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THE SPORT OF NUMBERS: MANIPULATING TITLE IX TO RATIONALIZE DISCRIMINATION AGAINST WOMEN

I. INTRODUCTION

Title IX of the Education Amendments of 1972 is one of the most important pieces of federal legislation passed to exclude sex discrimination from all educational forums and promote equality for girls and women.[1] Most notably Title IX is known for its advancements in female athletics by requiring "members of both sexes to have equal opportunities to participate in sports and receive the benefits of competitive athletics."[2] Furthermore, Title IX requires athletic scholarships, benefits, and opportunities to be allocated equitably and it requires effective accommodation of student interests and abilities.[3]

On June 27, 2002, the Secretary of the Department of Education ("DED"), Rodney Paige, created the Commission on Opportunities in Athletics ("Commission") in recognition of Title IX's thirtieth anniversary.[4] The purpose of the Commission was to "collect information, analyze issues, and obtain broad public input directed at improving the application of current Federal standards for measuring equal opportunity for men, women, boys and girls to participate in athletics under Title IX."[5] After eight months of review, the Commission suggested approximately twenty-three recommendations for Title IX reform[6] in a report entitled "Open to All: Title IX at Thirty."

Many of the recommendations in the report are targeted at achieving serious changes in how athletics departments comply with Title IX; and

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1. 20 U.S.C. § 1681 (2002).

2. National Women's Law Center, *The Battle for Gender Equity in Athletics: Title IX at Thirty* 1 <http://www.nwlc.org/pdf/Battle%20for%20Gender%20Equity%20in%20Athletics%20Report.pdf> (June 2002) [hereinafter *NWLC Battle*].

3. 44 Fed. Reg. 71413–71423 (Dec. 11, 1979) (Policy interpretation offered by the Department of Health, Education and Welfare regarding intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulations.).

4. U.S. Department of Education, *"Open to All:" Title IX at Thirty, The Secretary of Education's Commission on Opportunity in Athletics*, 1 <http://www.ed.gov/pub/titleixat30/title9_report.pdf> (Feb. 26, 2003) [hereinafter *Commission Report*].

5. *Id.* at 46.

6. *Id.* at 1.

more significantly, some recommendations "reduce the [athletic] opportunities and scholarships to which women and girls are entitled under the law."[7] A three-part compliance test established in 1979 offers institutions three independent ways to show that they are providing equal athletic opportunities to their male and female students.[8] However, many of the Commission's recommendations manipulate the ways in which schools count athletic participation by men and women under that three-part test.[9] In essence, some of these recommendations dilute the impact and significance of each of the prongs of the test at the cost of female participation. Title IX's purpose is to prevent discrimination against women in educational forums, but by diluting Title IX's mandate, the Commission is justifying and rationalizing on-going discrimination against women.

In response to the Commission's report, the DED issued a letter on July 11, 2003, entitled, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.*[10] In the letter, the DED recognized that discrimination against female athletes still exists and must be addressed by aggressive enforcement of Title IX.[11] In addition, the DED stated that it would undertake a campaign to help educational institutions better understand the three-part compliance test and work consistently with institutions in implementing Title IX.[12] Ironically, the DED did not comment on the Commission's recommendations. The DED could adopt any of these recommendations in the future, which in turn, could adversely affect athletic opportunities for women and girls.

This paper will analyze the Commission's recommendations aimed at lowering the level of compliance required to satisfy the current three-part test. Part II of this paper will explore the creation and enactment of Title IX of the Education Amendments of 1972. Part III will survey the expansion of Title IX protection to include athletic opportunities, and how such expansion has been interpreted by the courts and the DED. Part IV will explore the creation and mandate of the Secretary of Education's Commission on Opportunity in Athletics. Part V will critically analyze the Commission's recommendations against the current

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7. National Women's Law Center, *Title IX Commission's Draft Report Ignores Continuing Discrimination Against Women & Girls, Says NWLC* <http://www.nwlc.org/details.cfm?id=1310&section=newsroom> (February 20, 2003) [hereinafter *NWLC Draft Report Ignores*].

8. 44 Fed. Reg. 71418 (Dec. 11, 1979).

9. *See Commission Report, supra* n. 4, at 33–40.

10. Gerald Reynolds, Assistant Secretary for Civil Rights, U.S. Department of Education, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* <http://www.ed.gov/offices/OCR/title9guidanceFinal.html> (July 11, 2003).

11. *Id.*

12. *Id.*

legal backdrop of Title IX, focusing on specific recommendations which, if adopted, will directly contravene standing case law precedents. Specifically, Part V will address the positive federal appellate court treatment of the current Title IX policies, the likelihood that certain changes to such policies would be judicially overturned, and the inconsistency of these recommendations with current DED policies and Title IX itself.

In particular, Section A of Part V will address Commission recommendations that allow institutions to creatively count student enrollment and athletic participation in order to maintain enrollment-to-athletics ratios that meet the first test of compliance—substantial proportionality. However, as will be shown, such creative counting would actually mask the ongoing sex discrimination against women in athletics. Section B will investigate two recommendations that would permit institutions to perform interest surveys to demonstrate that the institution has satisfied the third test of compliance by fully and effectively accommodating the interests of the underrepresented sex. Part VI will conclude the paper by addressing current Title IX policies that effectively promote *both* men's and women's athletics and should properly remain intact and be vigorously enforced.

II. THE BIRTH OF TITLE IX

Prior to the adoption of Title IX of the Education Amendments of 1972, many colleges and universities discriminated against female students in a number of educational aspects.[13] One key forum of discrimination was athletics.[14] Many women were not only denied opportunities to participate in intercollegiate athletics, but were also denied the significant benefits of athletic scholarships.[15] In the late 1960s, Congress began to examine these disparities by investigating educational institutions and their discriminatory policies against women.[16] The House Special Subcommittee on Education held extensive hearings in 1970 and found "massive, persistent patterns of discrimination against women in the academic world."[17] Congress passed the Title IX bill as a remedy and President Richard Nixon signed it into law on June 23,

13. 118 Cong. Rec. 5803 (1972). In 1972, women represented fewer than 30,000 college and fewer than 300,000 high school athletic participants. In contrast, men represented approximately 170,000 college and 3.6 million high school athletes. *NWLC Battle*, *supra* n. 2, at 5.

14. *Cohen v. Brown U.*, 991 F.2d 888, 894 (1st Cir. 1993) [hereinafter *Cohen I*].

15. *Id.*

16. *Commission Report*, *supra* n. 4, at 14.

17. 118 Cong. Rec. 5804 (1972).

1972.[18]

Title IX prohibits federally funded education programs and activities from engaging in sex discrimination.[19] "Title IX's prohibitions against sex discrimination are broad and its mandate applies to *all* educational activities"[20] and all levels of education that receive federal funding—from elementary schools to universities.[21] Title IX was passed with two key objectives: "to avoid the use of federal resources to support discriminatory practices;" and "to provide individual citizens effective protection against those practices."[22] To accomplish these goals, Congress directed all federal agencies extending financial assistance to educational institutions to develop procedures for terminating financial assistance to institutions that violated Title IX.[23]

III. LEGAL HISTORY AND STATUTORY AMENDMENTS

To further the successful administration of Title IX, Congress approved the Javits amendment in 1974, which required the Department of Health, Education, and Welfare ("HEW"),[24] through its Office of Civil Rights ("OCR"), to promulgate regulations for determining compliance with Title IX.[25]

In 1975, OCR issued its first set of regulations to provide guidance to

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18. *Commission Report*, *supra* n. 4, at 14.

19. 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

20. *Civil Rights Restoration Act of 1987*, Pub. L. No. 100-259, 102 Stat. 28 (1988) [hereinafter *CRRA*]. *CRRA* is codified at 20 U.S.C. § 1687 (1994). *CRRA* directly overturned *Grove City v. Bell*, 465 U.S. 555, 573 (1984), which held that Title IX did not apply to an entire institution, but rather only to those departments that directly received federal funds.

21. *NWLC Battle*, *supra* n. 2, at 3. However, there are several statutory exclusions from Title IX including religious and military institutions. 20 U.S.C. § 1681 (a)(3)-(a)(4).

22. *Cannon v. U. of Chi.*, 441 U.S 677, 704 (1979) (where the Court interpreted the objectives of Title IX, citing to comments in the Congressional Record as support for its interpretations).

23. 20 U.S.C. § 1682 (2002).

24. "[I]n 1979, Congress split HEW into the Department of Health and Human Services (HHS) and the Department of Education (DED)." *Cohen I*, 991 F.2d at 895 (citation omitted). The existing Title IX regulations "were left within HHS's arsenal while . . . DED replicated them as part of its own regulatory armamentarium." *Id.* (citation omitted). Therefore, DED is the principle agency of policy enforcement. *Id.* (citing 20 U.S.C. § 3441(a)(1) (2002) (transferring all education functions of HEW to DED) and 20 U.S.C. § 3441(a)(3) (2002) (transferring education-related Office of Civil Rights work to DED)). Notably, HHS's and DED's regulations are identical except for the change in language necessitated by splitting HEW into HHS and DED. *Cohen I*, 991 F.2d at 895.

25. *Commission Report*, *supra* n. 4, at 15. *See Cohen v. Brown U.*, 101 F.3d 155, 165 (1st Cir. 1996) [hereinafter *Cohen II*] (discussing the scope of Title IX and effect on university's athletics programs). In addition, in 1974, Congress rejected the Tower Amendment, which would have excluded revenue-producing sports from Title IX jurisdiction. *Commission Report*, *supra* n. 4, at 15.

university athletic programs on how to interpret Title IX.[26] These regulations made it clear that gender discrimination in intercollegiate athletics was a violation of Title IX.[27] A section entitled, "Equal Opportunity," explained that a recipient of federal funding must "provide equal athletic opportunity for members of both sexes."[28] To determine whether universities were providing equal opportunities under Title IX, the Director of HEW was to consider specific factors, including:

> (1) whether the selection of sports and levels of competition effectively accommodate[d] the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms, practice and competitive facilities; (8) provision of medical and training facilities and services; (9) provision of housing and dining facilities and services; [and] (10) publicity.[29]

HEW further explained that unequal expenditures for men's and women's teams would not necessarily constitute a violation of this section, but that the Secretary could consider such factors in his or her overall assessment of equality.[30] In this set of regulations, HEW focused on compliance through equal opportunity instead of compliance through equal expenditure.[31]

In 1978, in response to more than fifty university discrimination complaints, HEW issued a set of proposed "Policy Interpretations" to clarify the obligations of federal aid recipients under Title IX.[32] The Policy Interpretation was promulgated in final form in 1979[33] and provided three areas of interests in determining compliance: (1) Athletic Financial Assistance (Scholarships); (2) Equivalence in Other Athletic Benefits and Opportunities; and (3) Effective Accommodation of Student Interests and Abilities.[34] In the second section of the Policy Interpretations, the regulations listed the above non-exhaustive list of

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26. U.S. Department of Education, *Office of Civil Rights, Reading Room, Sex Discrimination/Title IX, 1975 Memorandum to Chief State School Officers* <http://www.ed.gov/about/offices/list/ocr/ docs/holmes.html> (Nov. 11, 1975).

27. 34 C.F.R. §§ 106.37(c), 106.41 (2000).

28. 34 C.F.R. § 106.41(c) (2000).

29. 34 C.F.R at § 106.41(c)(1)-(10).

30. 34 C.F.R. at 106.41(c).

31. Megan K. Starace, *Reverse Discrimination Under Title IX: Do Men Have a Sporting Chance?*, 8 Vill. Sports & Ent. L.J. 189, 193 (2001).

32. *Cohen II*, 101 F.3d at 166.

33. 44 Fed. Reg. 71413, 71413-71423 (Dec. 11, 1979).

34. *Id.* at 71413.

factors to be considered in determining whether equal opportunities are available to both genders.[35] Of utmost importance is the third section, which establishes the "effective accommodation" test.[36] This test states that compliance under Title IX depends on an affirmative response to one of the following three questions:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
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> (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.[37]

After the Policy Interpretations were issued, the United States Supreme Court interpreted the language and intent of the regulations in a number of its decisions, adding another dimension to Title IX's enforcement.[38] In a non-athletic suit, the Supreme Court held in *Cannon v. University of Chicago*[39] that Title IX provides an implicit right of action for an individual affected by a violation of Title IX.[40] In *Cannon*, a female petitioner brought suit under Title IX after she was denied medical school admission at two private universities, alleging that these schools discriminated against her on the basis of sex.[41] The Court noted that the language of Title IX "does not . . . expressly authorize a private right of action by a person injured by [such] a violation."[42] Nonetheless, the Court engaged in a lengthy analysis to determine whether it was

35. *Id.* at 71417.

36. *Id.* at 71418.

37. *Id.*

38. *See Cannon*, 441 U.S. at 717 (stating there is an individual right of action under Title IX); *Grove City*, 465 U.S. at 573 (holding that Title IX only applied to specific departments receiving Federal financial assistance); and *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992) (asserting that a private party could collect money damages under Title IX).

39. *Cannon*, 441 U.S. at 677–749.

40. *Id.* at 717.

41. *Id.* at 680.

42. *Id.* at 683.

Congress's intent to provide a special class of litigants with a private action remedy.[43] Overall, the Court held that Title IX was patterned after Title VI of the Civil Rights Act of 1964, which courts have found to provide a private remedy.[44] The Court noted in conclusion that private rights are best created by Congress, but also recognized that in limited circumstances, Congress's failure to do so "is not inconsistent with an intent . . . to have such remedy available . . . ."[45] Thus, the Court's decision allowed educational institutions to be sued in court by private parties, rather than only being subject to investigation by OCR.[46]

In 1984, there was some uncertainty as to whether Title IX applied only to the specific program receiving federal funding or to the entire educational institution. The Supreme Court resolved the issue in *Grove City College v. Bell*,[47] by narrowly holding that Title IX only applied to the particular department receiving the federal financial assistance, and not to the entire institution.[48] The two significant issues presented in *Grove City* were (1) whether Title IX applied to Grove City College through indirect federal grants used by students to finance their education and, if so, (2) whether the federal assistance to that program could be terminated because the college refused to comply with Title IX.[49]

First, the Court found that Title IX did not distinguish between direct institutional assistance and aid received by the school through its students.[50] The Court, considering clear statutory language and Congressional intent, construed the phrase "receiving Federal financial assistance" to include both direct and indirect methods of assistance.[51]

The Court then analyzed whether any particular educational

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43. *Id.* at 688–710 (The four factors the Court considered were (1) "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member[;]" (2) whether "legislative history . . . expressly create[d] or den[ied] a private remedy . . . [;]" (3) whether "a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme[;]" and (4) "whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States.").

44. *Id.* at 702.

45. *Id.* at 717.

46. *Id.*

47. *Grove City*, 465 U.S. at 555.

48. *Id.* at 573.

49. *Id.* at 558. The Court considered a third issue, whether applying Title IX to Grove City infringes on the First Amendment rights of the college or its students. *Id.* On this particular issue, the Court concluded that Congress has the ability to "attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id.* at 575. Therefore, Grove City and its students can either accept the federal grants with the requirements or they can decline the use of the federal grants and not be subjected to such requirements. *Id.*

50. *Id.* at 564.

51. *Id.* at 569.

program or activity of the college could be characterized as "receiving" federal assistance through grants of its students.[52] The fact that federal funds eventually reached the College's general operating budget was not enough to subject the entire College to Title IX compliance.[53] Rather the Court held that when federal assistance is earmarked to the recipient's financial aid program, the particular department or activity must meet Title IX compliance, not the entire institution.[54] However, few athletic departments receive federal funds directly, so this ruling essentially removed nearly every university's athletic program from the scope of Title IX.

Congress responded to *Grove City* by adopting the Civil Rights Restoration Act of 1987 ("*CRRA*").[55] In its findings, Congress asserted that recent decisions and opinions of the Supreme Court impermissibly narrowed the broad application of Title IX.[56] Congress passed the *CRRA* to "restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered."[57] Regarding the Education Amendments, the Act states that Title IX applies to "all of the operations" of an educational institution, "any part of which is extended federal financial assistance."[58] Congress thereby reinstated Title IX's broad interpretation by clarifying that all programs at an educational institution receiving federal funding fall under the jurisdiction of OCR.

The Supreme Court further expanded the reach of Title IX's enforcement in *Franklin v. Gwinnett County Public Schools*.[59] Christine Franklin, a student at North Gwinnett High School, brought a suit alleging that the administration knowingly took no action to halt the continual sexual harassment she received from Andrew Hill, a teacher and coach employed by the district.[60] The United States District Court for the Northern District of Georgia dismissed the case and the Eleventh Circuit Court of Appeals affirmed the dismissal by stating that monetary damages could not be sustained for an alleged intentional violation of Title IX.[61] The Supreme Court reversed and remanded the case, holding

52. *Id.*

53. *Id.* at 572.

54. *Id.* at 573–74.

55. Pub. L. No. 100–259, § 2, 102 Stat. 28 (1988). The Act, as amended, is codified at 20 U.S.C § 1687 (1994).

56. Pub. L. No. 100–259, § 2, 102 Stat. 28.

57. *Id.*

58. 20 U.S.C. § 1687(4).

59. *Franklin*, 503 U.S. at 60.

60. *Id.* at 63–64.

61. *Id.* at 64–65.

that a private party could collect money damages in a Title IX lawsuit.[62] The Court relied on *Cannon v. University of Chicago*, which held that Title IX is enforceable through an implied right[63] and the general common law rule that "where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."[64] Even though the Legislature that passed Title IX did not specify a remedy, the Court analyzed the state of the law at the time of enactment and concluded that Congress did not intend to limit the remedies available in a Title IX suit.[65] In so doing, the Court significantly broadened Title IX's enforcement by allowing a damages remedy for an action to enforce Title IX.[66]

In addition to the Supreme Court's interpretations of Title IX, other bodies have contributed to the understanding of Title IX. In 1990, OCR published the *Title IX Athletics Investigator's Manual* to help aid in Title IX investigations of intercollegiate and interscholastic athletic programs.[67] The manual is based on the 1979 Policy Interpretations and outlines general areas of compliance, scholarship, other athletic benefits and opportunities, and the effective accommodation of students.[68] Furthermore, it explains the procedures OCR personnel should follow in investigating university athletic programs and provides consistency in enforcement.[69]

In 1994, Congress passed the *Equity in Athletics Disclosure Act*, which requires educational institutions to disclose statistical information regarding the gender of athletes and general enrollment at universities and colleges.[70] These annual reports are rather detailed in that they require the participating schools to report the number of full-time undergraduates, listing of all varsity teams, number of participants, operating expenses, coach salaries, money spent on athletically related student aid, ratio of student aid awarded between male and females, and total revenues from each sport.[71] This self-reporting is an essential element of OCR enforcement because it alleviates OCR of the burden of

62. *Id.* at 76.

63. *Id.* at 65.

64. *Id.* at 66 (internal quotation marks omitted) (quoting 3 W. Blackstone, Commentaries 23 (1783)).

65. *Id.* at 72.

66. *Id.* at 76.

67. Valerie M. Bonnette & Lamar Daniel, *Title IX Athletics Investigator's Manual* 1 (1990) [hereinafter *Investigator's Manual*].

68. *Id.* at 1–2.

69. *Id.*

70. 20 U.S.C. § 1092(g) (1994).

71. *Id.*

acquiring these statistics by itself.

More recently in the courtroom, eight of thirteen federal appellate courts have followed the established legal precedent of giving deference to reasonable regulations of administrative agencies and have sustained the legality of the three-part test.[72] The First Circuit in *Cohen v. Brown University* decided the most significant case in a series of opinions upholding the three-part test.[73] Due to budget cuts, in 1991, Brown University demoted two men's teams—water polo and golf—and two women's teams—gymnastics and volleyball—from university-funded to donor-funded varsity status.[74] In *Cohen I*, female student-athletes sued Brown University claiming that Brown violated Title IX by demoting these two women's athletic teams.[75] The plaintiffs argued that "Brown's decision to devalue the two women's programs without first making sufficient reduction in men's activities or . . . adding other women's teams to compensate for the loss"[76] failed to effectively and fully accommodate the interests and abilities of the student body.[77]

The court's analysis relied heavily on the Policy Interpretation's three-prong test for compliance.[78] To comply with Title IX, Brown had to satisfy one of the three prongs.[79] With regard to the first prong concerning substantial proportionality, the court stated that compliance with this prong creates "a safe harbor for those institutions that have distributed athletic opportunities in numbers 'substantially proportionate' to the gender composition of their student bodies."[80] At the time of the suit, Brown's student body was approximately 52% male and 48% female while its athletic roster was 63.3% male and only 36.7%

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72. *See Chalenor v. U. of N.D.*, 291 F.3d 1042, 1046-48 (8th Cir. 2002); *Pederson v. La. St. U.*, 213 F.3d 858, 879 (5th Cir. 2000); *Neal v. Bd. of Trustees of the Cal. St. U.*, 198 F.3d 763, 770 (9th Cir. 1999); *Horner v. Ky. High Sch. Athletic Assn.*, 43 F.3d 265, 277-75 (6th Cir. 1994); *Kelley v. Bd. of Trustees, U. of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995); *Cohen I*, 991 F.2d 888; *Cohen II*, 101 F.3d at 170, *cert. denied*, 520 U.S. 1186 (1997); *Roberts v. Colo. St. Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993).

73. *Cohen v. Brown U.*, 809 F. Supp. 978 (D.R.I. 1992); *aff'd, Cohen I*, 991 F.2d 888; *on remand to Cohen v. Brown U.*, 879 F. Supp. 185 (D.R.I. 1995); *aff'd in part, rev'd in part, Cohen II*, 101 F.3d 155. While this paper mentions all four cases, the paper emphasizes the First Circuit opinions. For this reason, the First Circuit opinions are labeled *Cohen I* and *Cohen II* (for simplicity), even though one of the district court opinions precedes *Cohen I* and the second follows *Cohen I* and precedes *Cohen II*.

74. *Cohen I*, 991 F.2d at 892.

75. *Id.*

76. *Id.* at 893.

77. *Id.* at 897.

78. *Id.* at 896-98.

79. *Id.*

80. *Id.* at 897.

female.[81] The court found that the student population and athletic composition were not substantially proportionate to each other and, therefore, Brown failed the first prong of the compliance test.[82]

Next, the court assessed whether Brown was in compliance with the second prong of the test.[83] Under this second option, Brown could comply with Title IX by showing "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities" of the underrepresented gender.[84] The First Circuit affirmed the lower court's finding that Brown did not meet the second prong of compliance.[85] The court held that although Brown's women's athletic programs developed significantly in the 1970s, the University did not continue this development in the 1980s and 1990s and therefore failed the second prong of the compliance test.[86]

The final prong of the compliance test is met by ensuring that the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program.[87] Again, the court concluded that there was enough interest and talent on the campus to support women's volleyball and gymnastics and therefore, by canceling these programs Brown failed the third prong by not fully and effectively accommodating the interests of female students at the University.[88] Because Brown failed all three prongs of the compliance test, the First Circuit affirmed the district court's preliminary injunction, which reinstated the women's volleyball and gymnastics teams.[89]

In 1996, the First Circuit faced these issues again in *Cohen II*.[90] Upon remand from *Cohen I*, the district court had found Brown to be in violation of Title IX and ordered that Brown submit a comprehensive plan for complying with Title IX.[91] Brown's compliance plan was later rejected by the district court and the court ordered specific relief.[92] Brown then appealed this order to the First Circuit.[93] In *Cohen II*, Brown argued that "an athletics program equally accommodates both genders

81. *Id.* at 892.
82. *Id.* at 903.
83. *Id.* at 897.
84. *Id.*
85. *Id.* at 903.
86. *Id.*
87. *Id.* at 904.
88. *Id.*
89. *Id.* at 907.
90. *Cohen II*, 101 F.3d at 155.
91. *Id.* at 161.
92. *Id.* at 162.
93. *Id.*

and complies with Title IX if it accommodates the relative interests and abilities of its male and female students."[94] The First Circuit rejected this comparative-level-of-interest argument because, in essence, Brown was stating that more males are interested in athletics than females.[95] The court found that Brown's reasoning was based on impermissible stereotypes, which "disadvantage[d] women and undermine[d] the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests."[96] The court went one step further and rejected statistical evidence assessing the level of women's interest in sports, noting that such evidence by itself cannot justify providing fewer athletic opportunities to women because it is "only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."[97] Furthermore, such evidence was completely irrelevant in Brown's case because women's interest in sports was evident through the viable and successful women's varsity teams which were demoted.[98] The First Circuit's decisions in *Cohen I* and *Cohen II* have shaped and defined the standard for Title IX compliance under the three-prong effective accommodation test.

In the midst of the *Cohen* decisions, OCR recognized the confusion regarding the proper application of the three-part test of Title IX compliance and, in January 1996, issued a *Clarification Memo* which specifically elaborated on how to properly apply the test.[99] The memo reiterates that for an institution to be in compliance with Title IX, that institution is required to satisfy only one prong of the three-prong test.[100] The memo fully addresses each prong of compliance and sets forth examples illustrating proper and improper compliance with Title IX under each prong.[101]

First, the *Clarification Memo* addresses prong one—the substantial

94. *Id.* at 174.

95. *Id.* The court noted that Brown's relative interest approach reads the "full" out of the duty to accommodate "fully and effectively." Prong three requires "not merely some accommodation, but full and effective accommodation." *Id.* at 174 (internal quotation marks omitted) (citing *Cohen I*, 991 F.2d at 898–99). After *Cohen II*'s decision, the Ninth Circuit also rejected the notion that the third prong of the three-part test could be satisfied by merely "relative" rather than full accommodation. *Neal*, 198 F.3d at 768–70.

96. *Cohen II*, 101 F.3d at 174 (citing *Cohen*, 879 F. Supp. at 209).

97. *Id.* at 179–80.

98. *Id.* at 180.

99. Norma V. Cantu, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* 1 <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>) (Jan. 16, 1996) [hereinafter *Clarification Memo*].

100. *Id.* at 2.

101. *Id.* at 4–12.

proportionality test.[102] The memo defines "participant" to include walk-on athletes[103] and states that participation rates are based on an institution's full-time undergraduate enrollment as compared to the institution's intercollegiate athletic program.[104] Because this test uses a case-specific analysis, strict numerical proportions are not necessarily required under particular circumstances; this allows for natural fluctuations in enrollment and participation rates as well as situations when the number of additional athletic opportunities required to achieve substantial proportionality would not be sufficient to sustain a viable team.[105]

Next, the memo discusses the second test—history and continuing practice.[106] The memo clarifies that "developing interests include interests that already exist at the institution."[107] Further, there are no fixed time intervals for compliance and no particular number of sports is dispositive.[108] However, the memo notes that DED "will not find a history . . . of program expansion where an institution [only] increases the proportional participation . . . by reducing opportunities for the overrepresented sex . . . ."[109] Nor will DED find compliance under this test when an institution "establishe[s] teams for the underrepresented sex only at the initiation of its program . . . or [when an institution] merely promises to expand its program . . . in the future."[110] The focus of test two is on program expansion that is responsive to the developing interests and abilities of the underrepresented sex.[111]

The *Clarification Memo* also discusses the third test—full and effective accommodation of the interests and abilities of the underrepresented sex.[112] The students whose interests must be evaluated are current and admitted students; the university is not required to

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102. *Id.* at 2.

103. *Id.* at 5–6 (citing 44 Fed. Reg. at 75415) (Participants include individuals: "(a) who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution . . . ; and (b) who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and (c) who are listed on the eligibility or squad lists maintained for each sport, or (d) who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.").

104. *Id.* at 6.

105. *Id.* at 6–7.

106. *Id.* at 7.

107. *Id.*

108. *Id.*

109. *Id.* at 8.

110. *Id.*

111. *Id.* at 7.

112. *Id.* at 9.

consider the interests of potential students.[113] High athletic participation of the overrepresented sex does not necessarily indicate that an institution is not in compliance with Title IX, as long as there is evidence that the "imbalance does not reflect discrimination . . . ."[114] In this situation, the memo states that DED will consider whether "there is (a) unmet interest in particular sports;[115] (b) sufficient ability to sustain a team in the sport;[116] and (c) a reasonable expectation of competition for the team."[117]

The *Clarification Memo* concludes by recapping that the three-part test provides an institution with flexibility for compliance.[118] The memo also clearly states that "nothing in the three-part test requires an institution to eliminate participation opportunities for men."[119]

IV. THE SECRETARY OF EDUCATION'S COMMISSION ON OPPORTUNITY IN ATHLETICS

In 2002, Title IX celebrated its thirtieth anniversary amidst the

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113. *Id.* at 9.

114. *Id.* at 9–10.

115. *Id.* at 10. Interest will be evaluated by numerous indicators such as:

> requests by students and admitted students that a particular sport be added; requests that an existing club sport be elevated to intercollegiate team status; participation in particular club or intramural sports; interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports; results of questionnaires of students and admitted students regarding interests in particular sports; and participation in particular interscholastic sports by admitted students.

Id. Interest can also be ascertained by looking at participation rates in high schools, amateur association, and community leagues. *Id.* Assessments of student interest should be straightforward, reach a wide audience of students, and be open-ended in sports towards which athletic interests can be expressed. *Id.*

116. *Id.* at 11. The examination of indications of ability will include:

> the athletic experience and accomplishment—in interscholastic, club or intramural competition—of students and admitted students interested in playing the sport; opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Id. Most importantly, poor competitive record or inability to have teams play at the same level as other athletics programs is not conclusive evidence of lack of ability. *Id.*

117. *Id.* Reasonable expectation will be determined by looking at competitive opportunities in the geographic area including "competitive opportunities offered by other schools against which the institution competes; and competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete." *Id.*

118. *Id.* at 11.

119. *Id.*

growing debate over the effectiveness of Title IX's enforcement.[120] College administrators claimed that OCR failed to provide clear guidance on how to comply with Title IX; interest groups alleged that OCR did not effectively enforce Title IX; and certain men's teams claimed reverse discrimination.[121] In June 2002, Secretary of Education Rodney Paige created the Commission on Opportunity in Athletics to respond to this growing public debate.[122] Secretary Paige charged the Commission to "collect information, analyze issues, and obtain broad public input directed at improving the application of current Federal standards."[123]

After eight months of fact-finding, the Commission compiled its findings and recommendations for improving the enforcement of Title IX.[124] The Commission found that: (1) "great progress has been made

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120. *Commission Report*, *supra* n. 4, app. 3 at 46.

121. *Id.*

122. *Commission Report*, *supra* n. 4, at 1. The structure of the Commission was composed of fifteen members appointed by the Secretary of Education from public and private sectors and three ex officio members from the DED. *Id.* app. 3, at 47. Ten of the fifteen commissioners were affiliated with NCAA Division I-A athletics ranging from athletics directors, coaches, a division commissioner, and a University President. *Id.* app. 5, at 53–56. Eight of the fifteen members were women. *Id.* Among these women were impressive athletes, such as a former WNBA player, a two-time Olympian, and a captain of the U.S. Women's National Soccer Team. *Id.* Ironically, no Commissioners represented Division II, Division III, junior or community colleges, or high school athletic programs, even though the Commission's Charter specifically stated that "members shall include representatives of . . . intercollegiate and secondary school athletes." *Id.* app. 3, at 47.

123. *Id.* app. 3, at 46. Specifically, Secretary Paige charged the Commission to address seven key questions:

> (1) Are Title IX standards for assessing equal opportunity in athletics working to promote opportunities for male and female athletes?
>
> (2) Is there adequate Title IX guidance that enables colleges and school districts to know what is expected of them and to plan for an athletic program that effectively meets the needs and interests of their students?
>
> (3) Is further guidance or other steps needed at the junior and senior high school levels, where the availability or absence of opportunities will critically affect the prospective interests and abilities of student athletes when they reach college age?
>
> (4) How should activities[,] such as cheerleading or bowling[,] factor into the analysis of equitable opportunities?
>
> (5) How do revenue producing and large-roster teams affect the provision of equal athletic opportunities? The Department has heard from some parties that whereas some men athletes will "walk on" to intercollegiate teams—without athletic financial aid and without having been recruited—women rarely do this. Is this accurate and, if so, what are its implications for Title IX analysis?
>
> (6) In what ways do opportunities in other sport venues, such as the Olympics, professional leagues, and community recreation programs, interact with the obligations of colleges and school districts to provide equal athletic opportunity? What are the implications for Title IX?
>
> (7) Apart from Title IX enforcement, are there other efforts to promote athletic opportunities for male and female students that the Department might support, such as public-private partnerships to support the efforts of schools and colleges in this area?

Commission Report, *supra* n. 4, app. 3 at 48.

124. *Id.* at 1.

[under Title IX], but more needs to be done to create opportunities for women and girls and retain opportunities for boys and men;"[125] (2) many institutions feel that they must meet the first prong of the compliance test, the proportionality requirement, to ensure a "safe harbor," and this has been a factor in their decision to cut or cap men's teams;[126] (3) increasing operational costs have threatened compliance with Title IX;[127] (4) there is great confusion about how Title IX requirements and enforcement can be strengthened;[128] and (5) artificial limits on walk-on opportunities do not benefit anyone.[129]

From these findings, the Commission set forth twenty-three recommendations, fifteen of which were approved unanimously by the Commission.[130] Most of the findings are rather benign in nature and merely call for clarity and consistency in Title IX enforcement by OCR. However, a handful of the recommendations, if adopted, would make it easier for schools to comply with Title IX by altering how institutions pass the three-prong test of compliance.[131] As stated in the Commission's findings, most school and college administrators feel that their institutions must meet the proportionality test of the first prong to ensure compliance under Title IX.[132] Many of the Commission's recommendations directly cater to this pressure by making it easier for schools to enjoy the first prong's "safe harbor."[133] Two other recommendations target the third prong by allowing institutions to conduct interest surveys or use high school participation ratios as a means of demonstrating that an institution is fully and effectively accommodating the interests of the underrepresented gender.[134] The last recommendation by the Commission gives broad discretion to the Secretary of Education to change the existing three-prong test.[135]

After reviewing the Commission's recommendations, Secretary Paige stated that he "intend[ed] to move forward only on those recommendations" that received unanimous support from the

125. *Id.* at 21–22.

126. *Id.* at 23–24.

127. *Id.* at 25.

128. *Id.* at 25–27.

129. *Id.* at 30–31.

130. *Id.* app. 6, at 59–60.

131. *See infra* Part V. A, B.

132. *Id.* at 23.

133. *See Commission Report*, *supra* n. 4, at 37–40, Recommendations 14, 15, 17, 20 and an unnumbered proposal, specifically directed at proportionality ratios.

134. *See id.* at 38–39, Recommendations 18 and 19.

135. *See id.* at 36 and 40, Recommendations 12 and 23.

Commission.[136] As an administrative agency, DED is authorized to promulgate its own rules and regulations "without approval from Congress or the courts."[137] Therefore, after appropriate public notice and response, the Secretary of Education can use his own discretion to adopt and implement regulations under Title IX.

V. COMMISSION RECOMMENDATIONS DILUTE TITLE IX'S MANDATE OF PROHIBITING SEX DISCRIMINATION

The Secretary of Education has broad discretion in implementing regulations concerning Title IX and, thus, could adopt Commission recommendations that reduce athletic opportunities and scholarship dollars to women and girls without approval from Congress or the courts.[138] Recommendations 14, 15, 17, 20, and an unnumbered recommendation, are targeted at lowering the standard for satisfying the substantial proportionality test. Through disingenuous counting requirements, these recommendations allow institutions to count relative compliance, not substantial proportionality; to count illusions of opportunities for women, not real opportunities; to *not* count actual opportunities given to men; to exclude non-traditional students from enrollment totals; and to reduce substantial proportionality to a 50:50 ratio. As these recommendations would dilute the requirement of substantial proportionality at the cost of eliminating athletic opportunities, scholarships, and recruiting budgets entitled to women, they are inconsistent with Title IX and case law precedents. In addition, Recommendations 18 and 19 impermissibly condone interest surveys as a way for institutions to meet the third test of fully and effectively accommodating the interests of the underrepresented sex, even though such interest surveys have already been rejected by the courts as a "measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."[139] Recommendations 18 and 19 contradict case law precedents, as well as Title IX, by dismissing, rather than fully and effectively addressing, the interests of girls and women. Overall, these recommendations manipulate how institutions comply with Title IX at the expense of

136. SportsIllustrated.com, *Title IX Talk* <http://sportsillustrated.cnn.com/more/news/2003/02/26/title_ix_ap> (accessed Feb. 26, 2003).

137. Marcia D. Greenberger, Co-President, National Women's Law Center, *Threats to Title IX and Sports Opportunities for Women and Girls* 2 <http://www.nwlc.org/display.cfm?section=athletics> (Mar. 6, 2003).

138. *Id.*

139. *Cohen II*, 101 F.3d at 179.

women's athletic opportunities. In effect, these manipulations rationalize rather than eliminate sex discrimination.

A. *Recommendations Targeted at Manipulating the Numbers to Reach the "Safe Harbor" of the Proportionality Prong*

Although there are three ways to show compliance with Title IX as set forth in the 1979 Policy Interpretations, universities and schools are most interested in satisfying the first test of substantial proportionality, known as the "safe harbor" in Title IX compliance.[140] In other words, if a school's male/female ratio is substantially proportionate to the male/female athletic opportunities, then the school is *per se* in compliance with Title IX and no further investigation is required.[141] This numerical analysis relies on hard data, which is easier to understand than the other two more abstract tests. Athletic departments are pressured to meet this test because it *ensures* compliance with Title IX and decreases the likelihood of lawsuits and the withdrawal of federal funding.[142] This undue pressure to meet prong one of Title IX compliance most likely played a significant role in the Commission's findings and recommendations, given that many of the Commission's recommendations are directly targeted at diluting the substantial proportionality test, thereby making it easier for institutions to attain this "safe harbor."[143]

Recommendation 14 directly attacks the substantial proportionality requirement by suggesting that OCR allow for a reasonable variance in the relative ratios in order to comply with Title IX.[144] As reason for the change, the Commission asserts that, in practice, the courts and OCR have required strict proportionality rather than substantial proportionality.[145] This is clearly not true. The substantial proportionality standard first appeared in the 1979 Policy Interpretations and has been interpreted by the courts and OCR on many occasions, but never has it been interpreted to mean strict numerical proportions.[146]

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140. *Cohen I*, 991 F.2d at 897.

141. *Id.* at 898.

142. *Id.*

143. *See Commission Report*, *supra* n. 4, at 37–40, Recommendations 14, 15, 17, 20, and an unnumbered proposal.

144. *Id.* at 37.

145. *Id.*

146. *See Neal*, 198 F. 3d at 763, 765, 768 (where court accepted a five percentage-point gap between female student ratio and female athlete ratio); *Roberts*, 998 F.2d at 829 (where the court noted that OCR does not require a "set ratio" but "that substantial proportionality entails a fairly close relationship between athletic participation and undergraduate enrollment" (citation omitted)). *See Clarification Memo*, *supra* n. 99, at 6.

The courts interpret substantial proportionality on a case specific basis and seem unwilling to set clear demarcations on what constitutes substantial proportionality, noting that the standard should be flexible with regards to the circumstances of each particular institution.[147]

However, case law does give some indication as to what the courts consider to be substantial proportionality. In *Roberts v. Colorado State Board of Agriculture*,[148] the Tenth Circuit found that the University's 10.5% disparity between enrollment and athletic participation did not meet the substantial proportionality test.[149] The court also reviewed OCR's three-year compliance review of Colorado State, which found disparities of 7.5%, 12.5% and 12.7%, which also did not meet the test's requirements.[150] The Third, Fifth and Ninth Circuits have addressed substantial proportionality, holding that 13%, 20% and 25%, respectively, did not satisfy substantial proportionality.[151] In *Neal v. Board of Trustees of the California State Universities*,[152] the Ninth Circuit found the University in violation of Title IX due to a 25% disparity in enrollment and athletic opportunities for women.[153] The initial lawsuit settled out of court, resulting in a consent decree mandating that the University implement and maintain a "proportion of female athletes that was within five percentage points of the proportion of female undergraduate students at [the] school."[154] Even though the courts do not subscribe to particular demarcations on what constitutes substantial proportionality, they are readily equipped to make these appropriate individualized

147. *See* cases cited in note 146. In addition, arbitrary percentages of compliance can mean entirely different things to different institutions. For example, University A has a student body make-up of 52% males and 48% females. The University has one thousand students in its athletic program and the break down is 62% males and 38% females. This 10% disparity denies women one hundred athletic spots as compared to their overall enrollment. In contrast, University B has the same student body make-up, but they have only one hundred student athletes. If University B has a 10% disparity in athletic participation it would only deny spots to ten women. Under the *Clarification Memo*, University B may be found to have obtained substantial proportionality because ten women may not be sufficient to support a viable team. Yet, University A would most likely not meet Title IX's substantial proportionality test because the one hundred women denied an athletic spot could easily be found to be sufficient to support a viable team(s). Therefore, it is apparent that substantial proportionality must be determined on a case specific basis.

148. *Roberts*, 998 F.2d at 824.

149. *Id.* at 829.

150. *Id.* at 830.

151. *Favia v. Ind. U. of Pa.*, 7 F.3d at 332, 343 (3d Cir. 1993) (where student body was 56% female but athlete population would only be 43% female under university's plan); *Pederson*, 213 F.3d at 878 (where student population is 49% female but "the population participating in athletics is . . . 29% female"); *Neal*, 198 F. 3d at 763, 765, 768 (where females comprised 64% of student population but only 39% of athlete population).

152. *Neal*, 198 F.3d at 763.

153. *Id.* at 765.

154. *Id.*

determinations.

Case law serves as a rough guideline for what may numerically constitute substantial proportionality; however, case law also demonstrates that the standard is flexible and that courts do allow for some variance.[155] As the above case law indicates, Recommendation 14, which garnished full consensus by the Commission, may be vulnerable to being overturned by the courts based on past precedent interpreting substantial proportionality more narrowly than the recommended reasonable variance.[156]

Further, OCR has stated that substantial proportionality should be determined through a flexible, case specific analysis.[157] OCR's *Investigator's Manual* instructs Title IX compliance investigators that "there is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation."[158] The manual merely advises that there needs to be a fairly close relationship between the two ratios.[159] The 1996 OCR *Clarification Memo* specifically states that "it may be unreasonable to expect an institution to achieve exact proportionality" due to natural fluctuations in enrollment and participation rates.[160] In addition, the memo recognizes that substantial proportionality would occur "when the number of opportunities... required to achieve proportionality would not be sufficient to sustain a viable team,"[161] allowing some flexibility in the standard. Moreover, OCR explains that substantial proportionality is institution specific and such a determination is properly made on a case-by-case analysis and not through a statistical test.[162]

The Commission's recommendation to allow reasonable variance in substantial proportionality would unnecessarily find institutions to be in compliance with this test under Title IX without actually providing equal opportunities for women.[163] The adoption of such a recommendation

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155. *See supra* nn. 146–54 and accompanying text.

156. *See id.*

157. *Clarification Memo*, *supra* n. 99, at 6.

158. *Roberts*, 998 F.2d at 829–30 (citing *Investigator's Manual*, *supra* n. 67, at 24.).

159. *Id.* at 830.

160. *Clarification Memo*, *supra* n. 99, at 6.

161. *Id.* at 7.

162. *Id.* at 6.

163. This recommendation is reported as having unanimous support by all Commissioners. However, two Commissioners, Donna de Varona and Julie Foudy, submitted a minority report clarifying that upon further review of the recommendation they withdrew their support due to the "damaging results that would not be consistent with Title IX." Donna de Varona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics* 15 <http://www.nwlc.org/pdf/MinorityReportFeb26.pdf>) (Feb. 26, 2003) [hereinafter *Minority Report*].

would change the current standard from a narrowly-construed, objective standard based on enrollment to an open-ended, subjective standard based on the Secretary of Education's judgment.[164] The broad language used by the Commission indicates that the Secretary of Education could make such determinations arbitrarily without considering case specific factors or circumstances—a notion rejected by both the courts and OCR.[165] Further, current interpretations by the courts and OCR have already built flexibility into the test, obviating the Commission's relative variance standard.[166] This new standard would result in a loss of opportunities for women in athletics because institutions would be given too much latitude in meeting the first prong of the Title IX test.[167] By lowering the standard, institutions would impermissibly be in the "safe harbor" of Title IX compliance with no incentive to provide equal participation opportunities to women, which is inconsistent with Title IX's purpose and mandate.

Recommendations 15, 17, and 20 are also aimed at lowering the standard of compliance under the first prong and accomplish this goal through unique counting and mathematic manipulations.[168] Recommendation 15 would allow substantial proportionality to be measured based on the ratio of the school's enrollment to a predetermined number of athletic participation slots allotted.[169] The *Commission Report* notes that this would allow a school to demonstrate available athletic opportunities "[e]ven if the slots a program makes available are not filled."[170] Again, the Commission is remiss in honoring Title IX's clear purpose--to provide equal opportunities to members of both sexes. This recommendation conflicts with clear case law precedent and current OCR practices.[171]

The courts have firmly recognized that athletic participation opportunities "must be real, not illusory."[172] In *Williams v. School District of Bethlehem*,[173] the plaintiffs sued the school district on behalf of their minor son, challenging the exclusion of their son from girls' field

164. *Id.*

165. *Roberts*, 998 F.2d at 829-30; *Clarification Memo*, *supra* n. 99, at 6.

166. *See supra* nn. 146-54 and accompanying text.

167. *Minority Report*, *supra* n. 163, at 15.

168. *See infra* nn. 169-229 and accompanying text.

169. *Commission Report*, *supra* n. 4, at 37.

170. *Id.*

171. *Williams*, 998 F.2d at 170; *Clarification Memo*, *supra* n. 99, at 3.

172. *Clarification Memo*, supra n. 99, at 3. *See Williams*, 998 F.2d at 170; *Cohen II*, 101 F.3d at 167.

173. *Williams*, 998 F.2d at 168.

hockey.[174] The Third Circuit's analysis focused on whether a male could be excluded from a single-sex female team.[175] The 1979 Policy Interpretations explain that a school must allow a member of the excluded sex to try out for a single-sex team only if the athletic opportunities of the excluded sex have previously been limited.[176] The district court focused on whether boys at Liberty High School were previously limited,[177] holding that the boys had been limited because girls had been able to try out for more teams than boys for two decades.[178] On appeal, the Third Circuit rejected this flawed analysis by stating:

> The mere opportunity to try out for a team . . . is not determinative of the question of previously limited athletic opportunities under Title IX. Athletic Opportunities means real opportunities, not illusory ones. If, to satisfy [sic] Title IX, all that the School District [was] required to do was to allow girls to try out for boys' teams, then it need not have made efforts . . . to equalize the numbers of sports teams offered for boys and girls.[179]

Therefore, the court reversed the grant of summary judgment and remanded for further fact-finding.[180] The court found that compliance with Title IX cannot be measured simply by comparing numbers, but instead found that the analysis should center on "the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole."[181] Because Recommendation 15's straw man slots conflict with case law stating that participation opportunities must be real, Recommendation 15 would most likely be rejected by the courts.

Current OCR guidelines specifically prohibit institutions from counting unfilled slots because OCR "must consider actual benefits provided to real students."[182] Because, as already established, compliance under Title IX is not just merely satisfying numerical amounts, OCR considers the quality and kind of benefits actually provided to student athletes.[183] If only slots were counted, an institution could be found in compliance with Title IX without any actual students benefiting; such a practice would be insufficient for Title IX compliance under OCR's

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174. *Id.* at 170.
175. *Id.* at 172.
176. *Id.*
177. *Id.* at 174.
178. *Id.*
179. *Id.* at 175 (internal quotation marks omitted).
180. *Id.* at 180.
181. *Id.* at 176 (quoting 44 Fed. Reg. at 71417).
182. *Clarification Memo, supra* n. 99, at 3.
183. *Id.*

standards.[184] Again, Recommendation 15 is vulnerable to rejection not only by case law precedent, but also by current standards of enforcement.

In addition to conflicting with case law and OCR's 1996 *Clarification Memo*,[185] Recommendation 15 *de facto* modifies the safe harbor of substantial proportionality by diminishing real participation opportunities afforded to women, such as the allocation of funding.[186] Currently, Division I colleges allocate 32% of their recruiting budgets to women's teams.[187] As a result of this recruiting disparity, fewer women than men receive athletic opportunities.[188] Therefore, if an institution could set a predetermined, but unfilled, number of slots for its women's teams, it would be given credit for meeting Title IX compliance without giving women actual participation opportunities and without expending similar recruiting budgets.[189]

Overall, Recommendation 15 could change an institution's ability to comply with substantial proportionality. For example, a school could more easily find itself in Title IX's "safe harbor," giving the institution no incentive to address unequal recruiting treatment, and women would continue to be denied equal opportunities.[190] This recommendation is inconsistent with Title IX's purpose of eliminating sex discrimination in educational opportunities.[191] Title IX is not interested in illusions of equality for women, but rather mandates that there be actual equal opportunities for women in athletics.[192] The recommendation that allows unfilled slots to meet the requirements of Title IX condones pervasive discrimination and unequal treatment of women by manipulating the numbers without really addressing the underlying issue that women are not being given equal opportunities.[193] At the most, Recommendation 15 is a mirage of compliance with Title IX, and such illusions have been firmly rejected by the courts and OCR.

Another recommendation directed towards manipulating actual participation opportunities is Recommendation 17, which excludes walk-on athletes from athletic ratios.[194] In essence, this recommendation is the

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184. *Id.*

185. *See supra* nn. 146–54 and accompanying text.

186. *Minority Report*, *supra* n. 163, at 13.

187. *Id.* at 13 (citing NCAA Gender Equity Report, 1999–2000, at 15).

188. *Id.*

189. *Id.*

190. *Id.*

191. 20 U.S.C. § 1681.

192. 20 U.S.C. §1681. In addition, courts that have interpreted Title IX have also expressed that opportunities must be real. *Williams*, 998 F.2d at 170 and *Cohen II*, 101 F.3d at 167.

193. *Minority Report*, *supra* n. 163, at 13.

194. *Commission Report*, *supra* n. 4, at 38.

inverse of Recommendation 15, allowing schools *not* to count athletic opportunities for men that the school actually provides.[195] In doing so, the deflated athletic rosters would be proportional to the student enrollment to satisfy the first compliance test. Based on the Commission's findings regarding walk-on athletes, "artificial limitations on the number of walk-ons may limit opportunities without any corresponding gain for the underrepresented sex."[196] Ironically, this conclusion is not based on any statistical analysis[197] and should be discredited in its entirety. The Commission further explained that roster management, a practice of limiting the number of men that can walk on to a team, controls the appearance of disproportional participation, but does not create any actual benefit to women.[198] In other words, unlimited walk-ons will not fix the underlying issue of disproportional participation of women, but instead only masks the problem. Therefore, it was illogical for the Commission to even recommend that walk-ons not be counted, when the Commission found that such a practice does not correspond to any benefit in disparate participation.[199]

To date, the courts have not been faced with the issue of how to hide walk-on athletes from an institution's overall athletics participation numbers. However, case law does indicate that intercollegiate athletics opportunities "should be measured by counting *actual participants*" without distinguishing between scholarship and walk-on athletes.[200] The courts have recognized that team size can vary throughout the athletic season based on injuries, cuts, and quits.[201] Therefore, team roster participants should be determined at the end of the completed season and should acknowledge those members that played for a majority of the season, whether they are bench-warmers or core players.[202] Moreover, the courts have applied a common sense application:

> Where both the athlete and coach determine that there is a place on the team for a student, it is not for [the courts] to second-guess their

195. *Minority Report*, *supra* n. 163, at 13. The Minority Report's *Finding* 17 implies that "men walk on more than women." *Id.* at 10.

196. *Commission Report*, *supra* n. 4, at 38.

197. *Commission Report*, *supra* n. 4, at 30. The Commission's finding begins by stating, "[a]lthough no statistical analysis of this issue has been performed, there has been much testimony about the relative rates at which men and women walk on to teams." *Id.*

198. *Id.*

199. *Id.*

200. *Cohen II*, 101 F.3d at 167 (emphasis added) (quoting *Cohen v. Brown U.*, 879 F. Supp. 185, 202–03 (D.R.I. 1995) (internal quotation marks and citations omitted)).

201. *Cohen*, 879 F. Supp. at 192.

202. *Id.*

> judgment and impose its own, or anyone else's, definition of a valuable or genuine varsity experience. It is the nature of a team that each student makes a different contribution to the team's success and takes from it a unique experience. *Every* varsity member is therefore a varsity "participant."[203]

Because courts most likely count *actual* team players during the season, Recommendation 17 may face rejection by courts that do not distinguish between scholarship recipients and walk-on athletes in assessing substantial proportionality. In addition, the courts may consider that walk-on athletes receive the same benefits of sports participation as full or partial scholarship recipients and recruited walk-ons.[204] After all, the institution's resources are spread among all participants—whether "official" athletes or merely walk-ons.

Importantly, the Commission found that male athletes are more likely to walk on to teams than female athletes.[205] Therefore, Recommendation 17 specifically benefits male athletes rather than women because these walk-on male athletes, which are not counted in the institution's proportionality ratio, still receive the benefits of coaching, training, equipment, tutors, and uniforms.[206] In fact, Recommendation 17 denies women necessary resources because the institution now has to shift money and resources away from funding women athletes in order to make up for the unreported male walk-ons.[207] The courts are at liberty to consider various factors in determining Title IX compliance and will most likely see through Recommendation 17's veil of compliance, recognizing that an athlete is a participant—whether recruited or not.

Recommendation 17 could also have far-reaching, damaging effects on women who attend institutions where scholarships are not provided to athletes—high schools and Division III colleges.[208] Under this recommendation, only full or partial scholarship athletes and recruited walk-ons count in the institution's proportionality ratio.[209] In the case of Division III colleges, only recruited walk-ons would be counted and the NCAA does not monitor contacts between coaches and prospective students at this level.[210] Therefore, there would be no way to monitor or

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203. *Id.* (emphasis added).

204. *Minority Report*, *supra* n. 163, at 13.

205. *Commission Report*, *supra* n. 4, at 30–31.

206. *Minority Report*, *supra* n. 163, at 13–14.

207. *Id.*

208. *Id.*

209. *Commission Report*, *supra* n. 4, at 38.

210. *Minority Report*, *supra* n. 163, at 14.

differentiate between recruited and non-recruited walk-on athletes, making it easier for a school to claim that their athletes are *not* recruited in order to comply with this recommendation.[211] This loophole would swallow Title IX in its entirety on Division III campuses. Overall, Recommendation 17 enables schools to pretend to comply with Title IX by not counting all athletic opportunities for men and reducing their obligation to female athletes.[212]

The most egregious manipulation by the Commission of the proportionality prong is Recommendation 20. This recommendation deflates the student enrollment numbers by excluding non-traditional students from the school's undergraduate population.[213] Conveniently, the Commission defines non-traditional students as those students not between the ages of eighteen and twenty-four, and students of any age who have children.[214] Data indicates that women outnumber men by 37 percent as individuals over twenty-four enrolled in degree-granting institutions.[215] Therefore, Recommendation 20 looks neutral on its face, but in effect will disparately impact women athletes by excluding a large portion of women to be counted towards enrollment numbers.[216] Even though the Supreme Court has held that discriminatory effect is not sufficient to maintain a sex discrimination case,[217] the Court has

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211. *Id.*

212. *Id.*

213. *Commission Report*, *supra* n. 4, at 39.

214. *Minority Report*, *supra* n. 163, at 14.

215. *Id.* (citing U.S. Department of Education, National Center for Education Statistics <http://nces.ed.gov/pubs2002/digest2001/tables/dt174.asp>).

216. An example illustrating this point may be more helpful in understanding the effects of Recommendation 20. At University A the undergraduate student population is 54% females and 46% males, which is substantially proportionate to 54% women athletes and 46% male athletes. However, University A has a large number of non-traditional students as undergraduates. These students are then excluded from the overall student population. Since data indicates that women outnumber men as non-traditional students, more women are excluded from University A's student body population. Therefore, the newly configured student body population is 49% females and 51% males with corresponding athletic opportunities. Under Recommendation 20, women athletes at University A have the potential to lose 5% of their athletic opportunities merely by excluding non-traditional students. Therefore, Recommendation 20 may look neutral on its face, but it has the potential of unfairly impacting women by denying them required athletic opportunities.

217. *Personnel Adminstr. of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). Feeney challenged a Massachusetts civil service statute which gave an absolute hiring preference to any veteran who obtained a passing score on particular examination. At the time of the suit, 98 percent of veterans in Massachusetts were men, meaning that the law benefited males while detrimentally effecting females. The Court held that the statute was not intentionally gender-based and only purposeful discrimination against women would give rise to an equal protection violation. Moreover, the Court stated that "the Fourteenth Amendment guarantees equal laws, not equal results." *Id.* at 273. *See Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 270 (1977) (holding that racially discriminatory intent or purpose must be motivating factor in order to strike down rezoning plan).

determined that discriminatory impact will be a factor in analyzing the underlying discriminatory purpose behind a law.[218] As Recommendation 20 is directed at weakening compliance under Title IX, it seems likely that the discriminatory impact of Recommendation 20, coupled with overall weakening of Title IX enforcement, may be sufficient to prove the discriminatory intent necessary to violate the Equal Protection Clause. Furthermore, "as applied" challenges could be used to show that the government has enforced a neutral-sounding provision in a way that discriminates against women, which would also be sufficient for mid-level gender review under the Equal Protection Clause.[219]

In addition, Recommendation 20's classification of students with children as "nontraditional" students is outright discrimination in and of itself. Furthermore, this classification can be seen as discrimination against women because female students are most readily identifiable with children. The impact of this recommendation would be to deflate the number of women enrolled and, thus, artificially inflate the proportion of women participating in athletics.[220] Again, this disparate impact is a pretext to sex discrimination against women by excluding them from opportunities rightfully theirs under the proportionality test of Title IX.[221] Further, there is no way to fairly implement this rule.[222] Would an institution be prepared to do background checks on all of its students to see who had mothered or *fathered* a child?[223] The Commission clearly did not think this recommendation through very well.

Two of the Commissioners released a *Minority Report* in which they articulated another objection to Recommendation 20.[224] The *Minority Report* explains that this recommendation is impermissibly based on stereotypes that students over a certain age or with children are not interested in participating in sports.[225] The Supreme Court has been clear that it will strike down classifications based on faulty generalizations or stereotypes.[226] The *Minority Report* concludes that "[t]his

218. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that discriminatory purpose must be proven to show racial discrimination that violates the equal protection clause and that disproportionate impact is a factor in ascertaining intent).

219. *See J.E.B. v. Ala.*, 511 U.S. 127, 130-31 (1994) (holding that intentional discrimination on basis of gender by state actors violates the equal protection clause).

220. *Minority Report, supra* n. 163, at 14.

221. 44 Fed. Reg. at 71418.

222. *Minority Report, supra* n. 163, at 14.

223. An institution may be surprised to find out that John Doe superstar quarterback is the father of three children.

224. *Minority Report, supra* n. 163, at 14.

225. *Id.* at 14.

226. *See U. S. v. Va.*, 518 U.S. 515, 533 (1996) (holding that generalizations about women no longer justify denying opportunities to women who have talent and capacity outside the average

recommendation would allow every school to presume, for purposes of Title IX, that all students who are over the age of twenty-four or who have children are uninterested in playing sports."[227] Although Recommendation 20 merely seems to exclude non-traditional students from the overall enrolled-student-to-athlete ratio, it is unclear whether non-traditional students would also be excluded from participating in athletics altogether. Furthermore, Title IX *requires* consideration of the interests of an institution's students, traditional or non-traditional, in allocating athletic opportunities.[228] If Recommendation 20 precludes this type of consideration, then it violates the clear intent of Title IX to establish equal protection under the law for all students.[229] Thus, Recommendation 20 is seriously flawed because (1) it will have a disparate impact on women athletes, (2) it is based on impermissible stereotypes, and (3) it violates the clear intent of equal protection under Title IX.

The last recommendation aimed at meeting the standard of proportionality is an unnumbered proposal that received a tie vote from the Commissioners.[230] This recommendation would permit institutions to allocate 50% of their participation opportunities to men and women respectively,[231] but would also allow institutions a 2 to 3% variance in complying with the 50% ceiling.[232] Since the recommendation received a tie vote, the Commission neither approved nor disapproved the recommendation, indicating that there are obvious concerns with the rule.[233] The *Commission Report* notes that this recommendation would provide a more quantifiable goal for compliance while allowing flexibility due to uncontrolled changes in athletic programs.[234]

Even if this rule were to be adopted, it may not satisfy the proportionality prong to which it is directed.[235] For example, if a school has a student body population of 64% female to 36% male, a 50:50 athletic roster would not be "substantially proportionate" as required under the first test of compliance.[236] Furthermore, this rule sets a ceiling on participation and scholarship opportunities to *both* men and women,

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description).

227. *Minority Report, supra* n. 163, at 14.

228. 44 Fed. Reg. at 71418.

229. 20 U.S.C. § 1681.

230. *Commission Report, supra* n. 4, at 40.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *See generally* 44 Fed. Reg. at 71418.

236. *See supra* nn. 140–62 and accompanying text.

no matter how large of a percentage they represent in their respective student body.[237] In practice, an institution comprised of 60% male and 40% female would probably never be willing to cap their men's teams and allow women to have more opportunities than required by their relative student body proportion.

The *Minority Report* also notes that the 2 to 3% variance from the 50% standard would in effect allow schools to impose a ceiling at 47% for women athletes.[238] This would result in a loss of opportunities to women and girls under the current law, given that women comprise 53% of student bodies at Division IA schools and 49% at high schools.[239] The 2 to 3% variance may set a lower-than-required ceiling, but at the same time it also sets a floor to athletic opportunities for women. Therefore, institutions could not slip below this 47% and athletic departments should be striving for 50:50 opportunities.[240] Again, the Commission's apparent motive behind this recommendation was to give noncompliant institutions a way to manipulate the numerical data in order to be found in compliance.[241] Consequently, this recommendation would result in the denial of athletic opportunities to women by allowing the continuance of on-going sexual discrimination in our nation's educational environments.[242]

In conclusion, each of these recommendations appears to be targeted at lowering the substantial proportionality standard by manipulating how institutions count athletic opportunities. These manipulations reduce athletic opportunities for women and in effect mask the underlying issue—that sex discrimination still occurs in athletics today. These disingenuous counting methods rationalize and justify discrimination against women rather than prohibiting such sex discrimination.

237. *Commission Report*, *supra* n. 4, at 40.

238. *Minority Report*, *supra* n. 163, at 15.

239. *Id.*

240. *Commission Report*, *supra* n. 4, at 40.

241. *Minority Report*, *supra* n. 163, at 15.

242. *Id.*

B. Recommendations Impermissibly Allowing Interest Surveys as a Means of Full and Effective Accommodation under the Third Compliance Prong

The third independent way to show compliance with Title IX is by demonstrating that the interests and abilities of the underrepresented sex have been fully and effectively accommodated.[243] OCR's 1996 *Clarification Memo* explains that there is a presumption that disproportionately high male participation rates may indicate that the institution is not providing equal athletic opportunities, but that an institution can rebut said presumption under test three by showing that the imbalance does not reflect discrimination.[244] Such evidence must demonstrate that the institution has fully and effectively accommodated the interests of the underrepresented sex.[245] OCR is to consider three factors when making its assessment under this test: "whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team."[246]

The Secretary's Commission found that administrators were unsure how to assess student interest in athletics and were uncertain about the propriety of using interest surveys to measure student interests.[247] The Commission found that institutions did not understand whether they had to exactly match these interest levels and whether they had to approve every request for a new women's team regardless of financial limitations.[248] Based on these findings, the Commission proposed Recommendations 18 and 19 to address any confusion under the third compliance test.[249] However, these two recommendations directly conflict with standing case law precedents and abruptly diverge from current OCR policies.

Recommendation 18 inappropriately allows institutions to conduct interest surveys as a way of "(1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports."[250] The Commission noted that the criteria for such interest surveys should be guided by OCR and that this

243. 44 Fed. Reg. at 71418.

244. *Clarification Memo*, *supra* n. 99, at 9–10.

245. *Id.*

246. *Id.* at 10.

247. *Commission Report*, *supra* n. 4, at 26.

248. *Id.*

249. *Id.* at 38–39.

250. *Commission Report*, *supra* n. 4, at 38.

recommendation would allow institutions to have a quantifiable way to show compliance with the third test.[251] Interest surveys may provide quantifiable data, but the courts have specifically rejected the use of surveys in this regard.[252] In the *Cohen* cases, the First Circuit twice rejected Brown University's use of relative interest as a way to comply with full and effective accommodation.[253] In *Cohen I*, the court stated that Brown's interest surveys would "begin under circumstances where men's athletic teams have a considerable head start," which would not accurately measure the true interests of women.[254] In *Cohen II*, the court more emphatically stated,

> [T]here exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports .... [T]o allow a numbers-based lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX. We conclude that, even if it can be empirically demonstrated that ... women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men. Furthermore, such evidence is completely irrelevant where ... viable and successful women's varsity teams have been demoted or eliminated.[255]

Cohen's rejection of interest surveys has been followed in other circuits.[256] For example, in *Horner v. Kentucky High School Athletic Association*, the Sixth Circuit cautioned that reliance on interest may be gender-neutral, but "it is a method which has great potential for perpetuating gender-based discrimination."[257]

Thus, Recommendation 18 is inherently flawed for many reasons. First, as mentioned above, interest surveys have been rejected by the courts as a way of perpetuating sex discrimination.[258] Second, interest surveys in essence force women to *prove* their interest in athletics before being given their right to equal opportunity to play under the law.[259]

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251. *Id.*
252. *Cohen II*, 101 F.3d at 179–80.
253. *Id.*
254. *Cohen I*, 991 F.2d at 900.
255. *Cohen II*, 101 F.3d at 179–80.
256. *Neal*, 198 F.3d at 768; *Horner*, 43 F.3d at 273.
257. *Horner*, 43 F.3d at 273.
258. *See supra* nn. 250–55 and accompanying text.
259. *Minority Report*, *supra* n. 169, at 16.

Third, interest surveys are based on the notion that women are not as likely to be interested in athletics.[260] This notion rests on impermissible stereotypes, which have been unequivocally rejected by the Supreme Court.[261] Fourth, evidence indicates that women are not any less interested in athletics than men when the doors of opportunity are open.[262] Prior to Title IX's enactment, women's participation totaled 300,000 in high school sports and fewer than 32,000 in intercollegiate athletics. Today there are 2.8 million girls participating in high school athletics and approximately 170,000 women in college sports.[263] Title IX has opened the door for women to demonstrate their interest in athletics; interest surveys, as suggested in Recommendation 18, would only close the door of discrimination on women again.

While not as egregious as Recommendation 18, Recommendation 19 also relies on potential interest surveys to assess interest. Recommendation 19 would allow institutions to demonstrate compliance with the third test by utilizing ratios of male/female athletic participation in the surrounding area or surveys of prospective or enrolled students' interest.[264] Again, the only justification for such a recommendation is that the Commission notes that this approach would allow institutions to quantify compliance.[265]

There are several problems with Recommendation 19. First, while quantifiable data is easy to administer, on-going sex discrimination is not so easily quantified. The third test is *not* designed to be an easy numbers game; rather it is intended to be more abstract and flexible in addressing sex discrimination against women.[266]

Second, this recommendation is very ambiguous in what it permits. Recommendation 19 could be read to allow interest surveys to be used to demonstrate the abilities and interest of the underrepresented sex.[267] But, as stated above, interest surveys would only perpetuate sex discrimination.[268] This recommendation could also be read to allow "relative" accommodation based on trends, rather than the requisite full and effective accommodation.[269] However, relative accommodation has

260. *Id.*
261. *See supra* n. 226 and accompanying text.
262. *Minority Report, supra* n. 169, at 17.
263. *NWLC Battle, supra* n. 2, at 2.
264. *Commission Report, supra* n. 4, at 39.
265. *Id.*
266. 44 Fed. Reg. at 41718; *Clarification Memo, supra* n. 99, at 9.
267. *Minority Report, supra* n. 163, at 17.
268. *See supra* nn. 250-55 and accompanying text.
269. *Minority Report, supra* n. 163, at 17.

been specifically rejected by appellate courts, holding that comparative levels of interest rests on the overgeneralization that men are more interested in athletics than women.[270] This impermissible stereotype has disadvantaged women and undermined the remedial purpose of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interest.[271]

Third, Recommendation 19 would permit institutions to compare their participation rates with the participation rates of the region, state, nation, or national governing body.[272] Title IX, however, is institution specific, requiring institutions to provide equal athletic opportunities to *its* students.[273] The third test requires institutions to demonstrate that the interests and abilities of *its* students have been fully and effectively accommodated, not whether outside third-party interests have been accommodated.[274] OCR's *Clarification Memo* explains that "the [1979] Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students."[275] Using other schools or states as a standard is inappropriate because it violates the purpose of Title IX. The courts and OCR have set forth adequate guidance on how the third test of compliance should be administered, and these current practices should remain intact.

In summary, Recommendations 18 and 19 impermissibly condone interest surveys as a way for institutions to meet the third test of fully and effectively accommodating the interests of the underrepresented sex. Interest surveys have been rejected by the courts as a "measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."[276] Recommendations 18 and 19, therefore, contradict case law precedents and Title IX by dismissing, rather than fully and effectively addressing, the interests of girls and women.

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270. *Neal*, 198 F.3d at 768–70; *Cohen I*, 991 F.2d at 898–99. The *Cohen I* court noted that Brown's relative interest approach reads the "full" out of the duty to accommodate "fully and effectively." Prong three requires "not merely some accommodation, but full and effective accommodation." *Cohen I*, 991 F.2d at 989.

271. *Cohen II*, 101 F.3d at 174 (citing *Cohen*, 879 F. Supp. at 209).

272. *Commission Report*, *supra* n. 4, at 39.

273. 44 Fed. Reg. at 41718.

274. 44 Fed. Reg. at 41718; *Clarification Memo*, *supra* n. 99, at 9.

275. *Clarification Memo*, *supra* n. 99, at 9.

276. *Cohen II*, 101 F.3d at 179.

VI. CONCLUSION—CURRENT TITLE IX POLICIES EFFECTIVELY PROMOTE BOTH MEN'S AND WOMEN'S ATHLETICS

Title IX has been cited as the "most successful civil rights statute in history."[277] Through Title IX implementation and enforcement, opportunities for women to participate in athletics have substantially increased, while at the same time men's participation has increased as well.[278] Currently, 150,916 college women and 2.78 million high school girls participate in competitive athletics and 208,408 college men and 3.92 million high school boys participate in athletics.[279] Even though Title IX has leveled the playing field somewhat for women and girls, there still is much to be done to achieve equality.[280] Women still lag in participation opportunities, scholarship dollars, budgets, and other aspects of sports programming.[281] Therefore, although complete equality has not been achieved, Title IX is working in its current form and current Title IX policies effectively promote both men's and women's participation opportunities equally.

Under Title IX's current policies, institutions can comply with athletic participation in one of three ways.[282] This flexibility allows institutions a choice in which test they choose to employ to comply with Title IX.[283] In addition, none of these three standards requires schools to cut teams and each test can be achieved by expanding opportunities for the underrepresented sex.[284] Seven out of ten adults familiar with Title IX think that Title IX should be strengthened or left alone.[285] Myles Brand,

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277. Joanna Grossman, *The Future of Title IX, The Federal Statute Concerning Gender Equality in Athletics: Can it Survive the Secretary of Education's Planned Revisions?* <http://writ.findlaw.com/grossman/20030311.html> (Mar. 11, 2003).

278. *NWLC Battle*, *supra* n. 2, at 5.

279. *Id.* at 2.

280. *Id.* at 17.

281. National Women's Law Center, *Quick Facts on Women and Girls in Athletics* <http://www.nwlc.org/display.cfm?section=athletics> (June, 2002). There are 2.78 million girls that participate in high school athletics as compared to 3.92 million boys. In college, 150,916 women compete compared to 208,408 men. *Id.* In college, women receive only 43% of all athletic scholarships dollars. In Divisions I and II women received at least $133 million less in scholarship dollars than men. *Id.* Women's scholarships totaled $372 million while men's totaled $505 million per year. *Id.* Women only receive 36% of operating budgets and 32% of recruiting dollars. *Id.* In 2000 for Division I institutions, for every dollar spent on women's sports, almost two dollars were spent on men's sports. *Id.*

282. *See supra* nn. 78–88 and accompanying text.

283. *Clarification Memo*, *supra* n. 99, at 2.

284. *Id.* at 11.

285. Erik Brady, *Poll: Most Adults Want Title IX Law Left Alone*, USA Today, <http://www.usatoday.com/sports/college/other/2003-01-07-title-ix_x.htm> (last updated Jan. 7, 2003).

President of the NCAA, has also opposed any changes to Title IX stating, "Title IX needs to remain in place in its current form in order to achieve full gender equity."[286] Brand also states that he would only support those recommendations that make it easier to enforce Title IX.[287]

The Commission on Opportunity in Athletics' findings and recommendations should be carefully reviewed and many of the recommendations should be rejected in their entirety. Recommendations that manipulate compliance under Title IX only rationalize discrimination against women. Thus, instead of weakening polices under Title IX, the DED is correct in focusing on educating institutions and the public on the importance of Title IX and the need to keep striving to achieve sexual equality.[288] Further, the DED has reaffirmed its commitment to Title IX and has stated that "it will aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply."[289]

Equal opportunity for girls and boys and women and men is crucial to our nation and Title IX promotes this equality in educational settings.[290] The opportunity to participate in athletics reaches beyond the playing field into increased health, self-confidence, academic performance, and leadership skills.[291] Thus, to further equality in the educational setting and to achieve such desirable attributes as mentioned above, Title IX must be preserved and enforced in its current form for school athletics to be truly "open to all."

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286. *Brand Opposes Changes to Title IX*, Sports Illustrated <http://sportsillustrated.cnn.com/more/news/2003/03/04/brand_titleix_ap> (last updated Mar. 4, 2003).

287. *Id.*

288. Reynolds, *supra* n. 10.

289. *Id.*

290. 20 U.S.C. §1681.

291. *Minority Report*, *supra* n. 163, at 20.

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