

# LET THE GIRLS PLAY: MAKING THE CASE FOR THE REFORM OF TITLE IX

*Georgia Summer*

## INTRODUCTION

“We had no idea how bad the situation really was – we didn’t even use the word sex discrimination back then – and we certainly had no sense of the revolution we were about to start.”

*-Bernice “Bunny” Sandler<sup>1</sup>*

Congress enacted Title IX of the Education Amendments of 1972 as a continuation of the Civil Rights legislation that was predominant during the 1960s and 1970s.<sup>2</sup> It was a response to decades of inequities between men and women in the educational realm. At its core, Title IX was a prohibition of discrimination on the basis of sex in any educational program that received federal financial assistance.<sup>3</sup> Its purpose was to solve the gender equity problem that was prevalent in higher education institutions and society in general.<sup>4</sup>

In many ways, the enactment of Title IX has done what it was intended to do. It has facilitated the significant increase in opportunities for female student athletes.<sup>5</sup> This effect is evident

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<sup>1</sup> Steve Wulf, Title IX: 37 words that changed everything, espnW (Mar. 22, 2012), [https://www.espn.com/espnw/title-ix/story/\\_id/7722632/37-words-changed-everything](https://www.espn.com/espnw/title-ix/story/_id/7722632/37-words-changed-everything).

<sup>2</sup> Christopher Paul Reuscher, Giving the Bat Back to Casey: Suggestions to Reform Title IX’s Inequitable Application to Intercollegiate Athletics, 35 Akron L. Rev. 117, 119 (2001).

<sup>3</sup> Brian L. Porto, Annotation, Suits by female college athletes against colleges and universities claiming that decisions to discontinue particular sports or to deny varsity status to particular sports deprive plaintiffs of equal education opportunities required by Title IX (20 U.S.C.A. §§ 1681-1688), 129 A.L.R. Fed. 571 (1996).

<sup>4</sup> Matthew L. Daniel, Title IX and Gender Equity in College Athletics: How Honesty Might Avert a Crisis, Ann. Surv. Am. L. 255 (1995) at 262.

<sup>5</sup> Id. at 266.

through the explosion of numbers of women participating in high school, intercollegiate, and professional sports. Title IX indicated the dawn of a new era in athletics for women.<sup>6</sup>

Title IX of the Education Amendments of 1972 states, “[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 . . . .”<sup>7</sup> Additionally, subsection (b) of §1681 was added to prohibit quotas as a means to accomplish the statute’s goal.<sup>8</sup> §1681(b) states that, “[n]othing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving benefits of any federally supported program or activity, in comparison with the number of percentage of persons of that sex in any community, state, section, or other area.”<sup>9</sup>

The most pressing debate surrounding Title IX at the time of its inception was regarding its scope.<sup>10</sup> Title IX’s legislative history did not provide adequate clarification as to whom it would apply to and the extent of its application.<sup>11</sup> The most disputed language in the statute revolved around the “receipt” of federal financial assistance.<sup>12</sup> Athletics is not mentioned anywhere in the legislative history nor in the statute, thus making it even more difficult to interpret its application - although it was clear that the statute would have major implications for college athletics.<sup>13</sup>

Two different applications of the scope of Title IX emerged after its introduction. These two approaches were the institution-wide approach and the program-specific approach.<sup>14</sup> Under the

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<sup>6</sup> *Id.*

<sup>7</sup> 20 U.S.C. § 1681(a).

<sup>8</sup> *Id.*

<sup>9</sup> 20 U.S.C. §1681(b).

<sup>10</sup> Reuscher, *supra* note 2, at 121.

<sup>11</sup> *Id.* at 122.

<sup>12</sup> Porto, *supra* note 3.

<sup>13</sup> Donald C. Mahoney, *Taking a Shot at the Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Programs*, 27 *Conn. L. Rev.* 943, 949-50 (1995).

<sup>14</sup> Porto, *supra* note 3.

program specific approach, only the individual department or program within the institution that received federal assistance would be required to comply with Title IX.<sup>15</sup> Throughout the 1970s and 1980s, courts operated under this approach, which was adopted by the United States Supreme Court in *Grove City College v. Bell* in 1984.<sup>16</sup> This case effectively placed all university athletic departments out of the reach of Title IX's requirements.<sup>17</sup>

This decision was quickly overturned by Congress, however, when it enacted the amendments to the Civil Rights Restoration Act of 1987.<sup>18</sup> The language of 20 U.S.C.A § 1687(2)(A) now explicitly states that the terms “program” and “activity” include “all . . . the operations of a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended federal financial assistance . . . .”<sup>19</sup> Thus, any educational program that receives federal funds either directly or indirectly is bound to comply with the provisions of Title IX.

The introduction of Title IX has had an extraordinary effect on the expansion and popularity of women's sports in general. These changes are evident through the increased status and respect for female athletes and also by the recent public achievements of individual female athletes.<sup>20</sup> Before the adoption of Title IX, women's intercollegiate sports received only two percent of the overall athletics funding.<sup>21</sup> In 1971, fewer than 32,000 female athletes participated in intercollegiate athletics. In 2018, that number reached 216,379.<sup>22</sup> These advances can be attributed to the introduction of Title IX. Unfortunately, the negative implications that have transpired throughout the lifetime of Title IX have come to outweigh the positive.

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<sup>15</sup> *Id.*

<sup>16</sup> *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

<sup>17</sup> *Porto*, supra note 3.

<sup>18</sup> *Id.*

<sup>19</sup> 20 U.S.C.A. §1687(2)(A).

<sup>20</sup> Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 *U. Mich. J.L. Reform* 13, 16 (2001).

<sup>21</sup> Paul C. Weiler, et al., *Sports and the Law: Text, Cases, and Problems* (6th<sup>th</sup> ed. 2018) at 913.

<sup>22</sup> Number of Student Athletes in the United States in 2018, by gender, Statista.com, <https://www.statista.com/statistics/1098761/student-athletes-by-gender/> (last visited Feb. 26, 2021).

This article contends that the current implementation of Title IX is the source of a wide range of issues and is ineffective in practice. While acknowledging the strides made in women's sports because of the existence of Title IX, this article suggests two revisions to the current Title IX statute. First, this article proposes adding competitive cheerleading to the Title IX equation. Second, this article asserts that Congress should supplement the language of Title IX of the 1972 Education Amendments to require that universities allocate athletics funding 50/50 to women's and men's athletic teams.

Section II examines the problems that have arisen in the implementation of Title IX, resulting from the actions of the agencies charged with its regulation. Section III discusses Title IX's application in the courts and analyzes the two primary judicial decisions involving Title IX and intercollegiate sports. Section III also suggests two revisions to solve the issues discussed in section II. Section IV discusses the current COVID-19 pandemic and the effects it might have on Title IX compliance. It also touches on the application of Title IX to transgender or transitioning student athletes.

## I. THE PROBLEM

Despite the intent of Title IX and its initial impact on women's athletics, Title IX has failed in its primary goal of achieving gender equity in athletics. The actual implementation of Title IX has proven to be inadequate, problematic, and the cause of deep tensions between student athletes and their respective institutions. This is due in large part to the Policy Interpretation promulgated by the Office of Civil Rights (OCR) in 1979. The purpose of the Policy Interpretation was to, "clarify the obligations which recipients of federal aid have under Title IX to provide equal opportunities in athletic programs."<sup>23</sup> The interpretation imparts a three-prong test to satisfy compliance if one of the three is answered in the affirmative. If an institution fails to satisfy the first prong, it still has the opportunity to satisfy the test with either the second prong, or the third prong.

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<sup>23</sup> Mahoney, *supra* note 13, at 953 (citing 44 Fed. Reg. 71, 415 (1979)).

- 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 underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- 3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>24</sup>

The application of, and the court's reliance on, the three-prong test has given rise to significant problems in the world of intercollegiate sports. First and foremost, this test mistakenly assumes that all college sports have the sole purpose of providing student-athletes with an education. In reality, there are certain collegiate sports which are intended to be, and act as, profit centers for their respective universities.<sup>25</sup>

Schools with large football programs (which produce a substantial amount of revenue for their athletic programs) tend to have the most difficulty maintaining compliance with Title IX because there is no comparable women's counterpart to offset the number of men on the team.<sup>26</sup> The three-prong test presumes an idealized view of college athletics that has had a profound effect on the way that Title IX is implemented and has produced deep tensions between men's and women's athletics teams, as well as between women's athletic teams and their collegiate institutions.

One source of these tensions involves financial restraints on school's athletic budgets. Instead of actively expanding athletic programs as was the norm in the 1970's, schools are now cutting

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<sup>24</sup> *Id.* at 954.

<sup>25</sup> Daniel, *supra* note 4, at 259.

<sup>26</sup> Kellen W. Bradley, *Teaching an Old Dog New Tricks: Title IX and the Essential Upgrade*, 2 *Ariz. St. U. Sports & Ent. L. J.* 199, 213 (2012).

back on athletic spending. As a result, programs are forced to cut men's teams, while retaining women's teams in order to comply with the requirements of Title IX.<sup>27</sup> A commentator on the subject said this concerning the adversarial relationship between women athletes and collegiate institutions:

“The accomplishment of sex equity goals and objectives is complicated by a resistant and progressively more male-dominated athletics establishment—an establishment that has historically opposed the provision of equal opportunity for women due to fears that cutbacks in revenue-producing men's sport[s] will undermine the financial stability of intercollegiate athletics. There is also an underlying belief among male athletics administrators that women's sports, like men's minor sports, do not deserve the financial support of major revenue-producing men's sports such as football and basketball.”<sup>28</sup>

The tensions run even deeper because of the fact that when courts have applied this test to lawsuits with female plaintiffs, they have succeeded at a disproportionately higher rate than their male counterparts.<sup>29</sup> This is due to the court's substantial deference on the first prong of the Policy Interpretation and also the reality that males are, in general, the overrepresented gender at a majority of institutions that receive federal funding.<sup>30</sup> Given this reality and their “losing track record,” institutions have increasingly taken steps to adhere to the requirements of Title IX, which almost always means cutting men's non-revenue athletic teams.<sup>31</sup>

Perhaps the most pressing issue with Title IX is that, despite having been in existence for 50 years, many institutions still do

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<sup>27</sup> Daniel, *supra* note 4, at 258.

<sup>28</sup> *Id.* at 257 (citing Donna A. Lopiano & Connee Zotos, *Equity Issues and Policy Problems in Women's Intercollegiate Athletics*, in *The Rules of the Game* 31, 32 (Richard E. Lapchick & John B. Slaughter eds., 1989)).

<sup>29</sup> Reuscher, *supra* note 2, at 136.

<sup>30</sup> *Id.*

<sup>31</sup> Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 *Am. U. J. Gender Soc. Pol'y & L.* 283, 306.

not comply with it.<sup>32</sup> Women's intercollegiate sports still face numerous deficiencies, including, "access to facilities, better practice time, lack of programs for girls, poor schedules for games (lack of priority), no administrative support, inadequate budget, low salaries for women coaches and for coaches of girls and women, poor equipment, and lack of adequate transportation . . . ." <sup>33</sup> Although overt sex discrimination was made illegal by Title IX, it did nothing to combat the subtle discrimination that still exists in collegiate sports.

## II. DISCUSSION

Title IX's success in regard to advancing opportunities for women, both in athletics and academics, cannot be understated. Regardless, the enforcement of Title IX has caused a myriad of issues, and as a result, is in critical need of reform.<sup>34</sup> In order to provide context and to have a productive discussion on how to solve the issues that Title IX has caused, it is important to consider its history, original purpose, and the relevant case law.

Title IX's original purpose was to prevent sex discrimination against people in programs that receive federal funding.<sup>35</sup> Title IX was formally adopted as a floor amendment and did not come with any formal hearings or a committee report.<sup>36</sup> It has been difficult for agencies to determine Congress's intentions for how to appropriately apply Title IX's objectives because of the lack of legislative materials regarding the history of the statute.<sup>37</sup>

Two early Supreme Court cases gave plaintiffs in Title IX violation cases considerable power. In *Cannon v. University of Chicago*, the Supreme Court held that individuals that have been injured by a Title IX violation may skip standard administration

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<sup>32</sup> Wesley Jenkins, Hundreds of Colleges May Be Out of Compliance with Title IX. Here's Why., Chronicle (Oct. 23, 2019), <https://www.chronicle.com/article/hundreds-of-colleges-may-be-out-of-compliance-with-title-ix-heres-why/>.

<sup>33</sup> Loretta M. Lamar, To Be an Equitist or Not: A View of Title IX, 1 Sports Law J. 237, 261 (1994) (citing Connie Fox, Introduction, Joperd, The Journal of Physical Education, Recreation & Dance, March 1992, at 34.)

<sup>34</sup> Bradley, supra note 26, at 217.

<sup>35</sup> Deborah Brake & Elizabeth Catlin, The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics, 3 Duke J. Gender L. & Pol'y 51, 53 (1996).

<sup>36</sup> Mahoney, supra note 13, at 949-50.

<sup>37</sup> Cohen v. Brown Univ., 991 F. 2d 888, 893 (1st Cir. 1993).

procedures and proceed with an implied private right of action.<sup>38</sup> Additionally, the Supreme Court in *Franklin v. Gwinnett County Public Schools* held that plaintiffs, upon a finding of an intentional violation of Title IX, are allowed to recover monetary punitive damages.<sup>39</sup>

Two lawsuits in particular have been instrumental in bringing to light the shortcomings of Title IX and its inadequacy in practice. These are *Cohen v. Brown University*<sup>40</sup> and *Kelley v. University of Illinois*.<sup>41</sup> It is worth noting that these two lawsuits were instrumental in ensuring equal opportunities for women in intercollegiate sports and protecting the original intent of Title IX. Nevertheless, they illustrate a deep issue in the actual implementation of Title IX.

The landmark case of Title IX, *Cohen*, was significant because of its analysis of the Policy Interpretation. It also set the standard for how Title IX is applied to this day.<sup>42</sup> Amy Cohen, a member of the women's gymnastics team, and several other student athletes filed a class action suit against Brown University for violating Title IX and demoting their teams to intercollegiate club status.<sup>43</sup> Of the 894 athletes at Brown, the total number of female participants was 328 women (which comprised approximately 37% of the total number of athletic positions) and 566 men (which comprised approximately 63% of the total number of athletic positions). Women, however, comprised between 48% - 49% of Brown's total student population.<sup>44</sup>

The court held that Brown failed to satisfy the three-prong test because of the considerable variance in the number of women enrolled at Brown and the number of athletic opportunities available to them.<sup>45</sup> On appeal, the First Circuit affirmed the

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<sup>38</sup> Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

<sup>39</sup> Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992).

<sup>40</sup> Cohen v. Brown Univ., 809 F.Supp. 978 (D.R.I. 1992), aff'd 991 F.2d 88 (1st Cir. 1993).

<sup>41</sup> Kelley v. Univ. of Ill., 832 F. Supp. 237 (C.D. Ill. 1993).

<sup>42</sup> Reuscher, supra note 2, at 131.

<sup>43</sup> *Cohen I*, 809 F. Supp. at 979, 981.

<sup>44</sup> Id. at 981, 985.

<sup>45</sup> Id. at 991-93.



ruling,<sup>46</sup> and also held that the Policy Interpretation used by the district court was entitled to “substantial deference.”<sup>47</sup>

Cohen represents a large majority of female athlete plaintiffs who have been largely successful in their Title IX claims.<sup>48</sup> On the other hand, *Kelley v. University of Illinois* illustrates the typical experience of male plaintiffs’ universities in Title IX lawsuits.<sup>49</sup> Male plaintiffs in Title IX lawsuits typically fail because of the application of the substantial proportionality prong that was given substantial deference in *Cohen* and the reality that the proportion of male athletes within most institutions is disproportionately higher than women athletes.<sup>50</sup>

In *Kelley*, the University of Illinois cut four varsity teams (men’s and women’s diving, men’s fencing, and men’s swimming) after it was faced with a \$600,000 budgetary deficit in its athletic programs. The university conceded that it kept the women’s swimming team to maintain compliance with Title IX.<sup>51</sup> *Kelley*, along with other members of the men’s swimming team, filed suit against the University, alleging that they had violated Title IX and the Equal Protection Clause.<sup>52</sup> The plaintiffs in *Kelley*, contended that, “Title IX . . . ha[s][.] though some alchemy of bureaucratic regulation[,] been transformed from a statute which prohibits discrimination on the basis of sex into a statute that mandates discrimination against males . . . .”<sup>53</sup> The trial court ruled against the plaintiffs, although it recognized the

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<sup>46</sup> *Cohen v. Brown Univ.*, 991 F.2d 888 (1<sup>st</sup> Cir. 1993) (*Cohen II*).

<sup>47</sup> *Id.* at 896-87.

<sup>48</sup> See *Cohen v. Brown Univ.*, 101 F. 3d 155, 180 (1<sup>st</sup> Cir. 1996) (holding that Brown University violated Title IX following the elimination of the women’s gymnastics and volleyball teams); *Roberts v. Colorado State Univ.*, 998 F.2d 824, 828-33 (10<sup>th</sup> Cir. 1993) (holding that CSU violated Title IX when it eliminated the women’s fast-pitch softball team); *Daniels v. School Bd.*, 985 F. Supp 1458, 1462 (M.D. Fla. 1997) (finding that the school board violated Title IX due to unreasonable disparities between the girls’ softball and boys’ baseball programs).

<sup>49</sup> *Kelley v. Univ. of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993).

<sup>50</sup> *Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa. 1995).

<sup>51</sup> *Kelley v. Bd. of Trustees*, 35 F.3d 265, 269 (7<sup>th</sup> Cir. 1994).

<sup>52</sup> *Id.* at 267.

<sup>53</sup> *Id.* at 270.

unfortunate loss of men's opportunities at the cost of maintaining compliance with Title IX.<sup>54</sup>

These two cases, along with a number of others, reveal the problem that the current application of Title IX imposes and why female student-athletes have a "perfect record" in court.<sup>55</sup> First and foremost, courts have blindly accepted *Cohen's* application of the three-prong test which has set the "substantial proportionality" prong as the legal standard for Title IX compliance.<sup>56</sup> The OCR has always asserted that the first prong of the Policy Interpretation is a "safe harbor" separate from the other two provisions.<sup>57</sup> In reality, however, the proportionality requirement has submerged the other two, dismantling the idea of flexibility offered by the test as a whole.<sup>58</sup>

This essay proposes a two-part solution to remedy the negative implications caused by the defective implementation of Title IX in its 50 years of existence. The first part proposes a fix to the disparities within the implementation of Title IX, and the second proposes equalizing the distribution of funds and resources to women's and men's athletic teams.

#### *A. Bring Competitive Cheerleading into the Title IX Equation*

As long as football is included in the calculation of proportionality under the first prong of the Policy Interpretation, universities will never meet the proportionality requirement without eliminating other men's sports.<sup>59</sup> Taking football out of the Title IX equation might help schools achieve substantial proportionality. Still, it will have a detrimental effect on the goals of gender equity, which was the original intention of Title IX. The most logical way to achieve proportionality, avoid cutting non-revenue men's teams, and actively expand opportunities for women, is to add a women's counterpart to men's football.

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<sup>54</sup> *Id.* at 243 ("The Court is not unsympathetic to the plight of the members of the men's swimming team and recognizes that Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results.").

<sup>55</sup> David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 *Fla. L. Rev.* 741, 782 (1995).

<sup>56</sup> *Id.* at 782.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

Competitive cheerleading should be adopted as a sport by the NCAA and added into the Title IX equation.

The court in *Biediger v. Quinnipiac University* was the first to address whether competitive cheerleading constituted a “genuine athletic opportunity” and therefore counted in the Title IX calculation.<sup>60</sup> In March 2009, Quinnipiac University was sued by five former members of the women’s volleyball team, and a former coach, alleging that Quinnipiac’s decision to eliminate the volleyball team violated Title IX.<sup>61</sup> Quinnipiac asserted that by including the women’s competitive cheerleading team in the calculation, they were still in compliance with Title IX.<sup>62</sup> Ultimately, the court ruled that Quinnipiac’s competitive cheerleading team did not qualify as a varsity sport under Title IX, however, the reasoning in this decision might open the door for competitive cheerleading to become classified as a sport under Title IX under the right circumstances.<sup>63</sup>

In making their decision, the court in *Quinnipiac* gave substantial deference to a letter written in September 2008 by the Office of Civil Rights (OCR).<sup>64</sup> The letter provided clarifying information to help institutions “determine ... whether an institution provides equal athletic opportunities as required by Title IX regulations,” and also listed guidelines to be used in determining which sports can be counted as an ‘equal athletic opportunity’.”<sup>65</sup> Until then, there was no system in place to determine which sports teams could be counted towards the “substantial proportionality” requirement.<sup>66</sup>

In the 2008 letter, the OCR disclosed that they did not have a specific definition of the term “sport” when determining what

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<sup>60</sup> *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 92-93 (D. Conn. 2010), *aff’d*, 691 F.3d 85 (2d Cir. 2012).

<sup>61</sup> *Id.* at 63.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 99-101.

<sup>64</sup> Ephraim Glatt, *Defining “Sport” Under Title IX: Cheerleading, Biediger v. Quinnipiac University, and the Proper Scope of Agency Deference*, 19 *Sports Law. J.* 297, 305 (2012).

<sup>65</sup> *Id.* (quoting Letter from Stephanie Monroe, Assistant Sec’y for Civil Rights, Dep’t of Educ. (Sept. 17, 2008), <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.) (emphasis omitted).

<sup>66</sup> *Id.* at 306.

counted as an “equal athletic opportunity.”<sup>67</sup> Alternatively, the OCR stated that the “determination of whether an activity is a sport will be on a case-by-case/school-by-school basis.”<sup>68</sup> The OCR uses the following factors, among others to determine whether an activity is a sport: (1) whether selection for the team is objectively based on factors related to athletic ability; (2) if the activity is limited to a defined season; (3) if the athletic department administers the activity; (4) whether the primary purpose of the activity is competition and not to support other athletes; and (5) if the team prepares for and engages in competition in the same way as other athletic teams with respect to coaching, budgeting, tryouts and eligibility, length and number of practice sessions, competitive opportunities, and recognition.<sup>69</sup>

The court in *Biediger* used these factors to determine that Quinnipiac University’s competitive cheerleading team could not be considered a “genuine athletic opportunity,” and thus could not factor into the Title IX equation.<sup>70</sup> However, the OCR’s promulgation of this case-by-case analysis could open the door for other competitive cheerleading teams to be classified as a sport under Title IX in the future.

In 1975, the Department of Health, Education, and Welfare (“HEW”) stated that “drill teams, cheerleaders and the like ... are not a part of [an] institution’s ‘athletic program.’”<sup>71</sup> Unlike traditional cheerleading in 1975, modern competitive cheerleading should be considered a sport using the OCR’s case-by-case analysis. Competitive cheerleaders participate in competitions across the country, performing high-risk stunts and routines<sup>72</sup> that are judged with an expectation of “a high level of

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<sup>67</sup> See Letter from Stephanie Monroe, Assistant Sec’y for Civil Rights, Dep’t of Educ. (Sept. 17, 2008), <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 100 (D. Conn. 2010), *aff’d*, 691 F.3d 85 (2d Cir. 2012)

<sup>71</sup> Letter from Peter E. Holmes, Dir., Office for Civil Rights, to Chief State School Officers (Sept. 1975), <http://www.ed.gov/about/offices/list/ocr/docs/holmes.html>.

<sup>72</sup> Erik Brady, Cheerleading the USA: A sport and an industry, USA TODAY (Apr. 26, 2002, 12:00 P.M.), [http://www.usatoday.com/sports/\\_stories/2002-04-26-cheerleading-cover.htm#more](http://www.usatoday.com/sports/_stories/2002-04-26-cheerleading-cover.htm#more).

perfection.”<sup>73</sup> Competitive cheerleading judges consider factors such as, “degree of difficulty, level of perfection, technique, timing, form, and synchronization.”<sup>74</sup> Most teams have recognized schedules and competitions throughout a season which concludes with a national championship.<sup>75</sup>

Competitive cheerleading characteristics are distinguishable from traditional side-line cheerleading because competitive cheerleading teams exist to compete, not to provide entertainment at other sporting events. Competitive cheerleading satisfies the OCR requirements fully and completely and should therefore be considered a sport and part of the Title IX equation.

Furthermore, if brought into the Title IX equation, competitive cheerleading would be the most logical numerical counterpart to football. Schools with football teams have had the most difficulty complying with Title IX.<sup>76</sup> Since the first prong of the proportionality test is given the most deference, schools are given two options to comply with Title IX: add women’s athletic teams or drop men’s athletic teams.<sup>77</sup> While it would be ideal for schools to add women’s teams, the financial constraints on school’s athletic budgets makes cutting men’s teams the more realistic choice.<sup>78</sup> Recognizing competitive cheerleading under Title IX would allow universities the opportunity of meeting substantial proportionality without having to cut male teams thereby eliminating the tensions and stigmas that have arisen with the implementation of Title IX.

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<sup>73</sup> Ashlee A. Cassman, *Bring It On! Cheerleading vs. Title IX: Could Cheerleading Ever Be Considered an Athletic Opportunity Under Title IX, and if So, What Implications Would That Have on University Compliance?*, 17 *Sports Law. J.* 245, 254 (2010) (citing 2009-2010 NCA Jr. High/High School/Recreation Judging Ranges).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Deidre G. Duncan, *Gender Equity in Women’s Athletics*, 64 *U. Cin. L. Rev.* 1027, 1028 (1996).

<sup>77</sup> Cassman, *supra* note 73, at 258.

<sup>78</sup> *Id.*

*B. Supplement the language of Title IX of the 1972 Education Amendments to require that universities should allocate athletics funding 50/50 to women's and men's athletic teams*

The Office of Civil Rights promulgated its interpretation of Title IX of the 1972 Education Amendments in a three-part test described in the Department's 1979 Policy Interpretation.<sup>79</sup> This interpretation was intended to clarify the vague language of Title IX and how schools can comply with its requirements to avoid the loss of federal funding.<sup>80</sup> The goal of the Policy Interpretation is not equality, but equity between the two genders. This is made clear from the first prong of the three-prong test, which requires that the intercollegiate-level participation opportunities for male and female students at a given institution is "substantially proportionate" to their respective full-time undergraduate enrollments.<sup>81</sup>

The test ensures that the gender percentage of a school's athletic program, in terms of scholarships, adequately reflects the university's undergraduate makeup. While this goes to solve the gender equity problem in both participation and scholarships, there is nothing in the Title IX language that calls for equal allocation of resources between the two genders.<sup>82</sup> In this way, Title IX has not been successful in providing true gender equity in college athletics. Female athletes seldom enjoy the same opportunities and funding as their male counterparts. There are very few, if any, athletic departments that spend an equal amount on men's and women's teams.<sup>83</sup>

In 2017, the NCAA released a report which revealed that Division I institutions spend double the amount on men's teams than on women's teams.<sup>84</sup> For recruiting, men's teams spent 67% of the total funding while women's teams spent 31% of the total

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<sup>79</sup> Mahoney, *supra* note 13, at 944.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Kate Fagan & Luke Cyphers, Five myths about Title IX, *espnW*, (Mar. 23, 2012), [https://www.espn.com/espnw/title-ix/story/\\_id/7729603/five-myths-title-ix](https://www.espn.com/espnw/title-ix/story/_id/7729603/five-myths-title-ix).

<sup>83</sup> *Id.*

<sup>84</sup> Amy S. Wilson, 45 Years of Title IX: The Status of Women in Intercollegiate Athletics, NCAA Research Department, [https://www.ncaa.org/sites/default/files/TitleIX\\_45-295-FINAL\\_WEB.pdf](https://www.ncaa.org/sites/default/files/TitleIX_45-295-FINAL_WEB.pdf).

funds.<sup>85</sup> Men's sports head coaches received 70% of the available funds for compensation, and women's head coaches received 30%.<sup>86</sup> Additionally, men's sports assistant coaches received 72% of the total funds available for compensation, while women's sports received only 28%.<sup>87</sup>

The only category of funding that was anywhere near equal was the scholarships category, and it is only in this category that women's numbers are protected by federal law.<sup>88</sup> Although the gap in spending at Division II and Division III universities is not as wide, it still exists.<sup>89</sup> Bernard Franklin, NCAA Executive Vice President of Education and Community Engagement and Chief Inclusion Officer, released this statement in regards to the findings of the 2017 report,

“While it is very encouraging to see progress has been made over the last 45 years with respect to the federal law Title IX and opportunities for women, the data also shows that there is still much to be done to increase equity and diversity, and to create a balanced scenario in intercollegiate athletics for our student athletes and administrators.”<sup>90</sup>

While it is tremendously important to achieve a balance in representation between men's and women's intercollegiate sports, the true goals of gender equity will not be realized if women's teams are continually receiving substantially less funding than their male counterparts. The reality of the disparities in funding is apparent considering access to facilities, poor equipment, lack of adequate transportation, and disproportionately lower salaries for women's team coaches.<sup>91</sup> In an illustrative example of the spending disparity, Texas A&M recently constructed a \$9 million football-only training facility. The rest of the teams, including

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<sup>85</sup> *Id.* at 28.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Jeremy Bauer-Wolf, NCAA: Disparities Persist for Women in Athletics, *Inside Higher Ed* (Jun. 23, 2017), <https://www.insidehighered.com/quicktakes/2017/06/23/ncaa-disparities-persist-women-athletics#:~:text=About%2042%20percent%20of%20Division,smaller%2C%20but%20it%20still%20exists.>

<sup>90</sup> *Id.*

<sup>91</sup> Lamar, *supra* note 33, at 261.

eleven female sports programs, must use the Netum Steed Laboratory, which opened in 1985.<sup>92</sup>

The solution to these tangible issues regarding disparities in the allocation of funding and resources seems simple on its face. Still, its actual implementation would require strengthening and supplementing the language of Title IX. Title IX prohibits sex discrimination in any educational program receiving federal assistance, and the OCR Policy Interpretation mirrors that prohibition. Title IX, however, only addresses the disparities in representation. In reality, sex discrimination runs deeper than just representation. When a male team receives a multimillion-dollar stadium while a women's team struggles to find adequate transportation to their next game, sex discrimination still exists. The only way to remedy this inequity is to require that all intercollegiate athletic programs allocate funds 50/50 to men's and women's athletic teams, respectively.

The most effective course of action would be to strengthen and supplement Title IX's language to require equal allocation of funding to men's and women's athletic teams. There are other alternatives, however, that would heavily encourage institutions to work towards true gender equity. One such alternative would be to demand accountability from within the NCAA. The NCAA could implement an accreditation program, providing that a university that fails to provide adequately equal resources to men's and women's athletic teams would lose its accreditation. Whether or not the NCAA implements specific programs, the NCAA should use its leadership capacity to further the goals of gender equity by first recognizing the issues plaguing women's sports and taking action to remedy them.

Female student-athletes have continually been denied the sense of fulfillment, self-confidence, and accomplishment intrinsic to participation in college athletics. Institutions treat female student athletes as second-class in nature when they deny them access to the same funding and resources than their male counterparts have always enjoyed. Furthermore, it promotes the very dangerous message that women's athletics is not worth the

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<sup>92</sup> Lora Wuerdeman, *Sidelining Big Business in Intercollegiate Athletics: How the NCAA Can De-Escalate the Arms Race by Implementing a Budgetary Allocation for Athletic Departments*, 39 N.C. Cent. L. Rev. 85, 96 (2017).



time and money and, therefore, not valuable. By taking steps to make sure women's and men's teams receive their fair share of resources, the NCAA could quickly resolve this problem.

### III. TITLE IX ISSUES TODAY

It would be remiss not to acknowledge the current state of affairs in intercollegiate athletic program's Title IX compliance with respect to the COVID-19 pandemic. Many universities, especially their athletic programs, are experiencing economic fallout due to the pandemic.<sup>93</sup> On April 9, 2020, commissioners from five NCAA Division I conferences requested consideration for waivers and leniency from several NCAA regulations, including Title IX compliance.<sup>94</sup>

Three of the NCAA bylaw waiver requests have the most potential to harm female athletes: financial aid minimums (Bylaw 20.9.9.4), participant requirements (Bylaw 20.9.6.3), and scheduling requirements (Bylaws 20.9.7.1 and 20.9.7.2).<sup>95</sup> The financial aid minimum waiver extension is the most potentially problematic for women's athletic teams. 75% of Power 5 Conference schools (Atlantic Coast, Big Ten, Big 12, Pac-12, and the Southeastern Conference) were not in compliance with Title IX's financial aid requirements in 2014.<sup>96</sup> The current state of financial affairs in college athletics coupled with flexibility in maintaining Title IX compliance would have a devastating effect on women's athletic participation and funding for women's teams.

Another issue that has yet to be addressed regarding Title IX is its application to transgender students. While the statute prohibits discrimination "because of ... sex," it does not address whether "sex" includes a person's gender identity or the identity they were assigned at birth.<sup>97</sup> Under the Obama Administration, the OCR released nonbinding guidance interpreting that a

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<sup>93</sup> Karen L. Hartman, *The Elephant in the Room: How Covid-19's Financial Impact Further Threatens Title IX Compliance*, 13 *International Journal of Sport Communication*, 399 (2020).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Jared P. Cole, Cong. Research Serv., *LSB10531, Title IX's Application to Transgender Athletes: Recent Developments 2* (2020).

student's gender identity is their "sex" under Title IX.<sup>98</sup> In 2016, the Trump Administration withdrew this guidance on gender identity, citing the need to "more completely consider the legal issues involved."<sup>99</sup>

Accordingly, in May 2020, the Office for Civil Rights issued a Letter of Impending Enforcement Action to the Connecticut Interscholastic Athletic Conference (CIAC). This letter stated that CIAC's policy of allowing transgender girls (individuals assigned a male sex at birth but now identify as female) to compete on female athletic teams violated Title IX, and that unless the CIAC came into compliance, their financial assistance would be suspended.<sup>100</sup>

This status of transgender students in the context of Title IX is a developing issue that will likely continue to grow in importance and significance in the years to come.

#### IV. CONCLUSION

At its inception, the purpose of Title IX was to eradicate discrimination and promote gender equity at a time when both were dangerously pervasive in our society. In some respects, it has done just that. Title IX has been the impetus for positive change within the realm of college athletics for female student-athletes, and it still has the potential to accomplish its initial goal of gender equity. Despite these advances, the current implementation of Title IX has proved to be the cause of a myriad of issues. Until these problems are solved, the goals of Title IX will never be fully realized, and Title IX will continue to be a hot-button issue.

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<sup>98</sup> *Id.*

<sup>99</sup> David Smith & Molly Redden, Trump Administration Rescinds Obama-era protections for transgender students, *The Guardian* (Feb. 23, 2017, 2:30 AM), <https://www.theguardian.com/us-news/2017/feb/22/transgender-students-bathroom-trump-obama>.

<sup>100</sup> Amanda Blanco, Connecticut lawmakers condemn Department of Education decision that CIAC policy on transgender athletes violates Title IX, *Hartford Courant* (Jun. 19, 2020, 3:39 PM), <https://www.courant.com/news/connecticut/hc-news-connecticut-athlete-letter-20200619-zzccq3sfhncataf53cgweypnu4-story.html>.