factors required for a temporary restraining order, the court also found in favor of Plaintiffs.¹³⁴ The court stated that Plaintiffs would suffer irreparable harm in the absence of relief.¹³⁵ The balancing of equities also favored Plaintiffs

127. *See id.* (articulating standard of review applied by Second Circuit in evaluating motions for temporary restraining orders).

128. *See id.* at *3 (stating standard for movant to prevail on motion for temporary restraining order).

129. *See id.* at *2 (granting Plaintiffs' motion for temporary restraining order enjoining Defendants from eliminating women's sport programs).

130. *See id.* at *5 (concluding "the participation gap [percentage] is well above a viable team size even when using the participation gap numbers offered by UConn for the academic years of 2019–2020 (34.46) or 2020–2021 (20)").

131. *See id.* (finding UConn failed to proffer any evidence suggesting natural fluctuations in enrollment were casting disparity in athletic participation opportunities).

132. *See id.* (articulating data suggested UConn experienced participation gaps disfavoring females every year for past thirteen years).

133. *See id.* at *6 (concluding cutting women's rowing would only exacerbate noncompliance by magnifying UConn's disparity in athletic participation opportunities).

134. *See id.* at *6–7 (concluding Plaintiffs met burden of showing likelihood of establishing irreparable harm, balancing of equities in Plaintiffs' favor, and furthering public interest).

135. *See id.* at *6 (determining Plaintiffs would likely suffer irreparable harm since many athletes train vigorously to compete at collegiate levels, while noting athletes would lose long-sought opportunities to compete at this level).

as UConn failed to describe any harm that it would face in sustaining the women's athletic teams.¹³⁶ Finally, the court held that the public's interest in guaranteeing Plaintiffs' civil rights as guaranteed under Title IX, favored Plaintiffs.¹³⁷ Finding that Plaintiffs met their burden for a temporary restraining order, the court ordered UConn to reinstate eliminated women's athletic teams.¹³⁸

G. First Circuit Declares Title IX Compliance Victory

On October 27, 2021, the United States Court of Appeals for the First Circuit upheld a revised settlement agreement between Brown University and student-athletes in a landmark Title IX compliance case, *Cohen v. Brown University*.¹³⁹ The approved settlement comes after nearly three decades of Title IX legal proceedings.¹⁴⁰ The litigation between Brown University and student-athletes began in 1991, when Brown University downgraded four women's athletic teams from fully varsity status to intercollegiate club status.¹⁴¹ Several members of the cut women's teams initiated suit against Brown University under Title IX claiming that the University did not effectively accommodate the interests and abilities of both sexes.¹⁴² At that time, the district court certified a class of all present and future Brown University female students who participate in intercollegiate athletics funded by Brown University.¹⁴³ This original class of students, all of whom have graduated, remain class representatives today.¹⁴⁴

136. *See id.* at *8 (finding no harm sustained by UConn while acknowledging negative effect on students such as team members transferring, coaches securing other positions, and ending recruitment efforts).

137. *See id.* (determining public interest favors institutional compliance with federal law).

138. *See id.* at *8 (concluding Plaintiffs prevailed on burden of proving irreparable harm plus substantial likelihood of success on merits).

139. *See Cohen v. Brown Univ.*, No. 21-1032, 2021 U.S. App. LEXIS 32209, at *34 (1st Cir. Oct. 27, 2021) (upholding Brown University's settlement agreement with student-athletes while rejecting objections raised by class members).

140. *See id.* at *4 (detailing historical roots of preceding starting in 1990s).

141. *See id.* (explaining initiation of suit when several women's volleyball and gymnastics teams sued Brown University for downgrading women's volleyball and women's gymnastics (alongside men's golf and water polo) from full varsity status to intercollegiate club status).

142. *See id.* (discussing basis for Title IX suit).

143. *See id.* at *4–5 (clarifying district court's decision to certify 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").

144. *See id.* at *5 (describing class representatives as women student-athletes then enrolled at Brown University, all of whom have graduated, save for two students who dropped out).

In 1992, the district court entered a preliminary injunction in favor of the student-athletes and held a trial on the merits.¹⁴⁵ After the trial, the court ruled that Brown violated Title IX and ordered it to submit a compliance plan.¹⁴⁶ In 1998, after the court's disapproval of Brown's initial proposal, the parties reached a joint agreement.¹⁴⁷ The agreement created a proportion representation scheme which required Brown to submit annual compliance reports, and created a mechanism for the parties to raise objections relating to Brown's compliance thereof.¹⁴⁸ This agreement was indefinite in duration.¹⁴⁹

This agreement stayed in place for about twenty-two years until May of 2020, when Brown University announced an initiative to downgrade five women's teams and six men's teams from varsity to club status.¹⁵⁰ The following June, Brown reinstated the varsity status of the men's track, field, and cross-country teams, excluding any women's teams and thereby violating the joint agreement.¹⁵¹ Following mediation, the parties entered into an amended settlement agreement, which was the agreement brought before the First Circuit.¹⁵² The amended settlement agreement expires in 2024 and holds that Brown University must restore two women's teams to varsity status, and may not downgrade any women's varsity team.¹⁵³

145. *See id.* at *6 (stating during trial, Brown University settled with Plaintiffs on claims relating to disparate-funding issues, so what remained were claims of disparate participation opportunities).

146. *See id.* at *5 (explaining district court holding Brown University violated Title IX by failing to provide equal participation opportunities for all genders).

147. *See id.* at *6 (reporting district court's disapproval of Brown University's initial plan to cut men's varsity teams as means of leveling playing field as well as appellate court's decision to remand finding district court's denial as wrong).

148. *See id.* at *6 (describing proportional representation scheme where each gender of Brown's athletes must lie within 3.5% or 2.25% of each gender's respective campus presence, depending on circumstances).

149. *See id.* at *7 (noting indefinite terms of joint agreement which provided jurisdiction to district court for both interpretation and compliance enforcement).

150. *See id.* (describing Brown University's announcement of "Excellent in Brown Athletics Initiative" which sought to make Brown's programs more competitive overall); *see also New Initiative to Reshape, Improve Competitiveness in Brown Varsity and Club Athletics*, NEWS FROM BROWN (May 28, 2020), <https://www.brown.edu/news/2020-05-28/athletics-excellence> [<https://perma.cc/YXT5-22ZK>] (discussing Brown University's "Excellence in Brown Athletics Initiative").

151. *See Cohen*, 2021 U.S. App. LEXIS 32209, at *8 (describing Brown University's decision to reinstate only men's sport teams while bowing to intense pressure and fierce backlash).

152. *See id.* (explaining despite Brown University's promise to achieve compliance by making unspecified programmatic modifications, class representatives sought enforcement of original agreement along with emergency relief).

153. *See id.* at *9 (noting Brown University chose to restore women's equestrian team and women's fencing team to varsity status).

Further, if Brown elects to make upgrades to any men's teams to varsity status, it must also upgrade an equal number of women's teams plus two to varsity status.¹⁵⁴

After the parties submitted the amended settlement agreement to the district court for approval, several of Brown's varsity female athletes objected to the agreement.¹⁵⁵ The objectors argued that (1) the named representatives were inadequate representatives of the class and (2) the proposed settlement was not fair, reasonable, or adequate.¹⁵⁶ The district court approved the amended agreement, stating that the number of objectors was small and that the agreement is representative and reasonable.¹⁵⁷

On appeal, the United States Court of Appeals for the First Circuit agreed and upheld the amended agreement.¹⁵⁸ First, the court held that the named representatives were adequate representatives of the class because the objectors did not show that the interests of the named class conflict with the interests of members of the class.¹⁵⁹ Second, the court held that the agreement was fair as it conferred demonstrable benefits to Brown's female athletes.¹⁶⁰ In its conclusion, the First Circuit stated that the settlement reached is not perfect, but that there is unlikely to be a solution to all the problems that might arise in Title IX lawsuits.¹⁶¹ Prophetically, the court ended its opinion by stating that the need for judicial supervision has diminished and the "finish line is in sight."¹⁶²

154. *See id.* (stating terms of amended settlement agreement).

155. *See id.* (stating twelve members of either Brown's varsity women's gymnastics team or its women's hockey team objected to amended settlement agreement).

156. *See id.* at *9 (summarizing Objector's arguments asserting class representatives could not adequately represent class as whole, and further agreement was unfair, unreasonable, and inadequate).

157. *See id.* at *9–10 (declaring number of objectors represents very small fraction of class members while noting this fact "is in and of itself representative of the settlement's reasonableness").

158. *See id.* at *35 (affirming judgment of district court).

159. *See id.* at *20 (declaring class representatives' interests do not meaningfully conflict with class members, so members together with representatives are "competent champions of the cause").

160. *See id.* at *29–30 (advocating conferred demonstrable benefits to class such as immediate reinstatement of women's equestrian and fencing teams, in addition to Brown University's commitment to not downgrade women's varsity teams for life of amended settlement agreement).

161. *See id.* at *35 ("The settlement reached here, though not perfect, marks a fitting conclusion to decades of judicial intrusion upon Brown's home field.").

162. *See id.* (referring to district court's conclusion marking finish line of judicial supervision over Brown University's Title IX compliance).

III. MIRAGE OF A FINISH LINE: ANALYZING THE EFFECTIVENESS OF
TITLE IX SETTLEMENTS AND WHAT COVID-INSPIRED
LITIGATION SHOWS ABOUT THE STATE OF
COLLEGIATE TITLE IX
NONCOMPLIANCE

While the court in *Cohen* proclaimed that the finish line for gender equality in collegiate sports is near, the COVID-19 pandemic has uncovered compliance issues rampant within the collegiate sport world.¹⁶³ Research has shown that about four hundred and sixty U.S. college teams have dissolved since the beginning of the COVID-19 pandemic in March 2020.¹⁶⁴ Of those, roughly fifty have since been reinstated.¹⁶⁵ In cases where teams were reinstated, “sounding the Title IX alarm has been central.”¹⁶⁶ While the *Cohen* court declared sight of a gender equality in sports finish line, coronavirus-related athletic cuts have flooded Title IX litigation.¹⁶⁷

Although the First Circuit concluded that Brown University’s amended settlement agreement “made considerable strides” in ensuring gender equality in collegiate athletic programs, the finish line is far from in sight.¹⁶⁸ The chief complaint of the objectors to the agreement was that the agreement expires in 2024 and that this end date forfeits the protections of the agreement without commensurate gains for the class.¹⁶⁹ The court responded by stating that there is no realistic prospect that the joint agreement would

163. For further discussion of Brown University’s settlement agreement, see *supra* notes 147–162 and accompanying text.

164. See Janet Lorin & Akayla Gardner, *How Title IX Helped Save College Sports Teams Cut During the Pandemic*, BLOOMBERG (Jan. 7, 2022), <https://www.bloomberg.com/news/articles/2022-01-07/how-title-ix-helped-save-college-sports-teams-cut-during-the-pandemic> [https://perma.cc/X5VG-4H44] (discussing research gathered by Jason Bryant, president of National Wrestling Media Association, tracking athletic teams following COVID-19 pandemic).

165. See *id.* (analyzing data showing four hundred sixty teams cut since March 2020, about one hundred forty-five were “casualties of college closures or mergers” while remaining three hundred twenty cut teams had approximately fifty reinstated).

166. See *id.* (acknowledging in some cases, reinstatement occurred when schools achieved “more solid financial footing,” citing Stanford University’s reinstatements following improvement in investment returns and alumni donations).

167. See *id.* (describing “flood of athletics work unseen in decades” brought by COVID-19 pandemic).

168. See *Cohen v. Brown Univ.*, No. 21-1032, 2021 U.S. App. LEXIS 32209, at *34 (1st Cir. Oct. 27, 2021) (determining Brown University’s class representatives made considerable strides in ensuring gender equality in collegiate sport programs).

169. See *id.* at *29 (citing objectors’ argument finding August 2024 expiration date as forfeit of protection for class).

last forever.¹⁷⁰ While it is true that injunctions should not operate into perpetuity, the agreement struck does not provide female athletes with tangible guarantees of equality beyond 2024.¹⁷¹ The court itself premises its holding on the fact that the agreement will benefit Brown's women athletes until 2024.¹⁷² It is unclear what Brown compliance will look like after 2024—however, it is important to note that the agreement had to be amended because Brown violated the previous agreement, which had an indefinite duration.¹⁷³ While some argued the amended settlement agreement was a major victory for gender equality in collegiate sports, others stated the decision was a major disappointment for women's rights in collegiate athletics.¹⁷⁴

The COVID-19 pandemic coupled with Title IX litigation not only shed a light on Title IX noncompliance, but also directly led to real changes in college sports.¹⁷⁵ One such example is the ramification of the *Ohlensehlen* lawsuit on the University of Iowa's athletics department.¹⁷⁶ Following the court's granting of a preliminary injunction, the University of Iowa reinstated women's swimming and diving.¹⁷⁷ On August 24, 2021, the court acknowledged the intention of the parties to enter into a settlement agreement.¹⁷⁸ Univer-

170. *See id.* at *31 (declaring it was never realistic joint agreement would last forever, moreover, accepting institutional reform litigation injunctions should not operate into perpetuity).

171. *See id.* at *32 (noting objectors' argument challenging ability of amended settlement agreement to protect women students matriculating after 2024).

172. *See id.* at *33 (concluding "all of Brown's women's athletes will benefit from the settlement until 2024").

173. *See id.* at *6 (referring to "new era" dawning at Brown University when initiative "Excellence in Brown Athletics Initiative" led to Brown University violating original agreement).

174. *See* Hailey Konnath, *1st Circ. Affirms Deal in 'Landmark' College Sports Bias Case*, LAW360 (Oct. 27, 2021), <https://plus.lexis.com/api/permalink/6736199f-0b0b-4dda-92a5-015f6314367d/?context=1530671> [<https://perma.cc/MKK2-2ZZP>] (quoting Robert J. Bonsignore, counsel for class members opposing amended settlement, stating decision to approve amended agreement is "huge blow for women's rights").

175. *See* Chris Wener, *Title IX Settlement a Catalyst in Launching Iowa Women's Wrestling*, *Barta Says*, DAILY IOWAN (Sept. 23, 2021), <https://dailyiowan.com/2021/09/23/title-ix-settlement-a-catalyst-launching-iowa-womens-wrestling-barta-says/> [<https://perma.cc/M4Z9-D4KA>] (announcing University of Iowa's decision to create women's wrestling team starting in 2023–2024 academic year).

176. *See id.* (reporting announcement of addition of women's wrestling team in response to "COVID-19's impact, along with a Title IX lawsuit settlement from four women's swimmers").

177. *See id.* (relaying announcement of University of Iowa permanently reinstating women's swimming and diving team while stalling men's swimming and diving until end of 2020–2021 academic year).

178. *See* Text Order Granting in Part and Denying in Part Joint Motion to Stay Litigation, *Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085 (S.D. Iowa 2020)

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sity of Iowa Athletic Director, Gary Barta, stated that the settlement agreement specifically required the University to add a women's sport.¹⁷⁹ Therefore, on September 23, 2021, the University of Iowa announced that the University will sponsor a women's wrestling team starting in the 2023-2024 academic year.¹⁸⁰ The University's Athletic Director attributed this decision directly to the COVID-19 pandemic and the *Ohlensehlen* litigation.¹⁸¹ COVID-19 and subsequent Title IX litigation in the *Ohlensehlen* case exposed Title IX noncompliance, led to the reinstatement of cut sport teams, and added more female opportunities in sports.¹⁸² Prior to these events, the University of Iowa expressed interest in creating a women's wrestling team, but took no concrete action in moving forward.¹⁸³ Therefore, the *Ohlensehlen* case, a direct consequence of the COVID-19 pandemic, increased gender equality in sports.¹⁸⁴

The immediate impact of COVID-19 and subsequent Title IX suits is not limited to the University of Iowa.¹⁸⁵ In many instances, the threat of Title IX lawsuits forced reversals of policies and internal reviews of Title IX compliance.¹⁸⁶ One such case was in Dartmouth College.¹⁸⁷ In July of 2020, Dartmouth College an-

(Case No. 3:20-cv-00080), ECF No. 84 (“[G]ranting in part and denying in part . . . the Joint Motion to Stay Litigation for 60 Days. The Court notes the parties indicate they have reached a settlement of the issues herein. The Court denies the request to stay proceedings, but given the parties’ notice of settlement, the Court removes the trial and final pretrial conference from the court’s calendar.”).

179. See Wener, *supra* note 175 (quoting Athletic Director Barta stating “[a]s part of the Title IX lawsuit settlement, we agreed to add a women’s sport . . .”).

180. See *id.* (announcing addition of women’s wrestling team in addition to providing ten scholarships for inaugural women’s wrestling team, which is expected to reach thirty to thirty-five athletes total).

181. See *id.* (quoting Athletic Director Barta stating “were it not for COVID we wouldn’t have cut sports. . . [and w]ere it not for the Title IX lawsuit, I wasn’t ready to add women’s wrestling yet”).

182. See *id.* (reporting reinstatement of women’s teams and decision to add women’s wrestling).

183. See *id.* (reiterating hope to gain women’s wrestling student-athletes on campus as early as 2022-23 academic year).

184. See *id.* (quoting University of Iowa statement “[t]he pandemic led to the athletic department cutting four sports. . . which brought on the Title IX lawsuit and subsequent settlement”).

185. See Hensley-Clancy, *supra* note 5 (detailing several Title IX lawsuits initiated following coronavirus-related sport program cuts).

186. See *id.* (noting several university policy reversals following lawsuit threats).

187. See Associated Press, *Dartmouth Reinstates Five Sports Teams After Title IX Concerns*, ESPN (Jan. 29, 2021), https://www.espn.com/college-sports/story/_/id/30801372/dartmouth-reinstates-five-sports-title-ix-concerns [<https://perma.cc/Y7AX-ZNFQ>] (detailing Dartmouth College’s response to calls for Title IX lawsuits following cuts to sport programs).

nounced that it would be making cuts to women's and men's athletic teams due to an expected financial deficit caused by the COVID-19 pandemic.¹⁸⁸ This decision sparked condemnation from athletes and inspired legal action by the women's swimming and diving team and women's golf team.¹⁸⁹ Those teams hired an attorney and subsequently alleged that Dartmouth was noncompliant with Title IX.¹⁹⁰ In response, Dartmouth entered into a settlement agreement agreeing to reverse its decision to cut the teams and conduct a gender equity review of its athletic program.¹⁹¹ The settlement agreement was an acknowledgement by Dartmouth that the data their athletics department used to determine Title IX compliance may not have been complete.¹⁹² Therefore, threats of Title IX actions led to the reinstatement of several Dartmouth women's athletic teams, to acknowledgement of Title IX noncompliance, and to reform for gender equality in athletics.¹⁹³

Threats of Title IX lawsuits had almost identical ramifications at Clemson University.¹⁹⁴ In November 2020, Clemson announced that it would be cutting athletic teams.¹⁹⁵ This announcement led to the first class action suits filed by both male and female student-athletes alleging Title IX violations.¹⁹⁶ Under the settlement agree-

188. *See id.* (reporting projected \$150 million financial deficit because of COVID-19 pandemic led to cuts in sport programs).

189. *See* Addison Dick et al., *Dartmouth Reinstates Five Sports Teams, Citing Title IX Compliance*, DARTMOUTH (Jan. 29, 2021), <https://www.thedartmouth.com/article/2021/01/dartmouth-reinstates-five-sports-teams-citing-title-ix-compliance> [<https://perma.cc/P7PP-7JGZ>] (detailing legal action taken by Dartmouth College's women's swimming and diving team and women's golf team in response to team cuts).

190. *See id.* (citing lawyer hired by women's swimming and diving team and women's golf team, alleging Dartmouth's violation of Title IX by failing to meet proportionality requirement while conceding prior to cutting women's swimming and diving and women's golf teams, Dartmouth was compliant with Title IX by accommodating interest of female student-athletes).

191. *See id.* (presenting final settlement agreement, which agreed to reinstate women's teams, conduct gender equity reviews, and reimburse legal fees).

192. *See id.* (quoting Dartmouth's statement "elements of the data that Athletics used to confirm continued Title IX compliance may not have been complete").

193. *See id.* (describing litigation threats as propelling Dartmouth to alter compliance procedures).

194. *See* Hope Bellair, *Clemson Adds Women's Sports After Reinstating Cut Sports*, BUS. OF COLL. SPORTS (June 24, 2021), <https://businessofcollegesports.com/olympicsports/clemson-adds-womens-sports-after-reinstating-cut-sports/> [<https://perma.cc/YV38-33T9>] (analyzing Clemson University's decision to reinstate cut sports in conjunction with adding new women's sports).

195. *See id.* (discussing Clemson University's decision to cut men's varsity track and field).

196. *See* *Male & Female Student-Athletes Win Historic Title IX Sex Discrimination Settlements with Clemson University*, BAILEY GLASSER LLP (Apr. 22, 2021), <https://www.baileyglasser.com/news-male-and-female-student-athletes-win-historic-title-ix>

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ment, Clemson agreed to reinstate cut teams, add new women's varsity teams, and conduct a gender equity review to adopt and develop a Gender Equity Plan.¹⁹⁷ Accordingly, Clemson announced that it would be adding a women's lacrosse team and women's gymnastics team in direct response to the settlement agreement.¹⁹⁸ The Iowa, Dartmouth, and Clemson settlements mentioned above are just a few in a line of Title IX settlement agreements stemming from COVID-19 related athletic cuts.¹⁹⁹ These agreements highlight that schools will attempt to remedy Title IX violations when threatened with legal action.²⁰⁰ Court decisions granting injunctions and subsequent settlement agreements show that universities must address Title IX compliance issues and need to remedy ineffective forms of data gathering.²⁰¹ Looking forward, these settlement agreements may lead to substantial change in equal gender access to collegiate sports.²⁰² Particularly, many schools that launched inquiries into gender reporting methods might face a more grim noncompliance reality than was originally realized.²⁰³

While the courts in *Ohlensehlen* and *Balow* came to different conclusions regarding the appropriateness of injunctive relief, they both exposed that universities continue to fail to provide proportional access to athletic opportunities for female athletes.²⁰⁴ The

settlement-clemson-university [<https://perma.cc/L6MK-NJKC>] (announcing settlement agreement following landmark class action suit brought by both male and female student-athletes, alleging Title IX violations).

197. *See id.* (stating settlement agreement would add women's lacrosse and women's gymnastics teams).

198. *See id.* (reporting Clemson University would add women's lacrosse and women's gymnastics in next two years).

199. *See id.* (detailing similar settlement agreements at East Carolina University, University of North Carolina, Williams & Mary College, and Brown University).

200. *See id.* (advocating "Clemson agreed to the history-making settlements with both the male and female student-athletes to avoid the threatened suits").

201. *See id.* (indicating Clemson University's failures to ensure equal treatment for women athletes).

202. *See Male & Female Student-Athletes Win Historic Title IX Sex Discrimination Settlements with Clemson University, supra* note 196 (detailing similar agreements reached by other universities from 2020 through 2021).

203. *See id.* (analyzing how threatening to sue uncovered women athletes being deprived of at least \$1.8 million in athletic financial aid- receiving only \$6,650,912 in athletic financial aid out of \$16,859,840 while comprising 50.48% of athletes).

204. *See generally* *Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1088 (S.D. Iowa 2020) (detailing existing Title IX violations that occurred prior to dissolution of women's sports teams and citing COVID-19 as cause of financial constraints).

court in *Balow* used a heightened standard of review, and therefore held that Plaintiffs were not likely to succeed in their claim.²⁰⁵ However, expert testimony established a gap in female opportunities in sports.²⁰⁶ Further, in *Lazor*, the court specifically declined to follow and criticized the court in *Balow* for referring to the average size of teams as a criterion for proportionality.²⁰⁷ In *Lazor*, the court also granted injunctive relief to plaintiffs alleging Title IX violations when UConn eliminated their women's rowing team citing COVID-19 related budget constraints.²⁰⁸

The cases discussed above shed light on several requirements for plaintiffs to succeed on their Title IX claims.²⁰⁹ The determining threshold in these suits has been to supply the court with accurate data showing gender participation gaps.²¹⁰ A large portion of these decisions are dedicated to examining the accuracy and methods by which experts evaluated athletic participation within universities.²¹¹ Therefore, any plaintiff that seeks a preliminary injunction to reinstate cut athletic teams on the basis of Title IX violations must produce accurate data as to gender gaps in athletic participation.²¹² Plaintiffs in jurisdictions with heightened standards of review, such as in *Balow*, will face a harder time convincing a court that a preliminary injunction is necessary.²¹³ However, that burden is the heaviest portion of the preliminary injunction stan-

205. See *Balow v. Mich. State Univ.*, No. 1:21-CV-44, 2021 WL 650712, at *12 (W.D. Mich. Feb. 19, 2021) (utilizing higher review standard while acknowledging gaps exposed by expert testimony).

206. See *id.* at *6 (describing expert testimony indicating participation gaps, because ratio of male-to-female athletes is not proportional to number of participation opportunities necessary to achieve proportionality—estimating participation gaps of thirty-three, thirty-seven, and thirty-five in seasons ending in 2018, 2019, and 2020, respectively).

207. See *Lazor v. Univ. of Conn.*, No. 3:21-CV-583 (SRU), 2021 WL 2138832, at *13 (D. Conn. May 26, 2021) (“For those reasons, I respectfully disagree with *Balow* to the extent that it stands for the proposition that a participation gap smaller than the average team size defines compliance with Title IX.”).

208. See *id.* at *1–2 (summarizing Plaintiffs' claims alleging UConn's Title IX violations in cutting women's sports programs).

209. See generally *Ohlenschlen*, 509 F. Supp. 3d at 1088 (articulating standard of review for Title IX violations).

210. See *id.* at 1088-90 (reviewing expert testimony analyzing disclosures under Equity in Athletics Disclosure Act to determine athletic participation gaps).

211. See *id.* at 1098-99 (examining Defendant's objection to Dr. Lopiano's expert opinion as unduly speculative and reliant on inaccurate data).

212. See *id.* at 1100 (acknowledging requirement of reliability in expert opinions while finding Dr. Lopiano's testimony to be “highly credible,” and “exceedingly reliable” in showing Title IX noncompliance).

213. See *Balow v. Mich. State Univ.*, No. 1:21-CV-44, 2021 WL 650712, at *12 (W.D. Mich. Feb. 19, 2021) (distinguishing standard of review in *Ohlenschlen* before determining proper standard as likely-to-prevail).

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dards as courts agree that plaintiffs will face irreparable harm in these situations, and Title IX compliance is in the public interest.²¹⁴

These cases demonstrate that Title IX is an effective tool in protecting gender equality in sports.²¹⁵ Further, reinstatement cases have brought a renewed focus on Title IX noncompliance within collegiate sports.²¹⁶ However, these cases show that institutions must reevaluate and adjust their Title IX compliance efforts.²¹⁷ Particularly, as more women enroll in college, there will be a greater need for universities to reevaluate athletic opportunities and resources.²¹⁸ Many of the cases mentioned above have demonstrated that compliance information has been lacking.²¹⁹ Therefore, settlement agreements that focus on enhancing data gathering to better comply with Title IX requirements are beneficial for the future of gender equality.²²⁰ Accurate data regarding athletic opportunities will hold institutions accountable, lead to clarity in litigation proceedings, and provide student athletes with equal treatment.²²¹

214. See *Ohlensehlen*, 509 F. Supp. 3d at 1102 (listing profound impact of cut collegiate programs on Plaintiffs and describing harm faced as “irreparable,” “existential”).

215. See *Lorin*, *supra* note 164 (emphasizing importance of Title IX litigation threats in successful reinstatement cases).

216. See *id.* (“The Title IX reinstatement efforts may have a long-term impact by bringing renewed focus on compliance with the law. . . . As college enrollment increasingly tips towards women, there may be greater need for change in long-standing allocations of resources and teams.”).

217. See *id.* (emphasizing imperative nature of university commitments to renew focus on Title IX compliance following changes in make-up of enrollment).

218. See Kevin Carey, *Men Fall Behind in College Enrollment. Women Still Play Catch-Up at Work*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/2021/09/09/upshot/college-admissions-men.html> [<https://perma.cc/8QBY-LU6S>] (stating female enrollment in college almost doubled over last half-century).

219. See generally *Male & Female Student-Athletes Win Historic Title IX Sex Discrimination Settlements with Clemson University*, *supra* note 196 (discussing requirement for Clemson to implement data-collecting measures affecting Title IX compliance efforts).

220. See *Lorin*, *supra* note 164 (emphasizing importance of elevated response in Title IX compliance as make-up of college enrollment changes).

221. See *Balow v. Michigan State Univ.*, No. 1:21-CV-44, 2021 WL 650712, at 13 (W.D. Mich. Feb. 19, 2021) (discussing importance of expert testimony using accurate athletic enrollment data). For further discussion of expert testimony and Title IX litigation, see *supra* notes 116–122 and accompanying text.

IV. CONCLUSION: THE COVID-19 PANDEMIC AND THE
UNCOVERING OF TITLE IX NONCOMPLIANCE IN
COLLEGIATE ATHLETICS

Title IX of the Education Amendments of 1972 provides that institutions receiving federal funding cannot discriminate on the basis of sex.²²² The COVID-19 pandemic has exposed issues of non-compliance with Title IX amongst collegiate sport programs and forced reevaluation of compliance procedures in many instances.²²³ During the pandemic, several sports teams, many of them women's teams, were cut due to budgetary concerns.²²⁴ Many institutions either reversed course on their own under threat of Title IX litigation.²²⁵ Further, many institutions that proceeded in the litigation process were forced to do so following court injunctions.²²⁶ Plaintiffs in these cases saw an opportunity to hold institutions accountable for already prevalent Title IX violations on the basis of gender inequality in sport programs.²²⁷ COVID-19 related budget cuts have therefore exposed ongoing Title IX violations that are only exacerbated by continued cuts to women's sports.²²⁸ Despite the proclamation that the finish line for gender equality in collegiate sports is near, the COVID-19 pandemic has uncovered compliance issues rampant within the collegiate sport world and higher educa-

222. See 20 U.S.C.A § 1681(a) (West 1972) (prohibiting discrimination on basis of sex by withholding federal funds from Universities allowing or promoting discrimination).

223. See *Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1088 (S.D. Iowa 2020) (detailing existing Title IX violations occurring prior to dissolution of women's sports teams and citing COVID-19 as cause of financial constraints).

224. See *Hensley-Clancy*, *supra* note 5 (listing men's gymnastics, men's tennis, men's swimming, women's swimming, and women's diving all as cut sports programs).

225. See Daniela Allee, *Dartmouth College Reinstates Five Previously Cut Sports Team*, N.H. PUB. RADIO (Jan. 9, 2021), <https://www.nhpr.org/nh-news/2021-01-29/dartmouth-college-reinstates-five-previously-cut-sports-teams-after-threat-of-lawsuit> [<https://perma.cc/R3EG-CUQ7>] (detailing Dartmouth College's decision to reinstate teams previously cut due to COVID-19 financial concerns after threats of Title IX lawsuits).

226. See *Ohlensehlen*, 509 F. Supp. 3d at 1092 (detailing existing Title IX violations that occurred prior to dissolution of women's sports teams and citing COVID-19 caused financial constraints); see also *Lazor v. Univ. of Conn.*, No. 3:21-CV-583 (SRU), 2021 WL 2138832, at *8 (D. Conn. May 26, 2021) (issuing injunction against University).

227. See *Hensley-Clancy*, *supra* note 5 (detailing one female athlete's decision to expose ongoing Title IX violations to reinstate cut athletic teams following COVID-19 pandemic).

228. See *id.* (detailing decisions by female athletes to sue their universities for Title IX noncompliance once coronavirus-related sport cuts were announced).

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tion institutions must be prepared to renew their focus on gender equality in sports.²²⁹

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²²⁹ For further discussion of Brown University settlement agreement, see *supra* notes 148–174 and accompanying text.

* J.D. Candidate, May 2023, Villanova University Charles Widger School of Law; I would like to thank my family, friends, mentors, and MSLJ editors for their unwavering support. This Comment is dedicated to my partner, Benjamin, whose encouragement, positivity, and love guided me through not only writing this Comment but through all of my adventures.