1995

Financial Disparity as Evidence of Discrimination under Title IX

Anne Bloom

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

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

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/mslj/vol2/iss1/2

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
FINANCIAL DISPARITY AS EVIDENCE OF DISCRIMINATION UNDER TITLE IX

Anne Bloom*

"[W]here there is no money, there is no change of any kind."1

I. INTRODUCTION

Nearly fifteen years ago, the United States Civil Rights Commission recognized that "[f]acilities provided for women are often inferior to those provided for men."2 Today, intercollegiate athletic spending still heavily favors male athletes. A 1992 study found that NCAA schools spend on average less than a fifth of their recruiting funds and only about a quarter of their total athletic operating monies on women's teams.3 The same study found that appropriation of athletic scholarship money between men and women athletes is also unequal.4

These general statistics are corroborated by institution-specific information that has been made public in recent Title IX litigation. For example, in litigation against Brown University - an institution considered to have a good reputation for supporting women's sports5 - the United States District Court for the District of Rhode Island found that men's sports at Brown consumed nearly three-fourths of the total athletic operating budget.6 Similarly, Title IX litigation against Indiana University of Pennsylvania (IUP) estab-

* Member of Trial Lawyers For Public Justice and counsel for plaintiff in Favia v. Indiana University of Pennsylvania.


4. Id. (finding that women receive from 20% to 42% of scholarship monies).

5. Andrew Szanton, On Balance, BROWN ALUMNI MONTHLY, Oct. 1993, at 21, 24 (quoting Kathryn Reith, [former] Assistant Executive Director of Women's Sports Foundation). Reith explained that Brown is involved in Title IX because there "isn't blatant discrimination" at Brown. Id.

lished that, for every $8.00 IUP spent on men's athletics, it spent only $2.75 on women's athletics.\textsuperscript{7}

Despite the gross disparities, the issue of disparate financial resources has been largely de-emphasized in the recent litigation over school athletic programs. Instead, recent Title IX cases have focused on the rights of female athletes simply to participate in intercollegiate sports.\textsuperscript{8} As the first generation of Title IX lawsuits proceeds to trial to address the issue of a presence or lack of women's teams on campus, every indication exists that the plaintiffs in these cases will point more to evidence of financial disparity and that courts will be asked to grant them relief that specifically addresses the lack of spending on women's athletics.\textsuperscript{9} As current Title IX litigation compels schools to cease cutting women's teams to comply with the participation aspects of Title IX,\textsuperscript{10} the focus to obtain gender equity in sports will almost certainly progress from simply wanting a female team to wanting a team that is fairly funded. As a result, future litigation will focus more on the inequities in funding and the quality of services provided to women's teams than on the mere presence of a team or lack thereof.

As this trend develops, traditional defenses to Title IX actions may become less effective. A common defense to charges of discrimination under Title IX in the allocation of monies and services in school athletic programs is that the money for the programs did not come from federally allocated funds. For example, schools might argue that the money spent for football did not come from

\textsuperscript{7} Favia v. Indiana Univ. of Pa., 7 F.3d 332, 335 (3d Cir. 1993). Additionally, the court found that, despite the equal number of men's and women's varsity teams, men constituted 62% of varsity athletes and 79% of the athletic scholarships. \textit{Id.}

\textsuperscript{8} Both the \textit{Favia} and \textit{Cohen} decisions, for example, followed motions for preliminary injunctive relief by women athletes seeking to reinstate canceled women's teams. \textit{Favia}, 812 F. Supp. at 579; \textit{Cohen}, 809 F. Supp. at 980. The district courts in both cases ruled that, in order to obtain injunctive relief, plaintiffs need only demonstrate that they were interested in continuing to play their sport and that the number of female athletes competing at their institution is disproportionate to the number of male athletes, in light of their respective enrollments. \textit{Favia}, 812 F. Supp. at 583; \textit{Cohen}, 809 F. Supp. at 990-91. In reviewing the \textit{Cohen} case, the First Circuit observed that "both the financial assistance and athletic equivalence standards are inapposite." \textit{Cohen}, 991 F.2d at 897 n.12.

\textsuperscript{9} In granting plaintiffs' request for an injunction immediately reinstating canceled women's teams, the \textit{Cohen} court specifically stated that it would address the alleged inequities in "benefits and services" when the case proceeds on the merits. \textit{Cohen}, 809 F. Supp. at 996.

\textsuperscript{10} See Kelley v. Board of Trustees, 832 F. Supp. 237, 240 (C.D. Ill. 1999) (noting that compliance with Title IX and "gender equity" policy of The Big Ten Conference were factors in University's decision to eliminate men's swimming team), \textit{aff'd}, 35 F.3d 265 (7th Cir. 1994).
federal funds but from the revenues generated by the football pro-
gram. Today, such a defense holds little merit because university 
monies must be evaluated as a whole, regardless of the source.\textsuperscript{11} For this reason, no exception exists for football or other revenue 
producing sports.\textsuperscript{12} Similarly, a constrained budget or cash 
shortage is no excuse to a Title IX claim of gender inequity.\textsuperscript{13} 
While Title IX does not require that institutions "pour ever-increas-
ing sums" into its athletic programs,\textsuperscript{14} it does require that once a 
school decides to fund athletic programs, it must spend the money 
equitably.

How will Title IX be applied in these cases? Is an educational 
institution which is subject to Title IX required to achieve and 
maintain financial parity in its men's and women's athletic pro-
grams? Where might an institution or a plaintiff's lawyer look for 
violations of this aspect of Title IX?

This article addresses these issues and suggests that true com-
pliance with the letter and spirit of Title IX requires that colleges 
and universities provide equal athletic opportunities not only in 
terms of the number of sports offered to males and females, but 
also in terms of equality in funding. To illustrate this point, the 
article first examines the history of Title IX, the regulations promul-
gated thereunder and the various tests for measuring gender equity 
in athletics. The article then examines the various factors used to 
gauge financial funding disparities which a Title IX litigant may 
come to use in a case against a school. These factors may become 
an increasingly potent weapon for the Title IX plaintiff.

II. APPLICING TITLE IX TO DISPARATE FUNDING IN ATHLETICS 

A review of the legislative and regulatory history of Title IX 
makes it clear that Title IX was intended to address a range of dis-
parate treatment, including inequities in funding for student ath-
letic programs. Passed in 1972, Title IX is a federal law that 
prohibits sex discrimination at schools and universities that benefit

\begin{enumerate}
\item Cohen, 809 F. Supp. at 996 (rejecting Brown's argument that Brown Uni-
versity Sports Foundation monies should not be used in Title IX analysis).
\item Federal regulators have been unequivocal in stating that "[f]ootball or 
other 'revenue producing' sports cannot be exempted from coverage of Title IX." 
\item Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 588 (W.D. Pa.) (noting 
that statute does not provide an exception for schools confronting financial diffi-
culties) aff'd, 7 F.3d 392 (3d Cir. 1993).
\item Cohen v. Brown Univ., 991 F.2d 888, 898-99 n.15 (1st Cir. 1993) (observ-
ing that subtraction and downgrading of opportunities for overrepresented gen-
der would be a valid course of university compliance).
\end{enumerate}
from federal financial assistance. In practice, the law covers the "vast majority" of all colleges and universities. Although the language of the statute itself says nothing about financial disparity in school athletic programs, subsequent legislative activity demonstrates that Congress intended Title IX to address specifically the disparities in funding between men's and women's intercollegiate athletics.

The Department of Health, Education and Welfare (HEW) adopted regulations implementing Title IX on July 21, 1975. The regulations addressed, among other things, inequities in athletic benefits. Subsequent hearings on the regulations also discussed

15. Title IX 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," with certain exceptions. 20 U.S.C. § 1681 (1988).

16. Cohen, 991 F.2d at 893 (noting Title IX applies to all educational institutions receiving federal financial support).


18. For example, in 1974 Senator John Tower introduced an amendment to exempt all intercollegiate athletic programs from Title IX. See 120 Cong. Rec. 15922-23 (1974) (proposing Amendment No. 1343 (May 20, 1974)). Subsequently, the amendment was modified to exempt only revenue-producing sports. Else. Both of these amendments failed, signalling Congress' intent that Title IX be construed to address discriminatory funding in intercollegiate athletics. Congress ultimately adopted the alternative "Javits" amendment which only required that the Department of Health, Education and Welfare promulgate regulations "with respect to intercollegiate athletic activities [include] reasonable provisions concerning the nature of particular sports" such as contact sports. S. CONF. REP. NO. 10, 93d Cong., 2d Sess. 4271 (1974).


20. Else. The regulations state:

Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of the 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.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Director may consider the failure to provide necessary funds for
the disparity in funding between men's and women's athletic programs. In both the regulations and the hearings, Title IX would be construed to address these disparities. In 1979, the Office of Civil Rights (OCR) of HEW issued a "Policy Interpretation" of Title IX and its requirements. The Policy Interpretation addresses the issue of disparate funding for men's and women's teams in both general and specific terms. The Policy Interpretation is an official agency interpretation. Therefore, it should be accorded substantial deference by the courts.

According to the Policy Interpretation, satisfaction of Title IX requires that "the availability, quality and kinds of benefits, opportunities, and treatment" afforded to male and female student athletes be equal or "equal in effect." Significantly, the Policy Interpretation also states that Title IX does not require equal expenditures for male and female teams, so long as the programs are essentially equal. OCR's interpretation of Title IX does not focus on how much an institution spends. Rather, the issue becomes what the athletes receive in terms of opportunities.

teams for one sex in assessing equality of opportunity for members of each sex.

45 C.F.R. § 86.41(c).

21. At that time, female intercollegiate athletic programs were receiving only two percent of what men's programs were receiving. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor, 94th Cong., 1st Sess. 197 (1975) (statement of Rep. Stewart B. McKinney).

22. Id. at 439 (finding by Caspar W. Weinberger, [former] Secretary, Department of Health, Education and Welfare).

23. Policy Interpretation, 44 Fed. Reg. 71,413-23 (1979). In 1979, HEW split into the Department of Health and Human Services (DHHS) and the Department of Education (DED). See Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993). Subsequently, the DED became the principal enforcer of Title IX. Id.

24. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984), cited in Cohen, 991 F.2d at 895. As the First Circuit noted in the Cohen case, "[t]he degree of deference 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." Cohen, 991 F.2d at 895; see Chevron, 467 U.S. at 844 (stating Congress has explicitly delegated rulemaking power to agency; regulations prescribed under such power deserve "controlling weight").


26. 34 C.F.R. § 106.41(c) (1992), cited in Cohen, 991 F.2d at 896 n.9 (noting that unequal expenditures for separate teams does not violate Title IX *per se*, but DED may consider such disparity in assessing equality of opportunity).

27. Although the Policy Interpretation does not consider unequal aggregate expenditures alone to be sufficient to violate Title IX, the United States Civil Rights Commission has acknowledged that "[o]ne important measure of the extent to which colleges treat men and women equally is the amount of money budgeted for men's and women's athletic programs." U.S. Comm'n on Civil Rights, Pub. No. 63, More Hurdles to Clear: Women and Girls in Competitive Sports 26 (1980).
Although unequal aggregate expenditures alone do not constitute a violation of Title IX, funding disparities should not be ignored in a Title IX analysis. Where unequal aggregate expenditures exist, an examination under Title IX involves investigating how the money is being spent and determining the specific impact of the unequal funding. Aggregate funding disparities can result in noticeable programmatic differences in athletic opportunities for men and women. In those instances, the differences can render the overall program unfair, thus giving rise to a Title IX violation.

III. EVIDENCE OF FINANCIAL DISPARITY AND PROVING DISCRIMINATION UNDER TITLE IX

In order to examine the impact of unequal funding on an institution’s compliance with Title IX, one must delve into a full-scale compliance analysis as set out in the OCR’s Policy Interpretation. The Policy Interpretation sets out three general categories of discrimination in athletic programs under Title IX. These three areas are the following: (1) Effective Accommodation of Student Interests and Abilities, (2) Equivalence in Other Athletic Benefits and Opportunities, and (3) Athletic Financial Assistance or Scholarships. Non-compliance in any one of these three areas is a violation of Title IX. Evidence of disparities in funding for men’s and


29. Id. at 417; see 34 C.F.R. § 106.41(c)(1). The Director of the OCR will consider whether “selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes” in determining whether equal opportunities are available. Id.; see also Cohen v. Brown Univ., 991 F.2d 888, 897-98 (1st Cir. 1993) (discussing “Effective Accommodation” part of Policy Interpretation).

30. 44 Fed. Reg. 71,415; see 34 C.F.R. § 106.41(c)(2-10) (outlining factors associated with maintenance of athletic programs which the Director may consider in determining whether equal opportunities are available); see also Cook v. Colgate Univ., 802 F. Supp. 737, 744-45 (N.D.N.Y. 1992) (analyzing whether equivalence exists in other athletic benefits and factors at Colgate University), vacated, 992 F.2d 17 (2d Cir. 1993).

31. 44 Fed. Reg. 71,415; see 34 C.F.R. § 106.37(c) (awards of scholarships or grants-in-aid must be proportionate to number of students of each sex participating in interscholastic or intercollegiate athletics); see also Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 582 (W.D. Pa. 1993) (noting disproportionate scholarship awards at IUP).

32. Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1511 (D. Colo. 1993), (“[A] violation of Title IX may be shown by proof of a substantial violation in any of the three major areas of investigation set out in the Policy Interpretation.”) modified sub nom. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993); see Favia, 812 F. Supp. at 584 (implying plaintiff establishes Title IX violation by proving one of three prongs); Cohen v. Brown Univ., 809 F. Supp. 978, 984 (D.R.I. 1992) (discussing three elements of OCR Policy Interpretation), aff’d, 991 F.2d 888 (1st Cir. 1993).
women's programs are relevant to proving a violation under all three categories.\textsuperscript{33}

A. Effective Accommodation of Student Interests and Abilities\textsuperscript{34}

The "effective accommodation" prong delineates the "heart-land" of Title IX and its charge to ensure "[e]qual opportunity to participate."\textsuperscript{35} Perhaps for this reason, it has also been the primary "battleground" for Title IX litigation.\textsuperscript{36} To date, evidence of financial disparity has been offered largely as background evidence under this prong to help the court understand the environment of discrimination in which women's teams were cut.\textsuperscript{37} In future cases, however, evidence of inadequate funding of the underrepresented gender may be used directly to demonstrate failure to accommodate student interests and abilities.

In Cohen, the First Circuit appropriately followed what has been described as a "trinitarian" model for determining whether an institution's athletic program effectively accommodates students' interests and abilities.\textsuperscript{38} Under this framework, to defeat a Title IX

\begin{itemize}
\item \textsuperscript{33} See Favia v. Indiana Univ. of Pa., 7 F.3d 332, 343 (3d Cir. 1993) (noting that unequal aggregate expenditures does not automatically result in a finding of non-compliance under Title IX). However, a school's failure to provide funds for teams of one sex may be considered as a factor in assessing Title IX violations. \textit{Id.}
\item \textsuperscript{34} The fact that OCR reserved an entire section for effective accommodations within its Policy Interpretation serves as a good indication of its relative importance in addressing compliance under Title IX. Jill K. Johnson, \textit{Title IX & Intercollegiate Athletics: Current Judicial Interpretations of the Standard for Compliance}, 74 B.U. L. Rev. 553, 566 (1994).
\item \textsuperscript{35} Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993) (observing that institutions can violate Title IX even if they meet "financial assistance" and "athletic equivalence" statutory standards).
\item \textsuperscript{36} \textit{Id.} at 897; see also Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 831 (10th Cir. 1993) (analyzing district court's findings under "effective accommodation" prong); Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 585 (W.D. Pa.) (finding that continuing scholarship commitments to female athletes and providing assistance to athletes in transferring to other schools after cutting teams is not effective accommodation), \textit{aff'd}, 7 F.3d 332 (3d Cir. 1993).
\item \textsuperscript{37} The lack of emphasis on funding disparities may stem partly from the defendant schools' inadequate participation numbers which, even without evidence of discrimination in funding, are enough to justify the initial relief the women sought — reinstatement of canceled women's teams. See Favia v. Indiana Univ. of Pa., 7 F.3d 332, 335 (3d Cir. 1993) (noting women make up 55.6% of student body but receive only 38% of participation opportunities); Cohen, 991 F.2d at 892 (women make up 48% of student body but receive 36.6% of athletic opportunities).
\item \textsuperscript{38} The First Circuit concluded that "a Title IX plaintiff makes out an athletic discrimination case by proving numerical disparity, coupled with unmet interest, each by a fair preponderance of the credible evidence, so long as the defendant does not rebut the plaintiff's showing by adducing preponderant history-and-practice evidence." Cohen, 991 F.2d at 902.
\end{itemize}
challenge under the accommodation prong, an institution must demonstrate one of the following:

(1) gender parity between the student body and the athletic lineup,\textsuperscript{39}

(2) a history of continually expanding athletic opportunities for the underrepresented gender, or

(3) a demonstrable lack of interest on the part of the underrepresented gender.\textsuperscript{40}

Although proving discrimination under the accommodation prong focuses on the actual numbers of men and women participating in a school's athletic programs, evidence of funding disparities are highly relevant, particularly if an institution can not demonstrate gender parity between the student body and athletic participation rates.

For example, if an institution has more female students enrolled than male students but has a greater percentage of males participating in sports, the institution will not be able to satisfy the accommodation prong by demonstrating gender parity. In such instances, the institution will be forced to defend a Title IX challenge either by pointing to a continuing expansion of athletic opportunities for females at the institution or by attempting to prove that the female students are less interested in sports. Because of the long history of discrimination against women in athletic programs, an institution may have difficulty in demonstrating that it has adequately expanded opportunities or met women's interests in participating in sports when the women's athletic program continues to receive significantly less funding. Under this theory, a university could be held liable for failing to spend adequate amounts of money to encourage female participation in athletics.

This is not a novel approach to evaluating an institution's compliance under the accommodation prong. As early as 1980, the United States Civil Rights Commission acknowledged that "relatively less money allocated [to] women's programs" may limit the number of female athletes and "discourage" participation.\textsuperscript{41} More recently, a federal district court hearing a Title IX case considered

\textsuperscript{39} Cohen v. Brown Univ., 991 F.2d 888, 898 (1st Cir. 1993) (noting that an institution will not be in violation of Title IX if the plaintiff only establishes noncompliance based on lack of proportionality between the sexes). Noncompliance requires that the institution fails to meet one of the three prongs. \textit{Id}.

\textsuperscript{40} 44 Fed. Reg. 71,418 (1979).

\textsuperscript{41} U.S. COMM'N ON CIVIL RIGHTS, supra note 2, at 6 (noting that lack of opportunity discourages women from playing sports).
the inadequate funding of women’s teams in assessing “equality of opportunity” under the accommodation prong of Title IX.\footnote{See \textit{Cohen}, 809 F. Supp. 978, 994 (noting that Department of Health 
& Human Services regulations allow Department of Education to consider failure to fund teams of one sex in assessing equality of opportunity), \textit{aff’d}, 991 F.2d 888 (1st Cir. 1993).}

In \textit{Cohen}, Brown University permitted two women’s teams, formerly varsity teams, to continue as intercollegiate clubs “but cut off financial subsidies and support services routinely available to varsity teams (e.g., salaried coaches, access to prime facilities, preferred practice time, medical trainers, clerical assistance, office support, admission preferences, and the like).”\footnote{\textit{Cohen}, 991 F.2d at 892.} The trial court reinstated these women’s teams to varsity status and commented that the “bottom line [was] that Brown [knew] full well that the two women’s teams [would] not be able to effectively compete at an intercollegiate level without varsity status, recruitment assistance, and some type of guaranteed funding arrangement by the university.”\footnote{\textit{Cohen}, 809 F. Supp. at 993 (observing that Brown athletic officials admitted that intercollegiate club status is a “step down” from varsity status).} As a result of this decision, the creation of “major” and “minor” sports, where more male athletes are playing more major sports than female athletes, is impermissible.\footnote{\textit{Cohen} also 44 Fed. Reg. 71,422 (noting that no subgrouping of male or female students may be used to diminish rights of larger class of males and females to equal participation in educational benefits or opportunities).} Courts understand the connection between participation rates and adequate funding. In fact, the \textit{Cohen} court recognized what football recruiters have known for decades: interest and ability do not thrive in a vacuum.\footnote{U.S. COMM’N ON CIVIL RIGHTS, \textit{supra} note 2, at 5 (“Low participation rates . . . are more a reflection of lack of opportunity and fear of being thought ‘masculine’ than lack of interest.”).} How much a school spends directly affects participation rates and competition levels.

Significantly, in \textit{Haffer v. Temple University},\footnote{\textit{Haffer}, 678 F. Supp. 517 (E.D. Pa. 1987).} the first case that attempted to apply Title IX to intercollegiate athletics, the plaintiffs presented expert testimony connecting athletic interest and ability with the amount of money devoted to athletic scholarships, recruiting and publicity.\footnote{\textit{Haffer}, 678 F. Supp. at 526. The court noted that the number of students who want to compete in intercollegiate athletics and have the requisite skills is directly related to money devoted to scholarships, advertising, promotion and sports information activities. \textit{Id}.} In future Title IX litigation, plaintiffs should use similar testimony to demonstrate that their low participation
rates are caused by the university's failure to invest enough money in the program to stimulate interest and participation.

B. Equivalence in Other Athletic Benefits and Opportunities

While the accommodation prong focuses on participation rates, the "other athletic benefits and opportunities" prong addresses the mechanics of maintaining athletic programs. As a result, this is the most obvious area to look for the effects of unequal funding in the form of gender-based discrepancies in the provision of athletic benefits and opportunities.

The Policy Interpretation notes ten criteria, including effective accommodation, that are relevant in assessing discrimination under the provision of athletic benefits and opportunities.\(^49\) In addition, two other criteria are listed under "Application of the Policy."\(^50\) In order to provide greater specificity as to what each of these criteria entail, federal regulators also identified "components" for each of the criteria.\(^51\) Although courts have not yet adopted these criteria, they probably will adopt them in light of the strong deference to agency interpretations of Title IX.\(^52\) The key word for compliance with these factors is "equivalence."\(^53\)

---

49. These factors are set out in the regulations under Title IX. The factors are: (1) effective accommodation, (2) equipment and supplies, (3) scheduling, (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, (8) provision of medical and training facilities, (9) provision of housing and dining facilities and (10) publicity. 34 C.F.R. § 106.41(c). The Policy Interpretation also discusses recruitment of student athletes and provision of support services, noting that the Director of the OCR has the authority to consider other factors in the "equal opportunity" analysis. 44 Fed. Reg. 71,415.

50. The Application of the Policy lists recruitment of student athletes and support services as additional criteria in considering discrimination in the provision of athletic benefits and opportunities. 44 Fed. Reg. 71,417.

51. Id. at 71,416.

52. See Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993). The First Circuit noted that "appreciable deference" must be given to the Department of Education's interpretation of Title IX. Id.

53. 44 Fed. Reg. 71,415 ("[I]nstitutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect.").
1. **The Factors**

   a. **Equipment and supplies**

      In addition to equivalency in the provision of apparel and equipment, this factor requires equal access to "instructional devices" and "conditioning and weight training equipment." Unless the school can demonstrate a non-discriminatory reason for differences, all aspects of equipment provisions must be equivalent, including the "quality, quantity, suitability, availability, maintenance and replacement." Under this factor, investigations are conducted to determine how frequently uniforms are replaced, who pays for the equipment and who pays for equipment repair for men's and women's teams.

   b. **Scheduling of games and practice times**

      Universities have a long-standing practice of giving men's teams more desirable practice times and more opportunities to compete than women's teams. Title IX regulations require that men's and women's programs receive equivalent treatment concerning (1) the number, scheduling and location of games or competitive opportunities, (2) the opportunities to practice, including the length and scheduled times of practice, and (3) the opportunities to engage in pre-season and post-season competition. This

---

54. The listed factors do not include the effective accommodation factor. For a discussion of effective accommodation, see supra notes 34-48 and accompanying text.

55. 34 C.F.R. § 106.41(c)(2); see, e.g., Cook v. Colgate Univ., 802 F. Supp. 737, 744-45 (N.D.N.Y. 1992) (evaluating disparities in equipment provisions between men's and women's ice hockey teams at Colgate University), vacated, 992 F.2d 17 (2d Cir. 1993).


58. See, e.g., Cohen, 809 F. Supp. at 996. The Cohen court considered testimony that the men's ice hockey team received new uniforms every one or two years, while the women's ice hockey team received new uniforms every four or five years. Id.

59. See, e.g., Cook, 802 F. Supp. at 744. The court considered in Cook the fact that the men's ice hockey team received free skates while the women's team did not. Id.

60. Id.


62. See, e.g., Cook, 802 F. Supp. at 745 (giving men "prime" practice times, while women's practice times were sometimes preempted by men's team practice or by other activities is considered in determining Title IX violations).

63. 44 Fed. Reg. 71,416(b).
factor reflects the cornerstone underlying Title IX regulations which maintains that gender-based discrepancies are plainly unacceptable.

c. Travel and per diem allowances

Not very long ago, men's collegiate teams received more money for food and better hotel accommodations than women's teams when the teams traveled out of town to play away games. Title IX prohibits such differences unless they can be explained by some non-discriminatory cause. Federal regulations specifically identify modes of transportation, housing furnished during travel, length of stay before and after competitive events, per diem allowances and dining arrangements as appropriate areas for review under this factor.

Does the men's baseball team always receive bus transportation to away games while the women's softball team carpools? Does the institution have a "football" table in the dining hall but no equivalent dining arrangement for a women's athletic team? While these examples by themselves are not necessarily violations of Title IX, such discrepancies pose problems for an institution that can not provide any non-discriminatory reason for the differences in treatment.

d. Opportunity to receive coaching and academic tutoring

The Policy Interpretation states that compliance under this factor requires equivalence regarding the availability of graduate assistants and full-time, part-time and assistant coaches. In short, female athletes should receive as much coaching as male athletes. If there were disparate coach-to-athlete ratios that could not be explained by any non-discriminatory reason, the institution would violate Title IX. Similarly, the availability of tutoring and the criteria

64. 34 C.F.R. § 106.41(c)(4).
65. In Haffer, the court acknowledged that the Temple University women's badminton and softball teams were housed four or five to a room while traveling, whereas men's basketball and football teams were housed only two to a room. Haffer v. Temple Univ., 678 F. Supp. 517, 531 (E.D. Pa. 1987).
67. 34 C.F.R. § 106.41(c)(5).
68. The regulation states:
(1) Coaching - Compliance will be assessed by examining, among other factors, the equivalence for men & women of:
   (a) Relative availability of full-time coaches;
   (b) Relative availability of part-time and assistant coaches; and
   (c) Relative availability of graduate assistants.

44 Fed. Reg. 71,416(c)(6) at 71,416(c)(1).
and procedures for obtaining tutors for men and women athletes must be equivalent.\textsuperscript{69}

e. Assignment and compensation of coaches and tutors\textsuperscript{70}

Similar to the "opportunity to receive coaching and academic tutoring" factor, the components of this factor include the quality, nature and availability of coaches. This benchmark also addresses the coaches' and tutors' compensation per sport per season, duration of their contracts, conditions relating to contract renewal, their experience, the nature of their duties and their working conditions.\textsuperscript{71} In addition, it would also be appropriate for a court to consider disparities in housing, parking and other services such as complementary automobiles and country club memberships that are provided to coaches.\textsuperscript{72} However, the one issue that will likely become the subject of significant future litigation under Title IX involves the effect of wide-spread discrepancies in salaries for the coaches of men's and women's teams.\textsuperscript{73} Plaintiffs should have little difficulty presenting expert testimony proving that, when a university pays its football coach three times more money than the field hockey coach, the university has bought itself better quality coaching for its male athletes. Universities will be hard-pressed to explain the differences with anything other than pretextual explanations.

f. Provision of locker rooms, practice and competitive facilities\textsuperscript{74}

This factor examines the quality and availability of athletic facilities.\textsuperscript{75} It includes discrimination in the quality and maintenance

\textsuperscript{69} The regulation provides:
\textsuperscript{70} (2) Academic tutoring - Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
\begin{itemize}
  \item [(a)] The availability of tutoring; and
  \item [(b)] Procedures and criteria for obtaining tutorial assistance.
\end{itemize}
Id. at 71,416(c)(2).
\textsuperscript{71} 70. 34 C.F.R. § 106.41(c)(6).
\textsuperscript{72} 72. See, e.g., Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 582 (W.D. Pa.), aff'd, 7 F.3d 332 (3rd Cir. 1993). The court found that several males on the athletic staff received complimentary cars and memberships at local country club, while female staff members did not receive such privileges. Id.
\textsuperscript{73} 73. See General Accounting Office, Intercollegiate Athletics: Compensation Varies for Selected Personnel in Athletic Departments (August 1992), at 2. This study has shown that compensation disparities exist between men's and women's coaches. For instance, the study found that "[h]ead coaches for women's basketball always had a lower average compensation than head coaches for men's basketball." Id.; see also NCAA Gender Equity Study: Summary of Results (March 1992), Table 4.
\textsuperscript{74} 74. 34 C.F.R. § 106.41(c)(7).
75. The regulation provides:
of fields\textsuperscript{76} and locker rooms\textsuperscript{77} as well as storage of team uniforms.\textsuperscript{78} Under this factor, an institution may not provide female athletes with fewer lockers, refuse to supply them with storage space or assign them the least desirable fields. This factor is a significant gauge of the level of athletic opportunities provided to each sex because the facilities, including fields and stadiums, golf courses, swimming pools or squash courts, are where the athletes practice, compete and spend the bulk of their sporting experience.

\section*{g. Provision of medical and training facilities and services\textsuperscript{79}}

This factor covers the provision of medical care, trainers, health insurance and weight training and conditioning facilities.\textsuperscript{80} Some schools may attempt to justify spending more money on men’s teams in this area by arguing that men’s sports are “high injury” because some involve physical contact, such as football or hockey, and therefore need extra money for medical services. This

(f) Provision of Locker Rooms, Practice and Competitive Facilities. Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

\begin{enumerate}
\item Quality and availability of the facilities provided for practice and competitive events;
\item Exclusivity of use of facilities provided for practice and competitive events;
\item Availability of locker rooms;
\item Quality of locker rooms;
\item Maintenance of practice and competitive facilities; and
\item Preparation of facilities for practice and competitive events.
\end{enumerate}


76. In \textit{Favia}, the court seems to consider the conditions of the men’s baseball field and women’s softball fields in deciding whether IUP was in violation of Title IX. The former associate director of athletics at IUP cited the disparate conditions of the fields, \textit{inter alia}, as evidence of IUP’s violations of Title IX. \textit{Favia} v. Indiana Univ. of Pa., 812 F. Supp. 578, 582 (W.D. Pa.), \textit{aff’d}, 7 F.3d 332 (3d Cir. 1993).

77. The \textit{Cohen} plaintiffs stated that the women’s ice hockey locker room was “significantly smaller than and inferior to the men’s locker room.” \textit{Cohen} v. Brown Univ., 809 F. Supp. 978, 997 (D.R.I. 1992), \textit{aff’d}, 991 F.2d 888 (1st Cir. 1993).

78. The \textit{Favia} court considered the women’s field hockey coach’s testimony that she kept the women’s field hockey uniforms in the trunk of her car. \textit{Favia}, 812 F. Supp. at 581.

79. 34 C.F.R. § 106.41(c)(8).

80. 44 Fed. Reg. 71,417(g). The regulation states:

(g) Provision of Medical and Training Facilities and Services. Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

\begin{enumerate}
\item Availability of medical personnel and assistance;
\item Health, accident and injury insurance coverage;
\item Availability and quality of weight and training facilities; and
\item Availability and qualifications of athletic trainers.
\end{enumerate}

\textit{Id.}
contention should be examined closely because some women’s sports, while not frequently involving physical contact, may also be “high injury,” such as women’s gymnastics, and require additional funding for medical services.

h. Provision of housing and dining facilities and services

The quality and availability of housing facilities, dining facilities and services for athletes, while not a common means of gauging gender equity in athletics, are also scrutinized as a significant part of a Title IX analysis. This factor requires that an institution choosing to house its football team in a high quality dorm must provide comparable housing to a comparable percentage of women athletes. In addition, under the OCR’s Policy Interpretation, this factor is comprehensive and includes any “special services” which are provided in conjunction with the housing, such as laundry, parking and maid service.

i. Publicity

Under the “publicity” factor, the OCR’s interpretation of Title IX looks at access to publicity resources for male and female athletes and the availability and quality of sports information personnel. The key issue is whether the school’s public relations office is allocating fairly its efforts between men’s and women’s athletic programs. Particulars of this factor include the time allocated between men’s and women’s athletic programs in the school trophy case. One court looked at special incentives, such as drawings,
that are used to increase attendance and heighten spectator interest in attending games. Another court examined whether the school was fair to women in allocating resources for newspaper coverage of away events. All of these items receive review under the "publicity" factor.

j. Recruitment

Another factor of importance in the Title IX equity analysis is athlete recruitment. The analysis looks at whether the opportunities to recruit and the access to financial resources are "equivalently adequate." In addition to requiring equality in recruiting efforts and in funding for recruiting activities, Title IX prohibits universities from "hobbling a coach's effort to improve his or her team." This factor also asks whether prospective students are treated similarly regardless of their gender. Appropriate areas of inquiry include the distribution of overall funds for recruitment purposes, the availability of cars to coaches for recruiting purposes and the fairness in the allocation of "admission preferences."  

88. In Favia, the United States District Court for the Western District of Pennsylvania found: "At each home football game and basketball game a scholarship for tuition for one semester is raffled off . . . . Although the women's basketball games almost always are played immediately before the men's, the drawing for the scholarship is conducted at half-time at the men's basketball games." Favia v. Indiana Univ. Pa., 812 F. Supp. 578, 582 (W.D. Pa.), aff'd, 7 F.3d 332 (3d Cir. 1993).

89. See Cohen, 809 F. Supp. at 997 (noting testimony that only women's basketball receives sports information coverage comparable to men's football, basketball and ice hockey was indicative of Title IX violations).

90. For a discussion of the publicity factor, see supra note 85 and accompanying text.

91. 44 Fed. Reg. 71,417. Recruitment is not addressed as a factor, per se. It is listed under a separate section entitled "Application of the Policy." Id. However, the court in Cohen specifically addressed the issue of recruitment and found that it "is considered a target area in [Title IX] 'Policy Interpretation.' " Cohen, 809 F. Supp. at 997.


93. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 834 (10th Cir. 1993). However, it is interesting to note that universities do not, in turn, have to offer scholarships to that team to aid a coach in improving his or her team. Id.


95. See Cohen, 809 F. Supp. at 997 (noting that data for 1990-91 indicated men's teams received three times the amount of recruiting dollars as women's teams).

96. At Brown, men's teams had a total of eleven cars, while only one women's team had a single car. Id.

97. Although not specifically identified as a recruiting device, the Cohen court noted Brown's argument that the University admissions practices have helped women gain participation opportunities to a greater degree. Id. at 991.
k. Support services 98

Title IX analysis also requires scrutiny of an institution's support services provided to men's and women's athletic programs. Assessing equivalence in support services requires an evaluation of the amount of administrative, secretarial or clerical assistance provided to men's and women's teams. 99 The focus here is on examining a key part of the athletic infrastructure of a university’s sports program. For example, the analysis determines whether office personnel sizes and long-distance telephone budgets are relatively equal. 100

2. Program-Wide Analysis

Once the specific information under each of the factors is collected, equivalency under the factors should be considered from a program-wide perspective. 101 In other words, an institution may, for example, provide extra publicity resources to its football team only if the institution compensates for the discrepancy by providing extra recruiting monies to the women’s basketball team. If the overall disparities are more than “negligible,” the institution will be in violation of Title IX unless the differences are caused by non-discriminatory practices. 102 Some non-discriminatory explanations for disparities may include the unique aspects of particular sports

98. The Title IX regulation addressing support services states:
(b) Provision of Support Services. The administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, particularly to the extent that they provided services which enable coaches to better perform their coaching functions. In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:
(1) The amount of administrative assistance provided to men’s and women’s programs;
(2) The amount of secretarial and clerical assistance provided to men’s and women’s programs.
99. Id.
100. Cohen, 809 F. Supp. at 982 (noting Brown had “stripped the coaches of women’s teams of office space, long-distance telephone service and clerical support”).
101. The regulation provides in relevant part:
2. The Policy - The Department will assess compliance with both the recruitment and general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect.
102. Id.
(such as the added expense of managing the larger crowds at football games or gymnastics competitions) or temporary imbalances caused by fluctuations in team needs.105

In summary, the "athletic benefits and opportunities" prong provides for a comprehensive review of an institution's athletic program. If, after an overall review, an institution is not simply spending more money on men's teams but also is utilizing the money to provide the men's teams with more opportunities and better services, the institution is vulnerable to a Title IX challenge.104

C. Athletic Financial Assistance and Scholarships

The third category of discrimination under the OCR's interpretation of Title IX addresses athletic financial assistance and scholarships. Title IX regulations require that institutions provide "reasonable opportunities" for financial aid awards for members of each sex "in proportion to the number of students of each sex participating in . . . intercollegiate athletics."105 Put simply, athletic scholarships must be proportionate to participation.106 Courts will look at the aggregate amounts awarded to female and male participants in order to determine whether a violation exists because Title IX does not protect specific athletes or programs.107 Perhaps the simplest way to determine if a school is in compliance with the Title IX requirements is to "divid[e] the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and compar[e] the results."108 If the amounts of money available for male and female participants is not "substantially equal," then the school is violating Title IX unless the institution can explain that the disparity is caused by a "legitimate, non-discriminatory factor."109 A memorandum issued by HEW to school officials in September, 1975, further explained that if scholarships are not proportionate, they must be awarded on a sex-neu-

103. Id. at 71,415-16.
104. In some instances, a university may be providing men's programs with more money, but because of the ingenuity of the directors of the women's programs, the programs are essentially equal. Under the OCR's interpretation of Title IX, unequal aggregate expenditures do not, by themselves, violate Title IX; therefore, this equality appears to be a permissible result. The seeming unfairness of the result, however, combined with the complexity of the comprehensive approach, suggests that it may be wiser to simply compare overall aggregate funding.
105. 34 C.F.R. § 106.37(c).
106. 45 C.F.R. § 86.37(c).
108. Id.
109. Id.
tral basis, which means that scholarships must be awarded on the basis of financial need, athletic ability or a combination of both.\textsuperscript{110} These criteria must be applied in a sex-neutral fashion to avoid a discriminatory impact.\textsuperscript{111}

At least one Title IX case has raised the issue of disparate funding in athletic scholarships. In \textit{Favia}, the plaintiffs alleged, \textit{inter alia}, that IUP discriminated against women athletes in the allocation of athletic scholarships.\textsuperscript{112} The trial court found that, before program reductions, female athletes constituted 37.77\% of the total athletes and received 21\% of the scholarship money awarded.\textsuperscript{113} These numbers plainly suggest a violation of Title IX for which the court may award relief unless IUP can demonstrate that the disparity is caused by a legitimate, non-discriminatory factor. Significantly, the IUP plaintiffs need not prove that they are entitled to additional participation opportunities to prove a violation under this category because, even at existing levels of participation, IUP is not providing its female athletes with proportionate scholarship monies.\textsuperscript{114}

A financial aid violation would also appear to exist when the reduction in financial aid is a result of low female participation that has been discriminatorily reduced.\textsuperscript{115} This makes for a more difficult case because the plaintiffs would first need to prove that the university has discriminated against them in the provision of actual opportunities to participate\textsuperscript{116} as well as in the provision of financial aid.\textsuperscript{117}

\textsuperscript{110} United States Department of Health, Education, and Welfare, Office for Civil Rights, Elimination of Sex Discrimination in Athletic Programs: Memorandum to Chief State School Officers, Superintendents of Local Educational Agencies and College and University Presidents 4 (1975).

\textsuperscript{111} Id.

\textsuperscript{112} Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 580-82 (W.D. Pa.), aff'd, 7 F.3d 332 (3rd Cir. 1993).

\textsuperscript{113} Favia, 812 F. Supp. at 580.

\textsuperscript{114} Favia, 812 F. Supp. at 585. IUP had 313 male athletes and 190 female athletes. \textit{Id}. at 580. Male athletes received $246,755 in scholarship money, while female athletes received $67,423. \textit{Id}. at 582. Applying the Policy Interpretation formula (dividing total aid per gender by total number of athletes for that gender), the men at IUP were receiving an average of $788 per athlete, while the women received about $355.

\textsuperscript{115} See Haffer v. Temple Univ., 678 F. Supp. 517, 539 (E.D. Pa. 1987) (observing that participation figures resulting from unlawful discrimination under Title IX cannot justify summary judgment on Title IX claim).

\textsuperscript{116} For a discussion of the effective accommodation prong of Title IX, see supra notes 29-41 and accompanying text.

\textsuperscript{117} One issue worthy of further discussion concerns whether the OCR's practice of tying the provision of athletic scholarships to existing participation rates makes sense. Under the present rule, a university arguably is prohibited from
IV. Conclusion

Although the OCR’s Policy Interpretation of Title IX suggests that institutions can spend more on men’s programs without necessarily running afoul of Title IX, a closer examination of Title IX compliance factors shows that the amount of money a school spends on women’s athletic programs is at the heart of compliance with Title IX. As with most litigation, it still makes sense to pursue the money.

As Title IX and its impact continues to be felt in the United States, the use of the argument of disparate funding between male and female athletic teams is likely to take on a more significant role both in terms of shaping the basis of gender equity suits and for providing another means to demonstrate the lack of gender equity in collegiate athletics and a concomitant violation of Title IX.

using scholarships as a means of increasing female participation in their intercollegiate athletic programs. In other words, if female athletic participation is currently 20% at an institution where females make up 50% of the enrollment, a university may be prohibited from offering females more than 20% of the scholarship money in an effort to boost female participation rates. This seems unfair, particularly with respect to those institutions that historically gave out more scholarship money to men. A rule that would benefit females would allow universities to use scholarship monies affirmatively to remedy the effects of past discrimination.