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Reverse Discrimination under Title IX: Do Men Have a Sporting Chance

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I. INTRODUCTION

In recent years, the elimination of sex discrimination in our society has developed into an issue of considerable importance. "Women have made great strides in academics, athletics and employment, continually breaking down glass ceiling barriers." The Civil Rights Act of 1964, which prohibits discrimination on the basis of sex and other protected classes under Title VII, has been the primary source of this progress. Moreover, Title IX, a provision of the Education Amendments of 1972, which prohibits sex discrimination in federally funded educational institutions, has led to dramatic educational advances for women in recent years.

The establishment of Title IX in 1972 prompted significant advancements in the opportunities available to female athletes. Within four years of its implementation, the number of female athletes in the United States increased by 600 percent, to comprise over two million participants. Consequently, during the 1970s,
universities across the country expanded women's intercollegiate athletic programs in order to support this trend of development.\(^6\) Presently, however, this movement is failing to survive because many universities are facing economic difficulties that prevent the continuing expansion of women's athletic programs.\(^7\) Women's teams, in the most extreme cases, are actually being eliminated.\(^8\) This is problematic under Title IX because many universities have not yet fulfilled the required statutory standards.\(^9\) Consequently, women athletes are instituting legal action against these universities, "seeking either the reinstatement of their eliminated teams or an expansion in the institution's women's program[s]."\(^10\)

In recent cases, women athletes have succeeded in Title IX legal disputes. Throughout the 1990s, circuit courts of appeals have consistently ruled that universities must take measures to remedy violations under Title IX.\(^11\) While these decisions are providing women unprecedented opportunities in intercollegiate athletic programs, the indirect result is that budgetary restrictions force universities to reduce the number of roster spots available on men's athletic teams or, in the alternative, eliminate these teams completely.\(^12\) As a result, many of the less prominent men's athletic teams are bearing the burden of Title IX compliance.\(^13\)

Men's athletic teams are responding by filing reverse discrimination claims.\(^14\) Thus far, federal courts have refused to find equal

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\(^7\) See Shook, supra note 4, at 773 (discussing universities' economic difficulties and their subsequent inabilities to meet requirements of Title IX).

\(^8\) See id.

\(^9\) See id.

\(^10\) Id. (noting that women athletes bring lawsuits to force compliance with standards set forth under Title IX).

\(^11\) For a discussion of recent Title IX decisions, see infra notes 68-106 and accompanying text.

\(^12\) See Shook, supra note 4, at 773-74 (stating that federal court rulings under Title IX indirectly force universities unable to afford athletic expansion to reduce men's programs).

\(^13\) See id. at 774 (noting that "less prominent" teams are those that do not generate revenue).

\(^14\) See, e.g., Neal v. Bd. of Trs., 198 F.3d 763, 773 (9th Cir. 1999) (finding no Title IX violation when university reduced number of roster spots available to male student-athletes to correct imbalance between each sex's participation in varsity sports); see also Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999) (finding no Title IX violation when university eliminated men's wrestling and soccer programs).
protection violations in the application of Title IX. Therefore, men’s athletic teams at many universities are currently facing the risk of reduction or termination.

This Comment provides an overview of Title IX and its effects on the survival of non-revenue athletic teams for male student-athletes. Part II outlines the statutory and regulatory background of Title IX and focuses on its early judicial interpretations. Part II also discusses the typical Title IX lawsuit of the 1990s and judicial responses to these actions. Part III describes the currently unsuccessful reverse discrimination claims resulting from the reduction and elimination of men’s athletic teams. Part IV assesses the impact of these recent decisions on the future of non-revenue men’s athletic teams.

II. BACKGROUND

A. Development of Title IX

Congress enacted Title IX as part of the Education Amendments of 1972. Title IX provides, in relevant part, 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 subject to discrimination under any educational program or activity receiving Federal financial assistance . . . .” Title IX expressly applies to all programs and activities at any “public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education.”

15. For further discussion of the federal courts’ rejection of alleged equal protection violations, see supra note 14 and accompanying text.

16. See, e.g., Neal, 198 F.3d at 765 (noting university’s decision to “adopt squad-size targets, which would encourage expansion of the women’s teams while limiting the size of the men’s teams.”).

17. For further discussion of Title IX’s statutory and regulatory background, see infra notes 21-67 and accompanying text.

18. For further discussion of these lawsuits, see infra notes 68-119 and accompanying text.

19. For further discussion of reverse discrimination actions, see infra notes 120-97 and accompanying text.

20. For further discussion of the impact on the future of non-revenue men’s athletics, see infra notes 198-213 and accompanying text.


22. 20 U.S.C. § 1681(c) (1994). There are several statutory exclusions under Title IX, including some religious and military institutions. See 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a) (2000) (exempting from Title IX educational institutions controlled by religious organizations to extent that statute is inconsistent with religious tenets of organizations); see also 20 U.S.C. § 1681(a)(4); 34 C.F.R. § 106.13 (2000) (exempting from Title IX educational institutions devoted to training individuals for United States military).
Initially, there was some uncertainty surrounding Title IX’s application to institutions of higher education. Universities questioned whether and how Title IX should be applied within the realm of collegiate athletics. At its inception, the broad language of Title IX caused considerable apprehension in the academic world. During this period, women’s participation in athletic programs in the United States was growing at an extraordinary rate. Despite this unprecedented growth, universities struggled both to understand and to accommodate the standards set forth in Title IX.

The confusion surrounding the extent of “Title IX’s coverage and the acceptable methods of compliance arose from the absence of secondary legislative materials.” In 1975, Congress directed the Secretary of Health, Education and Welfare (“HEW”) to create regulations explaining Title IX. This action was taken in an effort to provide guidance to university athletic programs. Specifically, these regulations made it clear that gender discrimination in intercollegiate athletics was in violation of Title IX.


24. See id.

25. See id. (noting that universities’ anxiety chiefly centered around identifying which individual programs, particularly in terms of athletics, might come within scope of discrimination provision, and how government would determine compliance). The Cohen court suggested that, for many schools, the men’s football budget far exceeded that of any other sport, and men’s athletics as a whole received a far larger portion of the allocated resources. See id. Typically, this share was vastly disproportionate to the percentage of men in the student body. See id.

26. For a discussion of the increase of women’s participation in athletic programs, see supra note 5 and accompanying text.

27. See Cohen, 991 F.2d at 892.

28. Id. at 893 (stating that “Congress included no committee report with the final bill and there were apparently only two mentions of intercollegiate athletics during the congressional debate”); see also Claudia S. Lewis, Note, Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose, 51 Fordham L. Rev. 1043, 1050-55, 1057-58 (1983) (discussing legislative and post-enactment history of Title IX).

29. See Cohen, 991 F.2d at 893, 895 (defining HEW split, reorganization procedure and placement of subsequent agency authority).

30. See 34 C.F.R. §§ 106.37(c), 106.41 (2000). “[I]n 1979 Congress split HEW into the Department of Health and Human Services (HHS) and the Department of Education (DED).” See Cohen, 991 F.2d at 895. The existing Title IX regulations “were left within HHS’s arsenal while, at the same time, DED replicated them as part of its own regulatory armamentarium.” Id. Despite this, “DED is the principle locus of ongoing enforcement activity.” Id.; see also 20 U.S.C. § 3441(a) (1) (transferring all education functions of HEW to DED); 20 U.S.C. § 3441(a)(3) (transferring education-related Office of Civil Rights work to DED). It is important to note that HHS’s and DED’s regulations are identical except for the change in language necessitated by the splitting of HEW into HHS and DED. See Cohen, 991 F.2d at 895.
tions was a section entitled "Equal Opportunity." Under this section, HEW stated that a recipient of federal funding "shall provide equal athletic opportunity for members of both sexes." The regulation provided that the Director of HEW would consider the following factors in determining whether universities were affording equal opportunities under Title IX:

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.

Furthermore, HEW explained "that 'unequal expenditures' for men's and women's teams would not necessarily 'constitute compliance with the section.'" Consequently, the interpretation of Title IX at that point in time appeared to focus on compliance through equal opportunity instead of compliance through equal expenditure.

In the three years following the issuance of the regulations, HEW received numerous discrimination complaints from more than fifty universities across the nation. Consequently, HEW proposed a "Policy Interpretation" of its regulations in order to decrease the number of complaints and encourage self-policing at the university level. The Policy Interpretation was promulgated in final form in 1979, and it stated that Title IX was designed specifically to address issues within intercollegiate athletics.

31. See 34 C.F.R. § 106.41(c) (2000).
32. Id. § 106.41(c).
33. Id. § 106.41(c) (1)-(10).
34. Shook, supra note 4, at 776 (citing § 106.41(c)) (considering HEW's failure to provide adequate funding for team of one sex in "assessing equality of opportunity for members of each sex.").
35. See id.
36. See id. (noting that over one hundred complaints were filed).
37. See Cohen, 991 F.2d at 893 (citing 43 Fed. Reg. 58,070 (1978)).
38. See id. (citing 44 Fed. Reg. 71,413 (1979)) (noting that Policy Interpretation gave "more detailed measure of equal opportunity.").
The Policy Interpretation suggested three requirements that must be followed in order to avoid a violation of Title IX. First, universities must comply with "Athletic Financial Assistance (Scholarships)." Second, universities must comply with "Equivalence in Other Athletic Benefits and Opportunities." Finally, universities must comply with "Effective Accommodation of Student Interests and Abilities."

Moreover, the Policy Interpretation established the "effective accommodation" test. The effective accommodation test stated that compliance with Title IX could be met in one of three ways:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are under-represented 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 under-represented among intercollegiate athletes, whether the institution cannot show a continuing practice of program expansion which 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.

40. Id.
41. Id.
42. Id.
43. See Cohen, 991 F.2d at 897 (noting that university must meet at least one of three prongs under Policy Interpretation).
44. 44 Fed. Reg. at 71,418 (noting additional factors to be considered). This Policy Interpretation listed factors such as:
   1. 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; or
   2. Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by the developing abilities among athletes of that sex.

Appellate courts have not given much consideration to these factors. Instead they have focused on the three prongs established in the effective accommodation test. See id.
Despite the regulations presented in 1975 and the Policy Interpretation presented in 1979, uncertainty surrounding the application of Title IX still remains. Universities and courts continued to speculate as to whether Title IX should be applied to the specific program receiving federal funding or to the entire educational institution. Specifically at issue was § 1681(a), which provided that sex-based discrimination in “any education program or activity receiving Federal financial assistance” violated Title IX. Whether a party was in favor of an “institution-wide” or a “program-specific” interpretation of this phrase depended on whether a party argued for or against compliance with Title IX.

The United States Supreme Court narrowly construed Title IX in *Grove City College v. Bell.* The Court held that Title IX did not

45. See Bredthauer, supra note 1, at 1108 (discussing interpretation of Title IX by universities and by Supreme Court).


47. See Grove City Coll. v. Bell, 687 F.2d 684 (3d Cir. 1982) (holding that entire college is brought under Title IX when students receive federal grants), rev’d in part, 465 U.S. 555 (1984); see also Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982) (holding that intercollegiate athletic program was subject to Title IX if university as whole received federal funds).

48. See Rice v. President & Fellows of Harvard Coll., 663 F.2d 336, 338-39 (1st Cir. 1981) (declining to apply Title IX where sex discrimination was not alleged in specific programs that received federal funding), cert. denied, 456 U.S. 928 (1982); see also Univ. of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (holding that University’s athletic department was not covered by Title IX if it did not receive direct federal funding); Othen v. Ann Arbor Sch. Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), aff’d, 699 F.2d 309 (6th Cir. 1983) (holding that athletic department of university was not covered by Title IX).

49. See Jill K. Johnson, Note, *Title IX and Intercolligate Athletics: Current Judicial Interpretation of the Standards for Compliance,* 74 B.U. L. Rev. 553, 561 (1994) (noting that narrow interpretation of “program-specific” disqualified almost all university athletic departments from Title IX coverage because they rarely collected direct financial assistance). Supporters of the “institution-wide” viewpoint believe that an entire educational institution falls under the requirements of Title IX if any part of the institution receives federal funds. See id. This applies to almost all collegiate athletic departments because almost all institutions of higher learning receive some sort of federal aid or admit students who receive federal loans. See id. Supporters of the “program-specific” viewpoint argue that Title IX forbids gender discrimination only in those specific programs or activities that receive direct federal funding. See id. Therefore, an athletic program did not have to comply with Title IX if it did not receive any direct federal funding. See id. This severely limits the number of university athletic departments falling under Title IX. See id. Both interpretations claim to have support in Title IX’s legislative history. See id.

apply to an entire institution merely because one of its students or one of its departments received a small federal grant. Because few athletic departments received federal funds directly, the number of Title IX investigations into claims alleging discrimination in athletic programs dropped dramatically. For example, Grove City College did not receive any financial assistance, but it enrolled students who received Basic Educational Opportunity Grants from the federal government. In effect, the Grove City College decision removed nearly every university's athletic program from the scope of Title IX.

In 1987, Congress legislatively reversed the Grove City decision, through the adoption of the Civil Rights Restoration Act ("CRRA"). The CRRA expressly stated that Title IX applies to "all of the operations" of an educational institution, "any part of which is extended Federal financial assistance." Thus, Congress favored a broad interpretation of Title IX. Congress passed the CRRA to reverse the program-specific approach of the Grove City decision, by restoring the broad scope of coverage and to clarify the application of Title IX. Although the CRRA did not mention athletics specifically, the record of the floor debate leaves little doubt that the enactment was at least partially aimed at creating a more level playing field for female athletes.

In 1990, the Office of Civil Rights ("OCR") published the Title IX Athletics Investigator's Manual ("Manual") in order to aid in Title IX enforcement.

51. See Grove City, 465 U.S. at 571-74 (discussing how Court agreed with Department of Education's determination that students' receipt of Basic Educational Opportunity Grants brought college within regulatory definition of recipient of federal financial assistance). The Court then determined that the only program or activity that received federal assistance was the college's financial aid program. See id. at 575. In so holding, the Court rejected the institution-wide theory. See id. at 572-73.

52. See Cohen v. Brown Univ., 991 F.2d 888, 894 n.5 (1st Cir. 1993) (discussing how Title IX cases dropped or curtailed).

53. See Grove City, 465 U.S. at 571-74.

54. See Johnson, supra note 49, at 564 (discussing effects of Grove City decision on university athletic departments).


57. See Johnson, supra note 49, at 564-65 (noting congressional findings that recent decisions and opinions have narrowed previously broad application of Title IX). Congress also found that legislative action was necessary in order to restore the prior interpretation of a broad, institution-wide application of the law. See id.

58. See Cohen, 991 F.2d at 894 (noting that Congressional Record included statements made by Senators Bryd, Hatch and Riegle decrying past discrimination against female athletes and discussing importance of Title IX to ensure development of athletic programs for women).
IX investigations of collegiate athletic programs. The Manual outlines general areas of compliance, scholarships, other athletic benefits and opportunities and effective accommodation of students, all of which were mentioned in the 1979 Policy Interpretation. Because it details the procedures that OCR personnel should follow in investigating an athletic program, the Manual has considerable practical significance.

In conclusion, the broad language of Title IX has created numerous difficulties concerning its interpretation and enforcement. However, the 1975 regulations, the 1979 Policy Interpretation, the Civil Rights Restoration Act of 1987, and the 1990 Investigator’s Manual have all helped to create a better understanding of Title IX.

B. Enforcement Mechanisms

The potential for litigation under Title IX increased substantially as a result of two Supreme Court holdings. These cases allow Title IX to be enforced through court action, with the potential for monetary relief in addition to equitable or injunctive relief, if such relief is still available at the time the case is adjudicated. In 1979 the Supreme Court held in Cannon v. University of Chicago that Title IX contained an implied private right of action for aggrieved parties. Furthermore, in 1992, the Court held in Franklin


60. For a discussion of the 1979 Policy Interpretation and the areas of compliance it outlines, see supra notes 38-44 and accompanying text.

61. See Johnson, supra note 49, at 567 (noting significance of Manual in giving concrete meaning to terminology of three part test). The Manual provides universities with some guidance as to how the OCR will evaluate the three prongs of the test. See id. Regarding the first prong, the Manual suggests to investigators that there is no set ratio that constitutes “substantially proportionate” or that, when not met, results in a disparity or a violation. See id. The Manual provides the following example: “if the enrollment is 52 percent male and 48 percent female, then, ideally, about 52 percent of the participants in the athletics program should be male and 48 percent female.” Id. The Manual also provides guidance for the second and third prongs of the test, by suggesting types of information that the OCR should gather in order to determine whether an institution could meet the requirements set forth in the test. See id.


63. 441 U.S. 677 (1979).

64. See id. at 717.
that an individual had a right to bring a private action for damages against an educational institution. The Gwinnett Court also held that a plaintiff could recover monetary damages for intentional violations of Title IX. The combination of these two decisions has opened the floodgates for Title IX litigation, resulting in a sharp increase in gender-based athletic discrimination complaints against universities.

C. Recent Title IX Caselaw: Women Athletes are Successful in Title IX Legal Battles

Recently, federal courts have examined Title IX and its ability to provide potential plaintiffs and university athletic departments with enforcement guidelines. These recent decisions have granted new opportunities to women who have the skill and desire to compete in collegiate athletics. The following cases illustrate the difficulties that universities encounter when faced with athletic budgetary constraints. Furthermore, these cases demonstrate how courts consistently analyze these disputes under the Policy Interpretation’s three-prong test.


In 1993, the First Circuit decided the most detailed case to date regarding Title IX compliance, *Cohen v. Brown University (“Cohen I”)*. In *Cohen I*, female student-athletes brought a class action suit under Title IX against Brown University. The student-athletes were members of the women’s gymnastics team and women’s volleyball team, both of which were “demoted from full varsity status to intercollegiate club status” when the University implemented cutbacks in the athletic department as “a belt-tightening measure.”

In 1991, Brown University declared that due to financial difficulties, it planned to eliminate four sports teams from its intercollegiate varsity athletic program. The University allowed each of

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66. See *id.* at 76-77 (noting that sexual abuse and harassment of female student by teacher had sufficient damaging effects as to compel Court to provide remedy).
67. See *id.*
68. 991 F.2d 888 (1st Cir. 1993).
69. See *id.* at 888.
70. *Id.* at 891 (noting that named parties also included President and Athletic Director of University).
71. See *id.* at 892 (noting that teams to be eliminated included women’s volleyball and gymnastics as well as men’s golf and water polo).
these teams to continue playing but demoted them to “intercollegiate club” status.\textsuperscript{72} This permitted the teams to continue to compete against other collegiate athletic teams, but it revoked all financial support and services that they had received previously from the University.\textsuperscript{73}

The plaintiffs filed a class action suit on behalf 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.”\textsuperscript{74} The district court issued a preliminary injunction, which ordered the University to reinstate the women’s athletic teams that were demoted from full varsity status while the plaintiffs’ Title IX claim was pending.\textsuperscript{75} From this decision, the University appealed.\textsuperscript{76}

The plaintiffs argued that the University’s elimination of these athletic teams violated Title IX’s ban on gender discrimination.\textsuperscript{77} Specifically, the plaintiffs argued that this violation “was allegedly exacerbated by Brown’s decision to devalue the two women’s programs without first making sufficient reductions in men’s activities or, in the alternative, adding other women’s teams to compensate for the loss.”\textsuperscript{78} Therefore, the pivotal issue in the case was whether Brown had accommodated effectively the interests and abilities of the student body.\textsuperscript{79}

\textsuperscript{72} Id.

\textsuperscript{73} See Cohen I, 991 F.2d at 892 (noting that services included “salaried coaches, access to prime facilities, preferred practice time, medical trainers, clerical assistance, office support, and admission preferences . . . ”). “Brown estimated that eliminating these four varsity teams would save $77,813 per annum, broken down as follows: women’s volleyball, $37,127; women’s gymnastics, $24,901; men’s water polo, $9250; men’s golf, $6545.” Id.

\textsuperscript{74} Id. at 893.

\textsuperscript{75} See id. at 891 (citing Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992)).

\textsuperscript{76} See id.

\textsuperscript{77} See id. at 892-93 (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992)) (recognizing implied private right of action under Title IX); Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (holding that exhaustion of administrative remedies was not prerequisite to Title IX suit).

\textsuperscript{78} Cohen I, 991 F.2d at 892-93 (noting that elimination of these four sports decreased women’s budget significantly while men’s budget decreased minimally). The Cohen I court noted that the elimination of the athletic teams took significantly more money from the women’s budget than from the men’s budget, although it “did not materially effect the athletic opportunity ratios.” Id. The court also noted that at the time, Brown’s student body was approximately 52\% male and 48\% female, while Brown’s varsity athletic roster was 63.3\% male and only 36.7\% female. See id. at 892.

\textsuperscript{79} See id. at 892, 897 (discussing how effective accommodation of student interests and abilities was pivotal issue because of statistical discrepancies).
The court looked to the Policy Interpretation's three-prong test to assess the issue of whether the University had provided an effective accommodation. The first prong, the substantial proportionality test, provides "a safe harbor for those institutions that have provided athletic opportunities in numbers 'substantially proportionate' to the gender composition of their student bodies." Regarding this prong, the First Circuit affirmed the holding of the district court, stating that Brown University failed to meet the substantial proportionality test because it did not offer enough varsity athletic opportunities for women students.

If a university cannot meet the first prong of the Policy Interpretation test, it may satisfy the second prong by showing that in order to meet the needs of the underrepresented gender, there is "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities" of the underrepresented gender. The First Circuit again affirmed the district court's decision, holding that although Brown could show that its women's athletic programs had developed significantly in the 1970s, the University had not continued this development over the next two decades. Therefore, the First Circuit concluded that the University's athletic program also failed to meet the second prong.

Having determined that the University did not meet the first two prongs required under the Policy Interpretation, the court looked to the third prong, the full and effective accommodation test. This test is met by "ensuring participatory opportunities at

80. See id. at 897. For further discussion of the Policy Interpretation's effective accommodation test, see supra notes 43-44 and accompanying text.
81. Cohen I, 991 F.2d at 897-98 (citing 44 Fed. Reg. at 71,418) (noting that university may stay in compliance with Title IX by "maintaining gender parity between its student body and its athletic line up.").
82. See id. at 903 (noting that university did not challenge finding due to strength of statistical evidence).
83. Id. at 898 (noting that second prong is met as long as university can prove that "an ongoing effort is made to meet the needs of the under-represented [sic] gender.").
84. See id. at 903 (noting that University's actions fell short of necessary level of program expansion). The First Circuit noted that while "a university deserves appreciable applause for supercharging a low-voltage athletic program in one burst rather than powering it up over a longer period, such energization, once undertaken, does not forever hold the institution harmless." Id.
85. See id. at 903.
86. See Cohen I, 991 F.2d at 903 (mentioning effects of University's not meeting either of first two prongs of accommodation test). "Even when male athletic opportunities outnumber female athletic opportunities, and the university has not met the first benchmark (substantial statistical proportionality) or the second benchmark (continued program expansion) of the accommodation test, the mere
the intercollegiate level when, and to the extent that, there is ‘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 . . . .’"87 The First Circuit found that Brown University failed to meet the third prong because it was not fully and effectively accommodating the women’s athletic programs.88 Due to Brown University’s failure to meet the three-prong test, the First Circuit affirmed the district court’s preliminary injunction, which reinstated the women’s volleyball and gymnastics teams.89

2. Cohen v. Brown University ("Cohen II")

In 1996, the First Circuit reexamined these issues in Cohen v. Brown University ("Cohen II").90 The Cohen II court also rejected Brown University’s argument that “an athletics program equally accommodates both genders and complies with Title IX if it accommodates the relative interests of its male and female students."91 Essentially, the University argued that because males are more interested in athletics, Title IX compliance could be obtained even if females held fewer athletic roster spots as long as the University’s action was directly proportionate to the comparative levels of interest.92 The Cohen II court declared that the University’s “relative interests approach” was invalid because it “disadvantage[d] women and undermine[d] the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests.”93

The First Circuit’s analysis in both Cohen I and Cohen II has defined the standards for Title IX compliance in the 1990s, and it has

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87. Id. at 898 (citing 44 Fed. Reg. at 71,418) (noting that University must continue development until opportunities are “equivalent by gender”).
88. See id. at 904 (noting that there was “great interest and talent among the school’s female student-athletes,” which would not be utilized if these teams were eliminated). Specifically, the court noted that there was interest and talent sufficient to support varsity teams in women’s volleyball and women’s gymnastics, and with the elimination of these teams, the talent would be wasted. See id.
89. See id. at 907 (noting that preliminary injunction was “well within the encirclement of judicial discretion.”).
90. 101 F.3d 155 (1st Cir. 1996).
91. Id. at 174.
92. See id.
eliminated the confusion surrounding the effective accommodation test.

3. *Favia v. Indiana University of Pennsylvania*

In *Favia v. Indiana University of Pennsylvania* ("IUP"), members of the women's gymnastics and field hockey teams filed suit "alleging that the University discriminated based on gender when cutting athletic programs, in violation of Title IX." The Third Circuit upheld the district court's finding that IUP had failed to meet the effective accommodation standard. The court applied the three prong test and reasoned that IUP did not meet the first prong, substantial proportionality, because a significant disparity existed between the number of female students and the number of female athletes. The court found that due to the recent decrease in the number of women's athletic teams at IUP, the second prong, continuing expansion, had also not been met. Finally, the court held that IUP failed to meet the third prong, the full and effective accommodation test, because evidence that there was significant interest and talent to support the athletic teams that had been eliminated. The *Favia* court further held that, although two men's teams were cut in order to maintain equality, that fact did not translate into equal opportunity for both sexes.


95. *Favia*, 7 F.3d. at 332 (noting that IUP planned to "replace the women's gymnastics program with a women's soccer program . . . [in order to] bring it closer to compliance with Title IX.").

96. See id. at 342-44.

97. See *Favia*, 812 F. Supp. at 584-85 (discussing court's agreement with plaintiffs' contention that University "failed to provide women students with opportunities to participate in Intercollegiate Athletics proportionate to the percentage of women in the undergraduate student body."). The court noted that elimination of the women's gymnastics and field hockey teams reduced the number of female student-athletes to 36.51 percent. See id.

98. See id. at 585 (stating that defendants "failed to override the proportionality requirement by not showing a history of expanding its athletic opportunities to respond to developing interest of women students."). The court noted that "the levels of opportunities for women to compete went from low to lower, and the 1991 cuts were not responsive to the needs, interests and abilities of . . . women students." Id. This discrepancy was rooted in the fact that for every $8.00 spent on men's athletic programs, only $2.75 was spent on women's programs. See id.

99. See id. (discussing court's belief that IUP had not fully and effectively accommodated interests and abilities of women athletes).

100. See id. at 582 (holding that equality in team numbers was not parallel to equality in number of opportunities for underrepresented sex).
4. Roberts v. Colorado State Board of Agriculture

In Roberts v. Colorado State Board of Agriculture,101 members of women’s varsity fast-pitch softball team filed suit “challenging [the] university’s discontinuation of the program.”102 The Tenth Circuit affirmed the district court’s finding that Colorado State University (“CSU”) failed to meet the requirements of any of the three prongs of the Policy Interpretation.103 The first prong, substantial proportionality, was not met because there was “a 10.5% disparity between female athletic participation and female undergraduate enrollment.”104 The second prong, continuing expansion, was not met because opportunities for women athletes at CSU had decreased over the last ten years.105 Finally, the third prong, the full and effective accommodation test, was not met because the softball team was competitive and healthy at the time that CSU terminated its varsity status.106

D. Reverse Discrimination: Men’s Claims Under Title IX are Currently Unsuccessful

Recently, many colleges and universities have been forced to cut athletic funding due to serious budgetary constraints.107 While many schools wish to comply with Title IX standards by expanding opportunities for women athletes, most cannot afford to do so. As a direct result of Cohen I and similar cases, many schools are now choosing to cut back on or eliminate men’s sports programs while retaining most, if not all, of women’s sports programs.108 Conse-

102. Roberts, 998 F.2d at 824 (noting that CSU eliminated men’s varsity baseball team in addition to women’s varsity softball team).
103. See id. at 831-32 (noting that Tenth Circuit upheld district court’s grant of permanent injunction ordering school to reinstate women’s softball team).
104. Id. at 830 (noting that plaintiffs met their burden of showing that defendant did not meet substantial proportionality based on disparity between athletic participation of women and women’s representation in student body).
105. See id. (noting that although CSU added eleven sports for women during 1970s, women’s participation opportunities decreased steadily during 1980s). The court noted that the facts “can logically support no other conclusion that that . . . CSU has not maintained a practice of program expansion in women’s athletics . . . .” Id.
106. See id. at 831 (stating that CSU could not prove athletic program had “fully and effectively accommodated interests and abilities of women athletes.”).
108. See id. at 810-11 (noting that some schools continue to expand women’s programs).
quently, many non-revenue men's sports teams have been demoted to club status or eliminated entirely.\footnote{109}

1. Kelley v. Board of Trustees

In 1993, the University of Illinois eliminated four varsity athletic programs.\footnote{110} The University's decision to eliminate these programs was "motivated by budget considerations . . . including the need to comply with Title IX."\footnote{111} In Kelley v. Board of Trustees,\footnote{112} members of the men's swimming team filed suit alleging that the University's actions violated Title IX and the Equal Protection Clause of the Fourteenth Amendment.\footnote{113}

Plaintiffs argued that the regulation and the Policy Interpretation distorted Title IX, and "through some alchemy of bureaucratic regulation . . . transformed . . . a statute which prohibits discrimination on the basis of sex into a statute that mandates discrimination against males."\footnote{114} The court dismissed this argument, finding that neither the regulation nor the Policy Interpretation were contrary to the purposes of Title IX.\footnote{115}

Plaintiffs also asserted that the substantial proportionality test, as defined in the Policy Interpretation, established a gender-based quota system that was contrary to the purpose of Title IX.\footnote{116} The court dismissed this argument, and it held instead that the Policy Interpretation created a reasonable approach to measure compli-

\footnote{109. See id. (noting that these teams include but are not limited to men's swimming, wrestling, soccer and gymnastics).}

\footnote{110. See Kelley v. Bd. of Trs., 35 F.3d 265, 267 (7th Cir. 1994) (citing these eliminated sports as men's swimming and fencing and men's and women's diving).}

\footnote{111. Id. at 269 (discussing reasons why men's swimming was eliminated). The University chose to maintain the women's swimming program "because such action would put the University at risk of violating Title IX." Id. (noting that number of female athletes was considerably lower than number of females attending University).}

\footnote{112. 35 F.3d 265 (7th Cir. 1994).}

\footnote{113. See id. at 267.}

\footnote{114. Id. at 270 (noting that applicable regulation was 34 C.F.R. § 106.41 and Policy Interpretation was 44 Fed. Reg. 71,418).}

\footnote{115. See id. (detailing court's rejection of plaintiffs' contention that regulation and Policy Interpretation opposed purpose of Title IX).}

\footnote{116. See id. at 271 (rejecting plaintiffs' suggestion that Policy Interpretation requires "statistical balancing"). The court found that the Policy Interpretation "merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance." Id. A university may still prove that it is Title IX compliant by showing that it has a history of program expansion for the underrepresented sex, or that the interests of the underrepresented sex are effectively accommodated by the existing programs, even if it has not met the substantial proportionality prong of the test. See id.}
REVERSE DISCRIMINATION UNDER TITLE IX

The Kelley court concluded that the school's actions were consistent with the statute, and neither the regulation nor the Policy Interpretation violated Title IX. Finally, the Seventh Circuit rejected the plaintiffs' contention that they were denied equal protection under the Fourteenth Amendment.

III. ANALYSIS

Recently, both the Seventh and the Ninth Circuits have reviewed decisions addressing issues of reverse discrimination under Title IX. In Boulahanis v. Board of Regents, the Seventh Circuit examined this issue when student-athletes at a state university challenged the elimination of the men's soccer and wrestling programs as a violation of Title IX. The Ninth Circuit also reviewed this issue recently in Neal v. Board of Trustees, where student-athletes also brought suit against a state university, alleging that the reduction of the number of roster spots on its men's wrestling team violated Title IX. Both courts concluded that the Universities' actions did not constitute Title IX violations. Decisions such as these set the precedent for analysis of reverse discrimination claims under Title IX.

A. Recent Decisions

1. Boulahanis v. Board of Regents

   a. Facts and Background

   In 1993, Illinois State University commenced an investigation of gender equity and Title IX compliance, and it ultimately concluded that the opportunities available to women were unequal to men.

117. See Kelley, 35 F.3d at 271.
118. See id. at 271-72 (noting that to require parallel teams would ensure equal opportunity to both sexes). Had this proposal been adopted, the men's swimming program would not have been eliminated. See id. at 271. However, the court noted that requiring parallel teams would deny "schools the flexibility to respond to the differing athletic interests of men and women." Id. (noting consequence that University would have to eliminate football program or start women's program regardless of whether interest was expressed by women students).
119. See id. (noting that equal protection claim stemmed from University's decision to eliminate men's swimming team while deciding to maintain women's swimming team).
120. 198 F.3d 633 (7th Cir. 1999).
121. See id. at 634-35 (noting that plaintiffs included past and future members of men's soccer and wrestling teams).
122. 198 F.3d 763 (9th Cir. 1999).
123. See id. at 765-66.
124. For further discussion of courts' analyses in these cases, see infra notes 128-41, 152-76 and accompanying text.
the opportunities available to men. Consequently, the University reviewed alternatives that would allow them to obtain Title IX compliance. The University considered the three options set forth by the Policy Interpretation of Title IX: 

1. provide participation opportunities for men and women that are substantially proportionate to their respective rates of enrollment as full-time undergraduate students; or 
2. demonstrate a history and continuing practice of program expansion for the under-represented [sic] sex; or 
3. fully and effectively accommodate the interests and abilities of the under-represented [sic] sex."

The University concluded that "substantial proportionality" was the best way to achieve Title IX compliance, due to the fact that the University had not added a women's sports team to its program in the last decade and due to the difficulty of accommodating effectively the interests and abilities of the female students. Ten options that would allow the University to obtain Title IX compliance were considered, and it was determined that the best course of action was to eliminate the men's soccer and men's wrestling programs, while adding a women's soccer program.

In Boulahanis, the plaintiffs were former and prospective members of the men's soccer and men's wrestling teams at Illinois State

125. See Boulahanis v. Bd. of Regents, 198 F.3d 633, 635 (7th Cir. 1999) (noting that study specified that University enrollment was forty-five percent male and fifty-five percent female, although participation in athletics was sixty-six percent male and thirty-four percent female).

126. See id. (citing 34 C.F.R. § 106.41(c) to assert that university must "provide equal athletic opportunity").

127. Id. (citing 44 Fed. Reg. 71,418 (1979)). For further discussion of the Policy Interpretation, see supra notes 37-44 and accompanying text.

128. See id. (mentioning that University's motivation for compliance was 1995 audit by NCAA that noted violations of Title IX requirements).

129. See id. at 635-36 (citing other options considered to achieve Title IX compliance). These options included:

1. dropping men's wrestling; 
2. dropping men's wrestling and men's soccer; 
3. dropping men's wrestling, men's soccer, and men's tennis; 
4. dropping men's wrestling and adding women's soccer; 
5. dropping men's wrestling and men's soccer and adding women's soccer; 
6. dropping men's wrestling, men's soccer, and men's tennis, and adding women's soccer; 
7. adding women's soccer; 
8. adding women’s soccer and bringing women to full funding; 
9. dropping men's wrestling and men's soccer, adding women's soccer and adjusting men's rosters and women's grants in aid; and 
10. dropping men's wrestling and men's soccer, adding women's soccer, and adjusting men's rosters and grants in aid for both men and women.

Id. The option chosen ultimately "increased the athletic participation of women to 51.72% and decreased the participation of men to 48.29%, thereby bringing the disparity between enrollment and participation to within three percentage points." Id. at 636.
University, who were not able to participate in athletics at the University because their programs were eliminated under the gender equity plan. The plaintiffs alleged a Title IX violation, as well as various violations of their constitutional rights under § 1983 and § 1985(3). After the district court granted summary judgment to the University on the Title IX claim and dismissed the constitutional claims, the plaintiffs appealed.

b. Seventh Circuit Analysis

The Boulahanis court first considered the plaintiff-appellants’ (“appellants”) contention that “the University’s actions in eliminating the men’s soccer and men’s wrestling programs were based solely on the sex of the participants.” This argument was comparable to an issue that the Seventh Circuit previously examined in Kelley v. Board of Trustees, where it held that the elimination of the men’s swimming program was not in violation of Title IX because “men’s participation in athletics [continued] to be more than substantially proportionate to their presence in [the University of Illinois’s] student body.”

The Seventh Circuit rejected the appellants’ argument that the Kelley decision was not controlling because it was distinguishable from the situation at issue. In effect, the appellants attempted to show a difference between “decisions in which sex is a consideration (as in Kelley) and decisions in which sex serves as the motivat-

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130. See Boulahanis, 198 F.3d at 634-35 (noting plaintiffs’ contention that University’s decision to eliminate athletic programs was based on sex).

131. See id. at 635 (discussing violations alleged by plaintiffs). This Comment will focus on plaintiffs’ contentions under Title IX and will not address the violations of constitutional rights under § 1983 and § 1985(3).

132. See id.

133. Id. at 636 (noting contention that elimination of teams violated Title IX because discriminatory actions would not have occurred “but for” sex of appellants). The Boulahanis court noted that the test to determine whether discrimination has occurred was if the evidence provided that the treatment of a person would have been different but for that person’s sex. See id. (citing Int’l Union v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991)) (quoting L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)) (citations omitted).

134. 35 F.3d 265 (7th Cir. 1994).

135. Boulahanis, 198 F.3d at 637 (citing Kelley, 35 F.3d at 270) (noting that elimination of men’s swimming team in Kelley occurred because of University’s attempt to reduce athletic budget). Members of the men’s swimming team argued that the University’s actions constituted a violation of Title IX due to the fact that while the men’s team was eliminated, the women’s team was maintained. See Boulahanis, 198 F.3d at 637 (citing Kelley, 35 F.3d at 269-70).

136. See Boulahanis, 198 F.3d 636 (noting appellants’ argument to distinguish Kelley was based on University’s motivations in elimination of athletic teams).
The Boulahanis court was not persuaded by this argument, and noted that it ignored "the fact that a university's decision as to which athletic programs to offer necessarily entails budgetary considerations." Furthermore, the court noted substantial difficulties when analyzing this argument "against the backdrop of the multiple concerns at work in a university's decision to eliminate an athletic program."

The Seventh Circuit looked to its decision in *Kelley*, where it was determined that the Policy Interpretations were "a reasonable exercise of the Office of Civil Rights' congressionally delegated discretion to interpret the law." The Policy Interpretations provide that universities may show Title IX compliance by proving that the "participation of the under-represented [sic] sex is substantially proportionate to their enrollment at the university." Therefore, "holding that universities cannot achieve substantial proportionality by cutting men's programs" is essentially "a requirement that universities achieve substantial proportionality through additional spending to add women's sports programs." The *Boulahanis* court suggested that this result would overlook the monetary restrictions with which universities often are faced.

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137. *Id.* (discussing appellants' contention that decision in this case did not violate Title IX because it was based on financial considerations).

138. *Id.* at 637 (elaborating on appellants' attempt to distinguish decisions to eliminate athletic programs motivated by financial concerns from those based on considerations of sex). "For universities, decisions about cutting or adding athletic programs are based on a consideration of many factors including: the total size of the athletic department, which is governed by budgetary considerations, and the distribution of programs among men and women, which is governed by Title IX concerns." *Id.* The Seventh Circuit found that it was difficult to distinguish two issues so closely entwined. *See id.* The court further noted that "both the decision of the University in this case and the decision of the University of Illinois in *Kelley* were based on a combination of financial and sex-based concerns that are not easily distinguished." *Id.*

139. *Id.*

140. *Id.* at 637-38 (citing *Kelley*, 35 F.3d at 270-71) (holding that Policy Interpretation must be given deference because it is "neither arbitrary or capricious") (citing Chevron U.S.A v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)); *see also Boulahanis*, 198 F.3d at 638 (citing Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993)) (stating that "[t]he degree of deference [given to agency interpretations] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.").


142. *Id.*

143. *See id.* (citing Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993)) ("[I]n times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletic programs.").
Therefore, the court relied on its holding in *Kelley* that there is not a violation of Title IX because men's athletic programs are eliminated, assuming that "men’s participation in athletics continues to be ‘substantially proportionate’ to their enrollment."144 The *Boulahanis* court held that because Illinois State University had maintained substantial proportionality between the number of men enrolled at the University and the number of men that participated in the athletic programs, it had provided a successful accommodation.145 The court ultimately concluded that the actions of Illinois State University did not rise to the level of a Title IX violation.146

2. *Neal v. Board of Trustees*

a. Facts and Background

In the 1996 academic year, female students substantially outnumbered male students at California State University, Bakersfield ("CSUB").147 Within the arena of varsity athletics, however, male students held sixty-one percent of positions on the University's athletic teams and received sixty-eight percent of the funds available for athletic scholarships.148 Subsequently, the California chapter of the National Organization for Women ("NOW") filed a lawsuit which resulted in a consent decree mandating "that each Cal. State campus have a proportion of female athletes that was within five percentage points of the proportion of female undergraduate students at the school."149 In order to comply with the consent decree, CSUB chose to decrease the size of all men's athletic teams.150

144. Id. (citing *Kelley*, 35 F.3d at 270) (noting that substantial proportionality was met here because athletic participation of men at University remained within three percentage points of enrollment after elimination of men's soccer and men's wrestling).

145. See id. at 639 (noting presumption of successful accommodation when because university achieves substantial proportionality); see also *Kelley*, 35 F.3d at 271; *Roberts*, 998 F.2d at 829 ("'[S]ubstantial proportionality' between athletic participation and undergraduate enrollment provides a safe harbor for recipients under Title IX."); *Cohen*, 991 F.2d 888, 897-98 (1st Cir. 1993) ("[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.").

146. See *Boulahanis*, 198 F.3d at 641.

147. See *Neal v. Bd. of Trs.*, 198 F.3d 763, 765 (9th Cir. 1999) (stating that female students made up sixty-four percent of population and male students made up thirty-six percent at CSUB).

148. See id.

149. Id. at 765 (noting that lawsuit alleged violation of state law comparable to Title IX).

150. See id. (noting that University did not support idea of eliminating some men's teams entirely). CSUB agreed to the reduction in number of roster spots at a time when state funding for higher education was decreasing. See id.
As a result of the reduction in the number of roster spots available to each athletic team, the number of participants on the men's wrestling team was initially restricted to twenty-seven. From 1996 to 1997, the number of participants was restricted to twenty-five, and although four of these spots were not filled, the wrestling team filed suit. The plaintiffs alleged that "the University's policy of capping the size of the men's team constituted discrimination on the basis of gender in violation of Title IX and of the Equal Protection Clause of the Federal Constitution." In order to prohibit the University from reducing further the size of the men's wrestling team, the district court granted a preliminary injunction. The district court held "that CSUB's primary motivation for capping the size of the men's teams was to meet the gender proportionality requirements of the consent decree," and that this violated Title IX. The defendants appealed the district court's grant of the preliminary injunction.

b. Ninth Circuit Analysis

The Neal court first considered the appellees' contention that "gender-conscious remedies are appropriate only when necessary to ensure that schools provide opportunities to males and females in proportion to their relative interest in sports participation." The amounts the University had to spend on its athletic programs was restricted. Therefore, the University decided to "adopt squad size targets, which would encourage the expansion of women's teams, while limiting the size of men's teams." Ideally, the plan would bring the University into compliance by the start of the 1997-1998 school year. Ultimately, the goal was to have fifty-five percent of roster spots filled by female students.

151. See id. at 765-66 (noting that Coach Terry Kerr and team Captain Stephen Neal protested reduction at its onset). While Neal argued that a smaller squad would not be as competitive, the team finished third in the nation in 1996. See id.

152. See Neal, 198 F.3d at 766 (noting that suit was filed due to rumor that men's team would be eliminated completely).

153. Id. at 766. This Comment will focus on plaintiffs' contentions under Title IX and will not address specifically the violation of the Equal Protection Clause.

154. See id.

155. Id. (noting further that court refused to rule on plaintiffs' equal protection challenge and rejected argument that Title IX provided "safe harbor" for schools achieving substantial proportionality between "percentage of athletes of one gender and percentage of students of that same gender."). The court concluded that the "safe harbor" argument as presented under Title IX would be problematic in relation to the Equal Protection Clause. See id.

156. See id. at 765.

157. Neal, 198 F.3d at 767 (noting, in opposition, appellants' argument that gender-conscious decisions concerning funding given to athletic teams are allowed to balance number of students with number of student-athletes). The Neal court noted the importance of this discrepancy in that men are generally more inter-

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appellees looked to the three-prong test set forth in the Policy Interpretation and attacked the first prong of the test, which states that a university is in compliance with Title IX if “participation levels for each gender are ‘substantially proportionate’ to their representation in the student body.” The Ninth Circuit relied on the First Circuit case, *Cohen v. Brown University*, which held that a university could not argue Title IX compliance when it provided females with fewer athletic roster spots, even if the school’s action was in response to males having a higher level of interest. Ultimately, the Ninth Circuit rejected this approach because it was not consistent with the purpose of Title IX. The *Neal* court suggested that this interpretation would allow universities to do almost nothing to equalize opportunities for men and women if they could prove that women were less interested in participating in the University's athletic programs. Furthermore, the court noted that because the ultimate purpose of Title IX was to encourage women interested in participating in varsity sports than are women. See id. Therefore, allowing “gender-conscious remedies until the proportions of students and athletes are roughly proportional gives universities with more remedial freedom than permitting remedies only until expressed interest and varsity roster spots correspond.” Id.

158. Id. at 767-68 (noting *Cohen I* court's view of Title IX compliance under three-prong test); see also id. at 769 (citing Pederson v. La. State Univ., 912 F. Supp. 892 (M.D. La. 1996)) (criticizing first prong of Policy Interpretation test). For further discussion of the Policy Interpretation of 1979, see supra notes 37-44 and accompanying text.

159. 991 F.2d 888, 899 (1st Cir. 1993) ("Cohen I").

160. See Neal, 198 F.3d at 768 (citing *Cohen I*, 991 F.2d at 899). The *Neal* court also noted the *Cohen II* court's statement that "Brown's relative interests approach cannot withstand scrutiny on either legal or policy grounds, because it disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the under-represented [sic] sex to the status quo level of relative interests." *Cohen v. Brown Univ.*, 101 F.3d 155, 174 (1st Cir. 1996) ("Cohen II").

161. Neal, 198 F.3d at 768.

162. See id. (noting that to comply with first prong of test, university must provide opportunities proportionate to gender composition of the student body, not proportionate to amount of interest expressed by each sex); see also Favia v. Ind. Univ. of Pa., 7 F.3d 332, 335-36 (3d Cir. 1993) (noting violation of Title IX when University had student body that was fifty-six percent female and athletic teams that were forty-three percent female). The Ninth Circuit noted the *Cohen I* court's clear rejection of the "interest" test. See Neal, 198 F.3d 768. "The reason for *Cohen I*'s 'interest' test was clear enough: 'Given that the survey of interests and abilities would begin under circumstances where men's athletic teams have a considerable head start, such a rule would almost certainly blunt the exhortation that schools should 'take into account the nationally increasing levels of women's interests and abilities' and avoid 'disadvantag[ing] members of an underrepresented sex . . . .'" *Neal*, 198 F.3d 768 (citing *Cohen I*, 991 F.2d at 900 (quoting 44 Fed. Reg. at 71,417)).
to participate in sports, the demand for the number of roster spots and scholarships reserved for women would eventually increase.\textsuperscript{163}

The \textit{Neal} court next considered whether, under Title IX, a university is allowed to reduce the athletic opportunities available to men in order to align them with the lesser athletic opportunities available to women.\textsuperscript{164} The Ninth Circuit noted that every court that has reviewed the Policy Interpretation and Title IX has determined that compliance may be achieved by increasing the opportunities available for the underrepresented gender or by decreasing the opportunities for the overrepresented gender.\textsuperscript{165} The court concluded that "if a university wishes to comply with Title IX by leveling down programs instead of ratcheting them up . . . Title IX is not offended."\textsuperscript{166}

The Ninth Circuit reversed the district court's grant of injunctive relief because the district court did not apply the interpretation

\textsuperscript{163.} \textit{See Neal}, 198 F.3d at 768 (noting that Title IX's purpose was to encourage females' interest and participation in athletics); \textit{see also id.} at 768-69 (citing \textit{Cohen II}, 101 F.3d at 178-79) (noting that if Title IX allowed universities to provide fewer athletic opportunities for women because women are stereotypically less interested in sports than men are, it would ignore purpose of eliminating discrimination from stereotyped notions of women's interests); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 272 (6th Cir. 1994) (noting that while some actions may appear gender-neutral, they are actually perpetuating gender-based discrimination).

\textsuperscript{164.} \textit{See Neal}, 198 F.3d at 769-70 (noting that other courts of appeals have addressed this issue); \textit{see also Horner}, 43 F.3d at 275; Kelley v. Bd. of Trs., 35 F.3d 265, 269 (7th Cir. 1994); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993) ("We recognize that 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 . . . . Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population."); \textit{Cohen I}, 991 F.2d at 898 n.15 (holding, "Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the over-represented gender while keeping opportunities stable for the under-represented [sic] gender.").

\textsuperscript{165.} \textit{See Neal}, 198 F.3d at 769-70. "[B]oosters of male sports argued vociferously before Congress that the proposed regulations would require schools to shift resources from men's programs to women's programs, but that Congress nevertheless sided 'with women's advocates' by deciding not to repeal the HEW's athletic-related Title IX regulations." \textit{Id.} at 770 (citing Mary Jo Festle, \textit{Playing Nice: Politics and Apologies in Women's Sports}, 171-76 (1996)) (noting that Title IX's legislative history and regulations were enacted to apply its provisions to college athletics). The \textit{Neal} court suggested that congressional intent was that "Title IX would result in funding restrictions to male athletic programs." \textit{Id.}

\textsuperscript{166.} \textit{Id.} at 770.
of Title IX as presented by the Department of Education. The Neal court looked to the plain meaning of the language set forth in the non-discrimination principle and held that it did "not bar remedial actions designed to achieve substantial proportionality between athletic rosters and student bodies." The court noted, furthermore, that the Seventh Circuit had rejected expressly the appellees' interpretation. The Ninth Circuit determined that the OCR's interpretation of Title IX's athletic provisions should be given deference under the previous decisions. Therefore, a university where male athletes are overrepresented can achieve Title IX compliance "by reducing sufficiently the number of roster spots available to men."  

Finally, the Ninth Circuit reviewed the district court's rejection of the OCR's interpretation of Title IX. The First and Seventh Circuits had addressed previously the issue of "the constitutionality of the first prong of the OCR test." In Cohen I, Cohen II and Kelley, the claim that the Policy Interpretation violated the Fourteenth Amendment was rejected and, conversely, it was held that the "constitutional analysis contained therein persuasively dispose[d] of any serious constitutional concerns that might be raised in relation to

167. See id. (citing Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993)) ("Cohen I") (noting that Department of Education is administrative agency that administers Title IX). Congress has specifically ordered that the development of standards for athletic programs under Title IX be handled by this administrative agency. See id. (citing Pub.L. No. 93-380, § 844, 88 Stat. 612 (1974)); see also Kelley, 35 F.3d at 269 n.3; Roberts, 998 F.2d at 828; Cohen I, 991 F.2d at 895; Neal, 198 F.3d at 770 (citing Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984)) (noting that Congress delegates agency power to interpret provisions of statute by regulation).

168. See Neal, 198 F.3d at 771 (reviewing 20 U.S.C. § 1681(a)).

169. See id. (noting appellees' argument that Chevron was not applicable because OCR's interpretation violated plain meaning of statute). The Neal court held that "appellees' interpretation of 20 U.S.C. § 1681(a)'s plain meaning would render 1681(b) superfluous." Id.

170. See id. at 771-72 (noting that other circuits have rejected this in holding that schools may reduce number of male roster spots in order to achieve Title IX compliance).

171. See id. (citing Cohen II, 101 F.3d at 173 and Kelley, 35 F.3d at 270-71) (noting that Cohen II and Kelley courts held that 34 C.F.R. § 106.41 deserved deference under Chevron and that OCR Policy Interpretation deserved deference under Martin); Neal, 198 F.3d at 771 (citing Favia v. Ind. Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa. 1992)) (holding that OCR's Policy Interpretation deserved great deference under Chevron).

172. Neal, 198 F.3d at 771.

173. See id. (rejecting district court's construction and adopting reasoning of Cohen I, Cohen II and Kelley).

174. Id. at 772.
the OCR's Policy Interpretation."\(^{175}\) The Ninth Circuit held, therefore, that district court's rejection of the OCR's interpretation of Title IX was incorrect.\(^{176}\)

**B. Current Decisions Are Furthering Congressional Intent**

Although the effective accommodation test offers three alternatives to universities who are seeking to meet the requirements of Title IX, in reality, the only realistic option is the alternative of substantial proportionality.\(^{177}\) In the last decade, universities across the nation have dealt with budgetary constraints in their athletic departments. As a result, the majority of these universities are not able to accommodate the interests of female athletes and are therefore in violation of Title IX.\(^{178}\) These problems have increased with recent Title IX decisions, in which the courts are not willing "to provide universities with other ways to maneuver around the effective accommodation test."\(^{179}\) Furthermore, the OCR's increasing caution in determining Title IX compliance is also problematic.\(^{180}\)

The substantial proportionality prong is considered the only realistic option under the effective accommodation test because the other two prongs, continuing expansion and full accommodation, are both extremely difficult to meet. The second prong, continuing expansion, necessitates in most instances, spending more money than would usually be spent on women's programs.\(^{181}\) Therefore, it is difficult to meet this prong of the regulation because it requires additional expenditures by athletic departments that already have little to spend.\(^{182}\) The third prong, full and effective accommodation, requires a university to develop women's ath-

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175. Id.
176. See id. at 772-73.
178. See Shook, supra note 4, at 806 (citing Andrew Blum, Athletics in the Court, Nat'l L.J., Apr. 5, 1993, at 31) (noting that "NCAA Gender Equity Committee found more than half of national undergraduate composition is female, but that women represent fewer than a third of available opportunities to play varsity sports.").
179. Id. (citing Joan O'Brien, The Unlevel Playing Field: College Football in Utah Slows Gender Equity's Forward Progress, SALT LAKE CITY TRIB., Sept. 4, 1994, at A1) (stating that OCR is taking more active approach according to athletic officials).
180. See id. (noting "vigilance" of OCR in determining compliance).
181. See id. at 793-96, 806 (illustrating that excessive program expansion in 1970s followed by "ten year dry spell of limited (if any) expansion in women's sports" will not meet standard).
182. See id. at 793-96 (finding this alternative to be problematic).
letics programs to fulfill the interests and talents of female athletes that have not been met. Realistically, universities cannot afford compliance under this prong in a time where budgetary restrictions are commonplace.

Both the Seventh and the Ninth circuits utilize the substantial proportionality prong as the foundation of their analyses. In both *Boulahanis* and *Neal*, the universities concluded that the substantial proportionality prong was the only affordable option that would bring them into compliance with Title IX. This option has proven to be problematic for many non-revenue athletic teams, such as soccer and wrestling. For example, in *Boulahanis*, the men's soccer and wrestling teams were completely eliminated, and in *Neal*, the number of roster spots on the men's wrestling team was reduced in an effort to comply with substantial proportionality. Many universities have found that the only way to achieve substantial proportionality is "subtraction and downgrading" of men's athletic teams when they are incapable of funding women's teams.

Current Title IX decisions such as *Boulahanis* and *Neal*, which have upheld the substantial proportionality prong of the effective accommodation test, are furthering the statute's congressional intent. The substantial proportionality prong of the test stipulates that if a university's "participation opportunities... are provided in numbers substantially proportionate to their respective enrollments," that the university will be presumed to be in compliance. It is presumed that "the substantial proportionality test reflects Title

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183. See Shook, supra note 4, at 793-96 (discussing expense of such program expansions).

184. See id. (noting that budgetary restrictions are becoming "the norm rather than the exception").

185. For a discussion of the *Boulahanis* and *Neal* courts' analyses, see supra notes 120-76 and accompanying text.

186. See *Boulahanis* v. Bd. of Regents, 198 F.3d 633, 638 (7th Cir. 1999) (noting that Title IX compliance is obtained by university when participation of underrepresented gender is substantially proportionate to enrollment of that gender); see also *Neal* v. Bd. of Trs., 198 F.3d 763, 768 (9th Cir. 1999) (citing that university is found to be Title IX compliant "if participation levels for each gender are 'substantially proportionate' to its representation in the student body.").

187. See *Boulahanis*, 198 F.3d at 633 (noting University's complete elimination of specific men's programs); see also *Neal*, 198 F.3d at 763, 765 (detailing University's reduction of roster spots on men's wrestling team).

188. Shook, supra note 4, at 808 (noting that women's teams are maintained, while men's teams are eliminated in order to comply with Title IX).

189. For a discussion of the substantial proportionality analysis as presented by the Seventh and Ninth Circuits, see supra notes 128-43, 151-76 and accompanying text.

IX's wording that 'no person . . . shall, on the basis of sex, be excluded from participation in . . . any education program or activity receiving federal aid.' than only the substantial proportionality prong explicitly embraces the constitutional ideal of equality because it compares participation to student body numbers by gender. If a university's method of funding athletic programs for one gender is equivalent to the percentage of that gender's membership in the student body, it can be assumed that even if the university is not able to meet the interests of all students, it has divided the athletic funding that it can afford in an even manner. "While discrimination in the choice of sports funded by the institution may exist, discrimination on the basis of gender does not exist." Therefore, decisions such as Boulahanis and Neal, which have upheld the substantial proportionality prong of the test, are furthering the congressional intent of Title IX. The substantial proportionality prong of the test is "no more than a starting place for Title IX compliance," which emulates the purpose of Title IX in an effort to create equal opportunities in athletic programs for both males and females.

IV. Impact

"Title IX is a dynamic statute, not a static one. It envisions continuing progress toward the goal of equal opportunity for all athletes [both men and women]." Furthermore, Title IX provides that because society has conditioned women to expect "less than their fair share of athletic opportunities, women's interests will not

191. Shook, supra note 4, at 798 (citing 20 U.S.C. § 1681(a)).
192. See id.
193. Id.
194. See id. at 798-99 (noting that it is discriminatory to extend benefit to some citizens on basis of sex unless purpose is to serve important governmental interest).
195. See id. at 799 (noting that "even" disbursements are equally dispersed in terms of gender).
196. Shook, supra note 4, at 799.
197. Id. (citing 34 C.F.R. § 106.41(c) (1995)).
198. Neal, 198 F.3d at 769 (discussing movement toward equal opportunity under Title IX).
rise to a par with men's overnight.” Since 1972 Title IX has been the strength behind the continued growth in women's athletics. The percentage of college athletes who are women increased from fifteen percent in 1972 to thirty-seven percent in 1998. Furthermore, between 1978 and 1996, there was a net gain of 1658 women's sports programs throughout the country. During the same period of time, however, there was a net gain of only seventy-four sports programs on the men's side.

By providing many new opportunities, Title IX has developed successfully women's interests in sports, as well as increased their potential to become intercollegiate athletes. Nevertheless, these increased opportunities for women should not come at the expense of decreased opportunities for men. Recently, many colleges and universities across the country have been forced to eliminate non-revenue men's athletic programs in an effort to achieve compliance with Title IX. Thus far, federal courts have refused to find merit in reverse discrimination suits alleging Title IX violations. Therefore, men's non-revenue athletic teams at many colleges and universities are faced with the risk of having the number of roster spots on their teams reduced or even having the teams eliminated completely. Reduction and elimination of non-reve-

199. Id. (noting that women's interests will develop as increased opportunities arise).

200. See Bredthauer, supra note 1, at 1107 (1998) (discussing development and current status of Title IX).


202. See id. (comparing increases in women's programs to that of men's programs).

203. See Note, Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression, 110 HARV. L. REV. 1627, 1640-41 (1997) (noting that women are taking advantage of opportunities created by Title IX).

204. See Joseph Filippone, Title IX in the Nineties, 15 N.Y.L. SCH. J. HUM. RTS. 561, 594-95 (1999) (noting decrease in opportunities for men in order to balance increased opportunities for women under Title IX).

205. See id. (noting that elimination of men's athletic programs is not answer to Title IX compliance); see also Shook, supra note 4, at 814 (finding that universities eliminate men's programs in order to develop women's programs due to budgetary constraints).

206. See Shook, supra note 4, at 793-96, 814 (noting case law supporting conclusion that reverse discrimination claims are currently unsuccessful); see generally Kelley v. Bd. of Trs., 35 F.3d 265 (7th Cir. 1994) (finding reverse discrimination claim unsuccessful); Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999); Neal v. Bd. of Trs., 198 F.3d 763 (9th Cir. 1999).

207. See Boulahanis, 198 F.3d 634-35 (noting complete elimination of men's soccer and men's wrestling programs); Neal, 198 F.3d 765-66 (citing reduction of number of roster spots on men's wrestling team); see also Shook, supra note 4, at
nue men’s teams is rapidly becoming the standard, as athletic departments are forced to downsize their programs in order to achieve Title IX compliance under the effective accommodation test.

Universities have argued under the “interest-based” theory, suggesting that decisions concerning funding for athletic programs that take gender into account may be made “to correct for an imbalance between the composition of the undergraduate student body and the composition of the undergraduate student athletic participants pool.” The adoption of the “interest-based” test for Title IX compliance, as presented by the universities in both the Cohen decisions and in Neal, would impede, and quite possibly destroy the continuing development in women’s participation and interest in athletics that has stemmed from the enactment of Title IX.

In Cohen I, the First Circuit noted that “athletics offers an opportunity to [execute] leadership skills, learn teamwork, build self-confidence, and perfect self-discipline” for collegiate students. For both men and women, these “lessons learned on the playing fields, are an invaluable means of attaining career and life successes in and out of professional sports.” It is essential that universities realize that if the motivating factor behind collegiate sports is truly

793-96, 814 (noting that reduction of men’s swimming, wrestling and gymnastics to club or nonexistent status in order to achieve Title IX compliance is customary).

208. See id. at 808-09 (noting that more prominent men’s teams such as football, basketball and baseball remain untouched).

209. Neal, 198 F.3d 763, 767 (noting that men’s interest in playing intercollegiate athletics is presently higher than women’s).

210. See id. at 769 (reviewing precedent set forth in other relevant Ninth Circuit cases); see also id. at 769 n.5 (citing Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994)) (discussing Title IX suit brought by female prisoners that contested “lack of vocational educational programs in women’s facilities relative to those available in men’s facilities.”). The Neal court noted that while regulations in Jeldness were different than regulations in this case, the prison context was comparable because segregation by sex is the accepted practice for prisoners and college athletes alike. See id. at 769 n.5 (citing Jeldness, 30 F.3d at 1228). The Neal court pointed out that Jeldness rejected the idea that “differing interest levels among the genders would justify providing women with significantly fewer educational opportunities than men.” See id. (citing Jeldness, 30 F.3d at 1229).

211. Cohen v. Brown Univ., 991 F.2d 888, 891 (1st Cir. 1993) (noting that “physical skills are a passport to college admissions and scholarships” allowing student-athletes to attend schools to which they would not otherwise be accepted).

212. Id. (noting opportunities gained by student-athletes).
educational enhancement, it is therefore necessary to maintain as many men’s and women’s teams as possible.\(^{213}\)

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\(^{213}\) See Shook, \textit{supra} note 4, at 793-96, 814 (noting that non-revenue men’s and women’s athletic teams should receive educational opportunities equal to sports such as football). Although the option of the reduction of roster spots on men’s athletic teams is not ideal, it would be a better alternative than the elimination of men’s athletic programs in their entirety. \textit{See id.}