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## Good Initiative, Bad Judgement: The Unintended Consequences of Title IX's Proportionality Standard on NCAA Men's Gymnastics and the Transgender Athlete

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### Recommended Citation

Shearer, Jeffrey, "Good Initiative, Bad Judgement: The Unintended Consequences of Title IX's Proportionality Standard on NCAA Men's Gymnastics and the Transgender Athlete" (2020). *Student Scholarship*. 1.

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# Good Initiative, Bad Judgement: The Unintended Consequences of Title IX's Proportionality Standard on NCAA Men's Gymnastics and the Transgender Athlete

## Abstract

Title IX fails to provide the tools or guidelines necessary to equalize opportunities for all student athletes in the collegiate setting despite the government's continuous effort to explain the law. This failure is because judicial precedent has largely developed around the binary proportionality test of compliance. Title IX was originally intended to equalize educational opportunities for male and female students in order to remedy past discrimination in our society. However, the application of Title IX has frequently created fewer opportunities in athletics due to the unintended relationship between the proportionality standard and the social phenomenon that is the commercialization of college sports. This comment will highlight recent historical challenges with Title IX's application in college athletics with a focus on men's gymnastics. This comment proposes that the Office for Civil Rights revoke their policy letter outlining the binary proportionality test, so that universities will be incentivized to use more qualitative measures of compliance. Finally, this comment will highlight developing legal issues with the application of the binary proportionality test on transgender athletes.

## Keywords

Title IX, student, athletes, transgender, men, gymnastics, college, sports, equality, educational, opportunity, civil rights, proportionality

## Cover Page Footnote

J.D. Candidate 2019, Texas A&M School of Law, MBA Webster University, BA Temple University, Marine Corps Veteran. This article is the result of numerous consultations with faculty and friends over the past three years. I thank Professor John Murphy for agreeing to supervise and advise me as I wrote this article. I thank Professor Kristen Rowlett for guiding me on my final edits and the publication process. I also want to thank the honorable Judge Bonnie Goldstein for allowing me to research this topic during my internship with her court. Additionally, I want to thank Shelli Koszdin, Susan Borschel, Sean Monaco, Clay Stewart, Chris Werner, and Dick Aronson, for their assistance and guidance with my research. Furthermore, I also thank Dean James McGrath, Professors Meg Penrose, Brian Holland, Franklin Snyder, Neal Newman, Lisa Rich, Angela Morrison, Gabriel Eckstein, Malika Hall, Aaron Retteen, Wayne Barnes, and Susan Fortney, for discussing my topic with me so that I could refine it and make it more relevant. Additionally, I would like to thank Ethan Hughes, Ian Webb, Cole Dolan, Anjelica Harris, Elise Aldendifer, Jesse Kitzen-Abelson, Carlos Maldonado, Daniel Grant, Emily Beard, Scott Beard, Nancy McGee, Chris Weinbel, Ashley Goldman, Dustin Hoffman, Cecelia Morin, Ryne Thacker, Roy Crockett, Sarah Turner, Arild Doerge, and Bryan Wilson, for taking time out of their schedules to read my work and provide constructive criticism and insight. Moreover, I want to give the biggest thank you to my former coaches Fred Turoff, Tom Gibbs, Pete Erickson, and Robert Murphy, for granting me a roster slot on their respective teams. Lastly, I want to thank my parents, John and Virginia Shearer, as well as my wife, Christine Shearer, for reading numerous drafts and providing their input.

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## INTRODUCTION<sup>1</sup>

Title IX has admirably created new educational and athletic opportunities for women that would not have existed otherwise. However, as a gender based anti-discrimination statute it was inevitable that a point would arise where rigid, binary, and quantitative requirements would fail to meet the demand of an evolving society. An overlooked consequence in Title IX's application pertains to college athletics with the elimination of lower revenue men's athletic programs. This consequence is the result of the increased commercialization of certain men's sports in the shadow of Title IX's proportionality standard.

Title IX fails to provide the tools or guidelines necessary to equalize opportunities for all student athletes in the collegiate setting despite the government's continuous effort to explain the law. This failure is because judicial precedent has largely developed around the binary proportionality test of compliance. Title IX was originally intended to equalize educational opportunities for male and female students in order to remedy past discrimination in our society. However, the application of Title IX has frequently created fewer opportunities in athletics due to

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<sup>1</sup> I am personally and professionally interested in the subject matter of this piece because an organization that I was affiliated with and donated to was negatively impacted by Title IX's application to college athletics. I was a competitive gymnast on the National Collegiate Athletic Association ("NCAA") Men's Gymnastics team at Temple University from 2004 to 2007. During this time there were roughly nineteen men's gymnastics teams in the entire NCAA. I observed the removal of James Madison University's NCAA program from varsity status due to Title IX requirements in 2006. This issue is important to me because the values, discipline, and other intangible skills that I developed through athletics are what drove my interest in higher education. Had it not been for gymnastics, my life would have taken a different path and I potentially may have never earned my undergraduate degree. I want other young men and women to have the opportunity to participate in college sports, because athletics can be a valuable addition to a person's education and life. I dedicate this piece of scholarship to my daughter Jaina. I hope that you find a passion in life that provides you with the joy, skills, and opportunities that the sport of gymnastics bestowed upon me.

the unintended relationship between the proportionality standard and the social phenomenon that is the commercialization of college sports. This comment will highlight recent historical challenges with Title IX's application in college athletics with a focus on men's gymnastics. This comment proposes that the Office for Civil Rights revoke their policy letter outlining the binary proportionality test, so that universities will be incentivized to use more qualitative measures of compliance. Finally, this comment will highlight developing legal issues with the application of the binary proportionality test on transgender athletes.

Overall, this comment is written so that legal and non-legal audiences can obtain a basic understanding of Title IX's application to college athletics through an overview of the law, regulations, policies, associated impact, and Title IX's likely future challenges. Part II of this comment will explain the complexities of Title IX that emerge from the combination of the statute itself, the regulations, and policy letters. Part III will examine the process for addressing Title IX complaints, the deference agencies receive, and the relevant cases pertaining to Title IX suits in athletics. Part IV will explain why the sport of men's college gymnastics is one of the most optimal sports to examine when researching the application of Title IX. Part V will demonstrate how men's college gymnastics has been negatively impacted by the proportionality test's requirements. Part VI will demonstrate how Title IX's application in college sports has often created fewer athletic opportunities for men due to the financial focus on sports such as college football and the requirements of Title IX's proportionality test. Part VII will highlight general consequences on student athletes and developing legal issues with Title IX's continued binary execution in the context of the transgender athlete. Part VIII proposes the revocation of the proportionality test. Part IX will close this comment and recommend ideas for future research on Title IX and athletics.

**What is Title IX and how does it work?**

In order to understand the execution of Title IX, one must understand the accompanying regulations, policies, and enforcement entities involved. The primary Title IX statute is just the tip of the iceberg. The overseeing agency authority, regulations, precedent, and policy interpretations, in their totality create what we know as Title IX in the present day.<sup>2</sup> When this comment refers to “Title IX,” that reference incorporates these aforementioned contributory moving parts.

Title IX, in its day to day application, is largely an administrative law mechanism. Entire law school courses are dedicated to explaining the processes of administrative law and its interpretations. This comment will briefly examine how the complex machinations of Title IX’s current state are routinely executed.

#### **A. What is Administrative Law?**<sup>3</sup>

Federal agencies typically oversee a specific subject area that Congress has empowered them to manage.<sup>4</sup> This responsibility is usually delegated by Congress due to a recognition that subject matter expertise is an important and valid concern in the process of regulating complex areas of the law.<sup>5</sup> The Administrative Procedure Act, which was passed in 1946, standardized the processes required for agencies to regulate.<sup>6</sup> The Administrative Procedure Act, among other

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<sup>2</sup> Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 325–26 (2012).

<sup>3</sup> Black’s Law Dictionary defines administrative law as “[t]he law governing the organization and operation of administrative agencies[.]” *See Administrative Law*, Black’s Law Dictionary, (4th Pocket ed. 2011).

<sup>4</sup> Linda D. Jellum, *The Legislative Process, Statutory Interpretation, and Administrative Agencies* 564–68 (2016).

<sup>5</sup> *Id.*

<sup>6</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558–1560 (1996).

things, mandates that Congress must empower an agency to oversee a particular subject matter and grant them authority to promulgate rules in that field.<sup>7</sup>

Congress has defined the term “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]”<sup>8</sup> Rulemaking is the “agency process for formulating, amending, or repealing a rule[.]”<sup>9</sup> Agencies can be defined as “all governmental authorities including administrations, corporations, . . . boards, departments, divisions, and agencies.”<sup>10</sup>

There are several types of rules that agencies can make. The method of making a rule is not necessarily required for understanding this comment, but a rudimentary understanding of the various rule types is important for comprehending Title IX’s mark on college athletics. There are four primary methods of engagement for rulemaking that a regulatory agency can undergo: (1) formal rulemaking, (2) informal rulemaking, (3) hybrid of formal and informal, and (4) policy dissemination.<sup>11</sup> A rule that has gone through the first three methods will have the force of law.<sup>12</sup> Force of law means that a rule will be treated essentially the same as an act of Congress in terms of the authority associated with it.<sup>13</sup>

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<sup>7</sup> Jellum, *supra* note 4, at 561, 564, 568.

<sup>8</sup> 5 U.S.C. § 551(4) (2012).

<sup>9</sup> 5 U.S.C. § 551(5) (2012).

<sup>10</sup> Jellum, *supra* note 4, at 561-62.

<sup>11</sup> Todd Garvey, U.S. Congressional Research Service, A Brief Overview of Rulemaking and Judicial Review, 2–4, 7 (2017).

<sup>12</sup> *Id.*

<sup>13</sup> Linda Jean Carpenter & R. Vivian Acosta, Title IX 6–7 (2005).

The formal rulemaking process generally involves a public hearing with an administrative law judge and testimony from various experts or stakeholders.<sup>14</sup> Informal rulemaking is conducted utilizing the Federal Register. Anyone from the public, such as stakeholders or experts, can comment or submit formal briefs to remark on proposed rules.<sup>15</sup> The hybrid process is merely a combination of the previous two methods.<sup>16</sup>

Regardless of whether the process was formal, informal, or a hybrid, the final rule will ideally incorporate all of the relevant inputs before it is submitted to Congress for approval or disapproval.<sup>17</sup> Generally speaking, the rule takes effect so long as Congress does not disapprove of the rule submitted.<sup>18</sup>

Lastly, an agency may, at its discretion, put forth policy interpretations or guidance for how it will carry out rules with its own procedures.<sup>19</sup> These interpretations are considered non-legislative rules and do not have the force of law.<sup>20</sup>

## **B. Purpose & Background**

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<sup>14</sup> Garvey, *supra* note 11, at 3.

<sup>15</sup> *Id.* at 2-3.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> 5 U.S.C. § 801 (2012).

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

<sup>19</sup> Garvey, *supra* note 11, at 7.

<sup>20</sup> *Id.*



Title IX was passed as an anti-sexual discrimination effort modeled after Title VII's anti-racial discrimination laws.<sup>21</sup> The purpose of Title IX is to remedy previous discrimination against women in higher education and simultaneously increase opportunities for women.<sup>22</sup>

### **C. Statute**

On June 23, 1972, Title IX was enacted.<sup>23</sup> Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”<sup>24</sup>

### **D. Agency oversight**

Congress created the Department of Education on October 17, 1979.<sup>25</sup> During this period, Congress also granted rulemaking authority to the Department of Education for matters within their area of responsibility.<sup>26</sup> The Department of Education's overall mission assigned by Congress is to “enable the Federal Government to coordinate its education [standardization] activities more effectively.”<sup>27</sup> The Department of Education accomplishes this by “ensuring access to equal educational opportunity for every individual[,]” supplementing state educational systems,

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<sup>21</sup> Cannon v. Univ. of Chi., 441 U.S. 677, 683–85 (1979).

<sup>22</sup> Sec'y of Educ's, Comm'n for Opportunity in Athletics, U.S. Dep't of Educ., Open to All: TITLE IX at Thirty 46, 14–15 (2003), available at <https://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf>.

<sup>23</sup> Carpenter & Acosta, *supra* note 13, at 3.

<sup>24</sup> 20 U.S.C. § 1681(a) (2012).

<sup>25</sup> See 20 U.S.C. § 3411 (2012).

<sup>26</sup> 20 U.S.C. § 3474 (2012).

<sup>27</sup> 20 U.S.C. § 3402 (2012).

“promot[ing] improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information[,]” and by improving the management, coordination, and accountability of federal education programs.<sup>28</sup>

Contemporaneously, Congress created the Office for Civil Rights (“OCR”) within the Department of Education and granted the Department of Education authority to delegate functions as necessary.<sup>29</sup> The OCR is responsible for issues pertaining to Title IX as a subordinate office within the Department of Education.<sup>30</sup> Lastly, as a catch-all measure for Title IX specifically, Congress gave a broad mandate to any agency involved with the distribution of federal funds for educational programs to enforce the requirements and objectives of Title IX.<sup>31</sup>

#### **E. Applicable Regulations<sup>32</sup>**

There are far more regulations that pertain to Title IX than this article can discuss. In order to lay the foundation for the discussion of the guidance and policy interpretation letters from the OCR to the relevant stakeholders in Title IX disputes, the Title IX regulations applicable to athletics will be briefly explained. The Title IX regulations discussed in this analysis underwent

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

<sup>29</sup> 20 U.S.C. § 3413 (2012); 20 U.S.C. § 3472 (2012).

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

<sup>31</sup> 20 U.S.C. § 1682 (2012).

<sup>32</sup> Reader should note that many of the regulations were originally passed by the Department of Education and Welfare under 45 C.F.R. Part 86, but were carried over to the regulations discussed here when the Department of Education was created as a separate entity. “[T]he regulations implementing Title IX were subsequently recodified without substantive change at 34 C.F.R. Part 106. [] The regulations governing athletics have remained in effect without substantive change since that time.” See *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 97 (W.D. Va. 2007), *aff’d sub nom. Equity in Athletics, Inc. v. U.S. Dep’t of Educ.*, 291 F. App’x 517 (4th Cir. 2008).

varying processes of hearings, debate, commentary, and refinement, associated with both formal and informal rulemaking.<sup>33</sup>

The regulations associated with Title IX significantly expands the statute's application, beginning with 34 C.F.R. §§ 106.1, 106.11, and 106.31.<sup>34</sup> These regulations link all of the following discussed regulations to the initial Title IX statute and scope of anti-discrimination. 34 C.F.R. § 106.31 largely mimics the language of the Title IX broad anti-discrimination statute with minor differences.<sup>35</sup> The three primary regulations that apply to Title IX athletic compliance are 34 C.F.R. § 106.41, 34 C.F.R. § 106.33, and 34 C.F.R. § 106.37.

Unlike the primary Title IX statute, one of the associated regulations is expressly applied to govern athletic opportunities through 34 C.F.R. § 106.41.<sup>36</sup> This regulation goes far beyond mimicking the language of the Title IX statute to allow opportunities for “try-out[s]” for teams that are not representative of the excluded sex so long as they are not contact sports such as “boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”<sup>37</sup> Furthermore, the regulation goes on to list specific areas of evaluation for equal opportunity such as:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice

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<sup>33</sup> Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 55–56 (1996).

<sup>34</sup> 34 C.F.R. § 106.1 (2018); 34 C.F.R. § 106.11 (2018); 34 C.F.R. § 106.31 (2018).

<sup>35</sup> 34 C.F.R. § 106.31.

<sup>36</sup> 34 C.F.R. § 106.41 (2018).

<sup>37</sup> *Id.* at § 106.41(b).

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.<sup>38</sup>

Concerns for the equal opportunity of facilities are raised by 34 C.F.R. § 106.33, which states that “[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”<sup>39</sup> The last pertinent regulation requires the fair and proportional distribution of financial aid, scholarships, and other financial incentives.<sup>40</sup>

Notably, Title IX compliance is required to be monitored, investigated, and enforced, by a representative at a college or university that is a recipient of federal funds.<sup>41</sup> Despite the requirement of each qualifying institution to have a compliance officer, there are questions from Title IX experts as to whether potential parties know such a position exists to assist with a potential grievance.<sup>42</sup>

## **F. Applicable Policy Letters**

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<sup>38</sup> *Id.* at § 106.41(c).

<sup>39</sup> 34 C.F.R. § 106.33 (2018).

<sup>40</sup> 34 C.F.R. § 106.37 (2018).

<sup>41</sup> 34 C.F.R. § 106.8 (2018).

<sup>42</sup> Carpenter & Acosta, *supra* note 13, at 21.

Title IX has clearly made a great deal of progress with increasing the inclusion of women in many activities that were historically considered to be exclusively for men.<sup>43</sup> However, many believe that Title IX is heading in a direction detrimental to men and women due to the continuously expansive policy and guidance from the OCR within the Department of Education.<sup>44</sup>

The Department of Education OCR guidance delineates specific factors and tests to achieve Title IX compliance, eventually leading to what is now known as the Three-Part Test. Unlike the first part of the Three-Part Test—the proportionality prong—the other two prongs of compliance have not been as heavily contested in the courts.<sup>45</sup> This lack of precedent has led some universities to view the most commented-on proportionality test as the compliance method of choice.<sup>46</sup> There are countless letters of guidance and policy interpretation governing the application of Title IX to college athletics. Many of these letters were an effort by the OCR to provide clarifying instructions on how to carry out the intentions of Title IX’s governing statute and regulations.<sup>47</sup>

The first letter is dated November 11, 1975, and it may be referred to as “Title IX Obligations in Athletics[.]”<sup>48</sup> It essentially conveyed first year compliance requirements of the new

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<sup>43</sup> Abigail M. Mabry, *Title IX: Proportionality and Walk-Ons*, 44 U. MEM. L. REV. 497, 508 (2013).

<sup>44</sup> Rachel Schwarz, *Timeout! Getting Back to What Title IX Intended and Encouraging Courts and the Office of Civil Rights to Re-Evaluate the Three-Prong Compliance Test*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 633, 649–51 (2014).

<sup>45</sup> Brandon Kai Golden, *Evaluating Opportunity in College Sports (Title IX)*, 22 CARDOZO J.L. & GENDER 313, 319–23 (2016).

<sup>46</sup> *Id.* at 320–21.

<sup>47</sup> Elizabeth Kaufer Busch & William E Thro, *Title IX: The Transformation of Sex Discrimination in Education* 28 (2018).

<sup>48</sup> Letter from Peter E. Holmes, Director, Office for Civil Rights, Dep't of Educ., to Chief State School Officers, (Nov. 11, 1975), available at <http://www2.ed.gov/about/offices/list/ocr/docs/holmes.html> [hereinafter 1975 Letter].

Title IX law pertaining to athletics. This initial letter asserted that Title IX does apply in athletic programs at educational institutions in receipt of federal funds.<sup>49</sup> The first Title IX letter also mandated university self-evaluations, affirmed the lack of quotas, pointed out there are differences between athletics and extracurricular activities, and identified generally appropriate methodologies for funding male and female teams.<sup>50</sup> Notably, the letter also proclaimed that different sports are allowed for each sex while highlighting the previously mentioned no contact exception discussed in 34 C.F.R. 106.41.<sup>51</sup>

The second letter of relevance was distributed on December 11, 1979. It was one of the first detailed and official commentaries on how the former Department of Health, Education, and Welfare interpreted Title IX's application to athletics through the statutes and regulations.<sup>52</sup> This letter created what is known as the Three-Part Test—without expressly stating such<sup>53</sup>—and attempted to elaborate on Title IX's requirements for: (1) student proportionality requirements associated with student athlete financial assistance, athletic team equipment, and student interest in the types of athletic programs offered—in relationship to—the student body's proportion of each sex; (2) demonstrating if the institution has a history of continuing program expansion for the underrepresented sex; and (3) demonstrating if there is evidence of meeting the interests of the

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See 1979 Policy Interpretation, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) [hereinafter 1979 Letter].

<sup>53</sup> *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 97 (W.D. Va. 2007), *aff'd sub nom. Equity in Athletics, Inc. v. U.S. Dep't of Educ.*, 291 F. App'x 517 (4th Cir. 2008).

unmet sex.<sup>54</sup> Additionally, this letter went through the notice and comment process, giving it more legal authority and weight when compared to a letter or policy that did not undergo that process.<sup>55</sup>

The Three-Part Test is the impetus behind this comment.

The January 1996 letter and its enclosure clarify the applications and limits of the Three-Part Test.<sup>56</sup> The OCR explains that the Three-Part Test can be complied with by meeting any of the prongs on their own.<sup>57</sup> Furthermore, each prong can theoretically achieve compliance independent of the other prongs.<sup>58</sup>

*The Three-Part Test* is composed of three prongs. The Proportionality Prong of the Three-Part Test requires a university to allocate resources of equipment, support staff, financial assistance, scheduling, and facilities, in proportion with the student body ratio of each sex.<sup>59</sup> The OCR provides several examples of what compliance looks like including: “If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part

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<sup>54</sup> 1979 Letter, *supra* note 52, § VII.

<sup>55</sup> Jellum, *supra* note 4, at 572.

<sup>56</sup> Norma Cantu, Assistant Secretary for Civil Rights, Dear Colleague Letter: Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, Office for Civ. Rights, U.S. Dep't of Educ. (Jan. 16, 1996), available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter 1996 Letter]; Norma Cantu, Assistant Secretary for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, Office for Civ. Rights, U.S. Dep't of Educ. (Jan. 16, 1996), available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter 1996 Clarification].

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

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

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

one.”<sup>60</sup> The OCR goes as far to recognize that student body ratios will change each year and appears to allow for deviations of 1% regarding resource allocations so long as the institution appears to be actively seeking compliance in the foreseeable future.<sup>61</sup> However, practical specifics of how to allocate such resources are noticeably absent from this letter. Is a university supposed to take a mathematical formula to a spreadsheet with percentages reflecting the student body and calculate scholarship fund assignments? Does the same apply to travel budgets for competitive teams? Answers to these questions do not appear in the letters that follow.

The second prong of the Three-Part Test asks if a college or university has a “[h]istory and [c]ontinuing [p]ractice of [p]rogram [e]xpansion for the [u]nderrepresented [s]ex[.]”<sup>62</sup> This test examines if the university actively engages in efforts to increase opportunities for the underrepresented sex to include roster slot increases, elevations of teams to varsity status, and the test also reviews any policies examining such procedures.<sup>63</sup>

The final prong of the Three-Part Test examines “whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex[.]”<sup>64</sup> Three key questions exist for this prong: (1) “Is there sufficient unmet interest to support an intercollegiate team?[:;]” (2) “Is there sufficient ability to sustain an intercollegiate team?[:;]” (3) “Is there a reasonable expectation of competition for the team?”<sup>65</sup>

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<sup>60</sup> *Id.*

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

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

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

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*



In 2003, the OCR attempted to convey—among other things—that schools should engage with the OCR when questions arise regarding the best method of achieving compliance with Title IX’s anti-discrimination policies; and that the elimination of teams in order to comply with Title IX is against the spirit of the law despite the fact that it may be a method of achieving legitimate compliance.<sup>66</sup>

Continuing the trend of clarification, the OCR issued yet another letter in 2005, titled “Additional Clarification of Intercollegiate Athletics Policy” that was a well-intentioned effort to push colleges and universities to utilize the other prongs of the proportionality test.<sup>67</sup> This clarification promulgated a model survey that could be used to achieve compliance with prong three of the Three-Part Test.<sup>68</sup> A lengthy user’s guide was provided as an appendix to this letter in order to provide educational institutions with the necessary tools for compliance.<sup>69</sup> Additionally, this letter of clarification discussed how a new athletic team may be created in order to comply with Title IX.<sup>70</sup>

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<sup>66</sup> Gerald Reynolds, *Assistant Secretary for Civil Rights, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, Office for Civ. Rights, U.S. Dep’t of Educ. (July 11, 2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

<sup>67</sup> James F. Manning, *Delegated Authority of Assistant Secretary for Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test--Part Three*, Office for Civ. Rights, U.S. Dep’t of Educ., (Mar. 17, 2005) available at <https://www.feminist.org/education/pdfs/AddnClarificationInterCollegiateAthleticsPolicy.pdf> [hereinafter 2005 Letter].

<sup>68</sup> See *User’s Guide to Developing Student Interest Surveys Under Title IX*, Nat’l Ctr. for Educ. Statistics, U.S. Dep’t of Educ. (Mar. 2005), available at <https://www.feminist.org/education/pdfs/AddnClarificationInterCollegiateAthleticsPolicy.pdf>.

<sup>69</sup> 2005 Letter, *supra* note 67, at 3.

<sup>70</sup> *Id.* at 12.

In 2008, the OCR issued another “Dear Colleague” letter where it elaborated what is a “sport” for the purposes of Title IX evaluation and compliance.<sup>71</sup> This letter gave several factors to examine for an institution to evaluate what is a sport, such as: competition, scheduling and availability, practice duration and frequency, athletic ability, team participation, and budget availability.<sup>72</sup>

In 2010, the OCR further expanded on prong three of the Three-Part Test.<sup>73</sup> In this letter, the OCR specifically revoked the guidance pertaining to the policy that the model survey could be utilized on its own to achieve compliance with the third prong of the Three-Part Test, but noted how it could be utilized in conjunction with other methods for such compliance.<sup>74</sup>

The fact that there have been so many attempts to expand on all three methods of compliance to include working beyond the facially quantitative approach associated with the proportionality prong, demonstrates a flaw in Title IX’s application among higher education’s athletic departments.

## **AVENUES OF TITLE IX ENFORCEMENT**

There are several available methods for resolving a Title IX dispute within the college setting. Methods of Title IX evaluation and compliance enforcement may be conducted formally

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<sup>71</sup> Stephanie Monroe, Assistant Secretary for Civil Rights, *Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance*, Office for Civ. Rights, U.S. Dep’t of Educ. (Sept. 17, 2008), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

<sup>72</sup> *Id.*

<sup>73</sup> Russlynn Ali, Assistant Secretary for Civil Rights, *Intercollegiate Athletics Policy: Three-Part Test, Part Three, Question 1*, Office for Civ. Rights, U.S. Dep’t of Educ. 1-3 (Apr. 20, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

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

with litigation or as an OCR investigation.<sup>75</sup> Informal resolution can occur within the institution itself.<sup>76</sup> This comment advocates for the removal of the proportionality test of compliance because these avenues of enforcement do not always look beyond the numbers required by the proportionality prong. This comment will demonstrate that such rigid and binary requirements do not support the needs of the modern student athletic community.

### **A. Complaint & Investigation**

One method of examining a Title IX issue is the complaint and investigation process.<sup>77</sup> The process for complaints and investigations begins as one might predict—with a complaint.<sup>78</sup> The complaint may come from either an injured party or someone who knows of a Title IX issue at an applicable institution.<sup>79</sup> The complaint can be made with a Title IX administrator at the institution or the OCR.<sup>80</sup>

After a complaint is made with the appropriate entity, an investigation will be conducted by either the OCR or a university compliance officer to determine its validity.<sup>81</sup> Upon a determination that a violation has occurred, the OCR or in-house compliance official will attempt to resolve the issue through a negotiation process.<sup>82</sup>

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<sup>75</sup> Busch & Thro, *supra* note 47, at 14–16.

<sup>76</sup> Carpenter & Acosta, *supra* note 13, at 21–22.

<sup>77</sup> *Id.*

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

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 21–24.

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

<sup>82</sup> *Id.*

## **B. Legal Action**

In *Cannon v. University of Chicago*, the United States Supreme Court established that injured parties alleging Title IX violations may assert an implied private cause of action for injunctive relief under Title IX, despite the lack of an express congressional intent to establish one.<sup>83</sup> However, “[i]t was not until 1992 that monetary damages were finally approved for Title IX named claimants.”<sup>84</sup> Once a monetary remedy was established, there was an increase in legal action from injured parties.<sup>85</sup>

Legal action frequently occurs when Title IX is the suspected cause for the elimination of an athletic team at a university.<sup>86</sup> There is a wide range of precedent supporting university actions in the name of Title IX compliance.<sup>87</sup> This precedent will be discussed after a brief description regarding the relevant types of agency deference used by the courts.

### **a. Agency Deference**

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<sup>83</sup> *Cannon*, 441 U.S. at 717.

<sup>84</sup> Elizabeth Reinbrecht, *Northwestern University and Title IX: One Step Forward for Football Players, Two Steps Back for Female Student Athletes*, 47 U. TOL. L. REV. 243, 248 (2015) citing, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72–73 (1992).

<sup>85</sup> Reinbrecht, *supra* note 84, at 248.

<sup>86</sup> Brenda L. Ambrosius, *Title IX: Creating Unequal Equality Through Application of the Proportionality Standard in Collegiate Athletics*, 46 VAL. U. L. REV. 557, 574–78 (2012).

<sup>87</sup> Schwarz, *supra* note 44 at 649–52.

Agencies are afforded a large amount of discretion with the method of enforcing the law they are assigned to oversee, the interpretations of such laws, and the application of their own policies.<sup>88</sup>

For example, the court in *Chevron, United States of America, Incorporated. v. Natural Resources Defense Council, Incorporated*, cemented some of the common processes regularly used in modern jurisprudence for evaluating an agency's interpretation of an issue.<sup>89</sup> The *Chevron* court noted that when the agency interpretation of an ambiguous statute is reasonable and such an interpretation is pursuant to an agency's congressionally empowered rulemaking process then the court must defer to that interpretation.<sup>90</sup>

Whereas, in *Auer v. Robbins*, the court noted that when an agency interprets one of its own regulations through something such as a policy, “[their] interpretation of it is, under our jurisprudence, controlling unless “plainly erroneous or inconsistent with the regulation.”<sup>91</sup>

## **b. Cases Pertaining to Title IX & Athletics**

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<sup>88</sup> Paul J. Larkin, Jr., Elizabeth H. Slattery, *The World After Seminole Rock and Auer*, 42 HARV. J.L. & PUB. POL'Y 625, 625–26 (2019).

<sup>89</sup> Jellum, *supra* note 4, at 640.

<sup>90</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45, 866 (1984).

<sup>91</sup> *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (*quoting* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989), *see also* *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, (1945)).

The courts have largely supported university actions in the name of Title IX compliance unless there is a facially obvious disparity impacting the historically underrepresented sex. A sampling of relevant Title IX cases demonstrating this premise and its impact on athletics will be discussed here in order to provide an adequate background.

For example, in *Cohen v. Brown University*, the First Circuit examined agency interpretations of the primary Title IX statute and its regulations.<sup>92</sup> In *Cohen*, the plaintiffs brought a class action suit alleging discrimination by the university for demoting the women's gymnastics and volleyball teams from varsity to club status.<sup>93</sup> The First Circuit rejected the University's argument that Title IX is an affirmative action statute violating the equal protection clause through reverse discrimination.<sup>94</sup> The dissent expressly disagreed with the majority's application of Title IX's Three-Part Test by alleging that the majority had in fact made the Three-Part Test a quota system.<sup>95</sup> Furthermore, the dissent argued that the university's first amendment right to govern their curriculum was being violated by the court's interference.<sup>96</sup>

In *Biediger v. Quinnipiac University*, the Second Circuit affirmed the district court's finding of a lack of Title IX compliance in a suit where several women's athletic teams were cut and the university attempted to replace them with a competitive cheerleading team in order to be

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<sup>92</sup> *Cohen v. Brown University*, 101 F.3d 155, 172-73 (1st Cir. 1996) (the first circuit found no error in the Chevron deference standard applied by the district court's analysis of the OCR's interpretation of the primary Title IX statute. The Court found no error in the district court's analysis applying a substantial deference standard to the OCR's interpretation of its own regulations).

<sup>93</sup> *Id.* at 161-62.

<sup>94</sup> *Id.* at 170-72.

<sup>95</sup> *Id.* at 195-97.

<sup>96</sup> *Id.* at 198-99.

compliant with the proportionality prong.<sup>97</sup> The court determined that: (1) cheerleading was not established enough competitively to be considered a sport for the purposes of Title IX compliance and (2) that the university had violated Title IX's requirements.<sup>98</sup>

In *Neal v. Board of Trustees of the California State Universities*, the Ninth Circuit found that a university may eliminate men's athletic teams for compliance if there is a large disproportion between the underrepresented gender's opportunities to participate when compared with the student body's gender ratio.<sup>99</sup>

In *Miami University Wrestling Club v. Miami University*, the Sixth Circuit expressly stated that cutting men's athletics teams in order to achieve compliance with the proportionality prong is valid because it "may be the only way for an educational institution to comply with Title IX while still maintaining the other niceties of its mission, such as its academic offerings."<sup>100</sup>

Lastly, in *Equity in Athletics, Inc. v. Department of Education*, the district court examined preliminary claims pertaining to an injunction sought by the plaintiffs against the James Madison University decision to remove eight men's teams and three women's teams in order to achieve proportionality with the undergraduate student body's ratio of males and females.<sup>101</sup> The court ultimately denied the plaintiff's attempt to seek an injunction halting the proposed athletic team

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<sup>97</sup> *Biediger v. Quinnipiac University*, 691 F.3d 85, 91–92, 105–06, 107–09 (2d Cir. 2012).

<sup>98</sup> *Id.* at 107–09.

<sup>99</sup> *Neal v. Board of Trustees of the California State Universities*, 198 F.3d 763, 765 (9th Cir., 1999).

<sup>100</sup> *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 613 (6th Cir. 2002).

<sup>101</sup> *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 90–93, (W.D. Va. 2007), *aff'd sub nom. Equity in Athletics, Inc. v. U.S. Dep't of Educ.*, 291 F. App'x 517 (4th Cir. 2008).

removals.<sup>102</sup> Subsequently, on appeal, the Fourth Circuit rejected several claims by the plaintiffs to include allegations of equal protection violations, disparate impact discrimination against males, arguments against precedent of agency deference, and first amendment claims.<sup>103</sup> Summary judgement was later granted in favor of the defendants due to the fact that the plaintiffs were determined to have failed to properly state a claim.<sup>104</sup> The court acknowledged that the 1979 policy letter was entitled to deference, but did not expressly clarify if that deference was under the type prescribed in *Chevron* or *Auer*.<sup>105</sup>

### **c. Pulling Funds**

The threat associated with an unresolved Title IX dispute is the removal of federal education funding for the university or college involved.<sup>106</sup> As of 2014, no such action has been taken.<sup>107</sup> This may be the result of the amount of red tape involved with actually taking such an action.<sup>108</sup> Title IX compliance officials tend to undergo a negotiation process in order to actually resolve disputes or complaints when a lack of compliance is found.<sup>109</sup>

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<sup>102</sup> *Id.* at 112-13.

<sup>103</sup> *Equity in Athletics, Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 669–671, 673-75, 679–68, 684 (W.D. Va. 2009), *aff'd*, 639 F.3d 91 (4th Cir. 2011).

<sup>104</sup> *Id.* at 684.

<sup>105</sup> *Id.* at 675–76.

<sup>106</sup> Donna A. Lopiano, Ph.D., *Fixing Enforcement and Due Process Will Not Fix What Is Wrong with the NCAA*, 20 ROGER WILLIAMS U. L. REV. 250, 288–89 (2015).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*



## WHY FOCUS ON THE SPORT OF GYMNASTICS IN A DISCUSSION OF TITLE IX?

Men's College Gymnastics within the NCAA has seen a severe and drastic decline in the number of varsity programs since the passage of Title IX. If the true goal of attending a university is to obtain an education, then the decline of men's gymnastics should be especially troubling. This is due to the fact that men's Division I NCAA gymnastics had the highest average graduation rate among student-athletes between 2007-2016, at 88%.<sup>110</sup> The graduation rate of athletes during the same period for football was 69% while men's basketball was at 70%.<sup>111</sup> This data should be a thought-provoking metric to remember as this analysis continues.

The sports of Men's Gymnastics and Women's Gymnastics present unique opportunities to analyze Title IX, because they appear the same on paper but are actually vastly different in their execution. There are many sports that carry the same name, but possess a separate competitive component for men and women. The sports of gymnastics are unlike the sports of men's and women's basketball, whose differences are actually negligible.<sup>112</sup> Perhaps the most identifiable differences between men's and women's basketball is that women's basketball uses a smaller ball and has a slightly closer three point line.<sup>113</sup> There are some other differences as well for men's and women's basketball but they are not really the focus of this analysis.<sup>114</sup>

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<sup>110</sup> FRANK P. JOZSA, JR., *STUDENT ATHLETES: MERGING ACADEMICS AND SPORTS* 91–92 (2019).

<sup>111</sup> *Id.*

<sup>112</sup> *Difference Between Men's & Women's Basketball*, SPORTSREC, <https://www.sportsrec.com/4693132/difference-between-mens-womens-basketball> (last visited Jul 24, 2019).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

*What is the Sport of Gymnastics?* Gymnastics itself is not a competitive endeavor; it is an activity about control over the body.<sup>115</sup> The execution of gymnastics is a “physical activity performed individually, or as a group, in which the participant demonstrates body control over a wide range of patterns.”<sup>116</sup> This is a broad definition. Artistic gymnastics might properly be described as “a competitive sport in which individuals perform optional and prescribed acrobatic feats mostly on special apparatus in order to demonstrate strength, balance, and body control[.]”<sup>117</sup> Because this piece focuses on Men’s Artistic Gymnastics at the college varsity level, it will sometimes refer to it as NCAA gymnastics or college gymnastics when it improves clarity or flow.

This comment will not delve too far into the finer details of the scoring systems or event requirements for the sports of men’s and women’s gymnastics, but some basic working knowledge on the differences between the two sports is important in order to understand how a rigid binary rule can produce results that are contrary to the spirit of Title IX.

Unlike sports such as basketball, the sports of men’s gymnastics and women’s gymnastics have different events for competing. Men’s gymnastics contains six competitive events: (1) floor exercise, (2) pommel horse, (3) still rings, (4) vault, (5) parallel bars, and (6) horizontal bar.<sup>118</sup>

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<sup>115</sup> U.S. Gymnastics, U.S. Dep’t of Educ., USA Gymnastics Safety Handbook for Gymnastics and Other Sport Activities 11 (1998).

<sup>116</sup> *Id.*

<sup>117</sup> Definition of Gymnastic, Merriam-Webster, <https://www.merriam-webster.com/dictionary/gymnastic> (last visited Jun 16, 2019).

<sup>118</sup> USA GYMNASTICS, MEN’S ARTISTIC GYMNASTICS EVENT DESCRIPTIONS <https://usagym.org/pages/gymnastics101/men/events.html> (last visited Jul 24, 2019).

Alternatively, women's gymnastics has four events: (1) vault, (2) uneven bars, (3) balance beam, and (4) floor exercise.<sup>119</sup>

Further differences between men's and women's gymnastics are: (1) uniform requirements,<sup>120</sup> (2) non-apparatus personal equipment requirements,<sup>121</sup> and (3) the availability of competitors. The availability of competitors is highly relevant in the college setting because there are only sixteen men's NCAA gymnastics teams—fifteen of which are Division I schools.<sup>122</sup> By contrast, Division I women's NCAA gymnastics has sixty-two remaining teams.<sup>123</sup> The lack of competition alone creates unique travel circumstances beyond the surface application of Title IX's proportionality prong. To summarize, each sex's sport gymnastics is unique, despite similarities that may exist on the face or name of the activity.

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<sup>119</sup> USA GYMNASTICS, WOMEN'S ARTISTIC GYMNASTICS EVENT DESCRIPTIONS <https://usagym.org/pages/gymnastics101/women/events.html> (last visited Jul 24, 2019).

<sup>120</sup> Pamela J. Hobart, What Do Men Wear For Gymnastics?, *Bustle* (Aug. 13, 2016), <https://www.bustle.com/articles/178465-do-men-wear-leotards-in-gymnastics-the-rio-games-arent-the-only-place-youll-see-singlets> (last visited Jul 25, 2019).

<sup>121</sup> GymnasticsHQ, Gymnastics Grips: Guide to Buying the Best Gymnastics Grips for You, *Gymnastics HQ* (Aug. 3, 2017), <https://gymnasticshq.com/gymnastics-grips/>.

<sup>122</sup> USA GYMNASTICS, SCHOOLS THAT SPONSOR MEN'S GYMNASTICS, <https://usagym.org/pages/home/college/meninfo.html> (Jul 25, 2019), see also Dvora Meyers, *Comparing Men's and Women's Gymnastics is Futile: They're Barely the Same Sport*, *THE GUARDIAN*, Aug. 16, 2016, <https://www.theguardian.com/sport/blog/2016/aug/16/mens-womens-gymnastics-comparison-olympics> (last visited Jul. 24, 2019).

<sup>123</sup> Callie Caplan, *Texas is a US hotbed for gymnastics but doesn't offer the D-I sport in college. Experts predict championships if that changes.*, *DALLAS MORNING NEWS* (Apr. 17, 2019), <https://www.dallasnews.com/sports/2019/04/17/texas-is-a-us-hotbed-for-gymnastics-but-doesn-t-offer-the-d-i-sport-in-college-experts-predict-championships-if-that-changes/>.

## V. HISTORY OF NCAA MEN'S GYMNASTICS AND OTHER PERCEIVED LOW-REVENUE PROGRAMS PRIOR TO AND AFTER THE PASSAGE OF TITLE IX

As of 2002, “more than 170 wrestling programs, 80 men’s tennis teams, 70 men’s gymnastics teams and 45 men’s track teams have been eliminated, according to the General Accountability Office.”<sup>124</sup> Additionally, “[i]n the first four years of [Title IX’s] implementation, participation in women's athletics increased by six hundred percent to include nearly two million participants. In 2008, 3.1 million girls participated in high school athletics with an additional 182,503 women participating in NCAA collegiate sports.”<sup>125</sup> Although there are reports from the Government Accountability Office (GAO), through a commission, which claim the overall number of athletic opportunities are increasing for both genders, these reports have been highly contested.<sup>126</sup> Subsequent reports from the GAO regarding the same topic have been further scrutinized, even by fellow members of the commission who felt that their findings were not properly captured.<sup>127</sup>

Several male athletes have sued colleges or universities over Title IX compliance cuts in college athletics, and the courts have typically ruled against the large majority of them.<sup>128</sup> In these cases, the male athletes challenged the proportionality test and ultimately failed due to the courts’ “focus[] on remedying past discrimination against women[.]”<sup>129</sup> Therefore, there has been some

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<sup>124</sup> Bill Pennington, *Colleges; More Men’s Teams Benched as Colleges Level the Field*, N.Y. TIMES, (May 9, 2002), <https://www.nytimes.com/2002/05/09/sports/colleges-more-men-s-teams-benched-as-colleges-level-the-field.html>.

<sup>125</sup> *Id.*

<sup>126</sup> Anderson, *supra* note 2, at 366.

<sup>127</sup> *Id.* at 368.

<sup>128</sup> *Id.* at 371.

<sup>129</sup> Ambrosius, *supra* note 86, at 582.

detriment to men's college sports because of Title IX, as men's college athletic opportunities have actually decreased.

## **VI. HOW HAS THE APPLICATION OF TITLE IX BEEN IMPACTED BY THE COMMERCIALIZATION OF COLLEGE ATHLETICS?**

The commercialization of collegiate sports has caused a unique environment and challenge for Title IX.<sup>130</sup> A large contributor to this environment of commercialization was the *NCAA v. Board of Regents of University of Oklahoma* case decided in 1984.<sup>131</sup>

In *NCAA v. Board of Regents*, the NCAA was sued by several universities alleging that the NCAA was monopolizing the product of televised college football—in violation of antitrust laws—because it placed a limit on how many televised games a university could have.<sup>132</sup> The court ultimately held that the NCAA decision to limit the number of televised football games was a violation of antitrust laws and that schools could pursue to have any number of their games appear on television.<sup>133</sup> Justice White's dissent maintained that while an antitrust violation may have occurred, it should be distinguished as an exception in the market of college athletics due to the unique nature of the activity.<sup>134</sup> Justice White further opined that this decision threatened the spirit

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<sup>130</sup> Alfred Dennis Mathewson, *By Education or Commerce: The Legal Basis for the Federal Regulation of the Economic Structure of Intercollegiate Athletics*, 76 UMKC L. REV. 597, 609–11 (2008).

<sup>131</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

<sup>132</sup> *Id.* at 120, 120–21.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 135–36.

of amateurism causing universities and students to pursue incentives in college athletics that were outside of the educational priority of seeking a degree.<sup>135</sup>

The NCAA itself contributes to the funneling of money towards specific sports such as football to the detriment of other men's sports under the proportionality test. For example, the 2018-2019 Division I Manual mandates Football Bowl Subdivision ("FBS") schools to allocate "an average of at least 90 percent of the permissible maximum number of overall football grants in-aid per year during a rolling two-year period; and . . . [a]nnually offer a minimum of 200 athletics grants-in-aids or expend at least \$4 million on grants-in-aid to student-athletes in athletics programs."<sup>136</sup>

The *NCAA v. Board of Regents* case, when combined with the NCAA bylaws and the well-established precedent supporting Title IX's proportionality, have resulted in unfair discriminatory practices through the pursuit of revenue producing football programs.<sup>137</sup>

There is, at a minimum, a correlation with the pursuit of perceptively large revenue sports such as football, to the detriment of other men's sports that are perceived to be non-revenue.<sup>138</sup> Because of commercialization and the proportionality test, opportunities have been taken away from male athletes against the spirit of Title IX merely for the sake of attempted compliance.

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<sup>135</sup> *Id.*

<sup>136</sup> NCAA, *2018-2019 NCAA Division I Manual art. 20.9.9-20.9.9.4* at 375–77.

<sup>137</sup> Kerensa E. Barr, *How the "Boys of Fall" Are Failing Title IX*, 82 UMKC L. REV. 181, 204 (2013).

<sup>138</sup> Lopiano, *supra* note 106, at 260–61.

Some men's sports have been negatively impacted more than others. "Men's gymnastics, for example, has seen the number of its NCAA programs plummet in the past 40 years. There were 124 men's gymnastics programs in 1975. When Temple's program [was] cut in July [2014], there w[ere] 17 [left]."<sup>139</sup> Additionally, most schools that pursue a large revenue producing football program, are chasing an unachievable dream.<sup>140</sup> "Only 24 [Football Bowl Subdivision] schools generated more revenue than they spent in 2014, according to the NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report."<sup>141</sup>

A recent occurrence demonstrating the trend of the football dream at the expense of other men's sports occurred with Temple University.<sup>142</sup> The university cited several reasons for the elimination of several athletic programs in 2014 including budgetary problems, Title IX compliance, and inadequate facilities, to name a few.<sup>143</sup>

Despite the fact that some non-football teams did receive facility upgrades, the reasoning provided by Temple University seems disingenuous when one takes a closer look. This is because

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<sup>139</sup> Joe Kearns, *My View: Decline in gymnastics signals the death of amateurism*, Daily Collegian, Feb. 25, 2014, | Penn State Division I Sports | Daily Collegian | collegian.psu.edu, [https://www.collegian.psu.edu/sports/division\\_one\\_sports/article\\_bdae3fec-9ea2-11e3-a9ab-001a4bcf6878.html](https://www.collegian.psu.edu/sports/division_one_sports/article_bdae3fec-9ea2-11e3-a9ab-001a4bcf6878.html) (last visited Jul 26, 2019).

<sup>140</sup> Brian Burnsed, *Athletics Departments that Make More than They Spend Still a Minority*, NCAA (Sep. 18, 2015), <http://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority>. See also Donna A. Lopiano, Ph.D., *Fixing Enforcement and Due Process Will Not Fix What Is Wrong with the NCAA*, 20 ROGER WILLIAMS U. L. REV. 250, 254–55 (2015).

<sup>141</sup> *Id.*

<sup>142</sup> Allie Grasgreen, *Weighing Value in Sports*, INSIDE HIGHER ED, Jan. 6, 2014, <https://www.insidehighered.com/news/2014/01/06/temple-cuts-highlight-cost-big-time-football>.

<sup>143</sup> Jeff Blumenthal, *Experts: Temple cut sports because football not producing enough revenue*, Dec. 10, 2013, PHILADELPHIA BUS. J., <https://www.bizjournals.com/philadelphia/news/2013/12/10/experts-temple-cut-sports-because.html>.

of the fact that the school was exploring the construction of a new football stadium that same year.<sup>144</sup> The athletic department at the time had a budget of \$44 million and the cuts were estimated to save \$3 million.<sup>145</sup> More disturbing was the fact that each game of Temple football costs \$265,000 at the Philadelphia Eagles Stadium.<sup>146</sup> The men's gymnastics team at Temple had a budget of roughly \$280,000 in 2014, of which \$58,933 was raised through donations.<sup>147</sup> This means one game of Temple football costs more than the 2014 budget, before adding donations, for the former Temple University Men's Gymnastics Team.

Therefore, there are cases where the commercialization of college sports has caused low revenue sports such as gymnastics to be eliminated due to Title IX's proportionality requirements with the allocations of facilities, budgets, and scholarships.

## **VII. WHAT IS THE CONSEQUENCE OF NOT ADDRESSING THE BINARY EXECUTION OF THE PROPORTIONALITY STANDARD?**

There are identified flaws with Title IX's previous and modern implementation under the proportionality standard. However, there are evolving and problematic issues with Title IX's application to the transgender population as well. Transgender athletes comprise a developing challenge for Title IX because it is unclear how to account for their participation utilizing the

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<sup>144</sup> Andrew Parent, Following cuts, teams receive new facilities, TEMPLE NEWS, Oct. 14, 2014, <http://temple-news.com/sports/following-cuts-teams-receive-new-facilities/>.

<sup>145</sup> Barry Petchesky, *How Temple Football Pulled Everything Down With It*, DEADSPIN (Dec. 6, 2013), <http://deadspin.com/how-temple-football-pulled-everything-down-with-it-1478147064>.

<sup>146</sup> *Id.*

<sup>147</sup> See correspondence titled "counter-arguments-final edit.docx in E-mail from Fred Turoff, Head Coach, Temple University Men's Gymnastics Team, to author (Jan. 29, 2014, 11:31 AM EST) (on file with author).



binary requirements of the proportionality test. These challenges are analogous to recent events surrounding transgender military service.

The former Secretary of Defense, James Mattis, defined the term “transgender” as “those persons whose gender identity differs from their biological sex.”<sup>148</sup> Transgenderism has been a frequent topic of discussion in the media over the past several years. Topics have ranged from issues associated with transgender bathroom usage<sup>149</sup> to transgender service in the military.<sup>150</sup> Regardless of where one stands on the debates associated with transgenderism, the issues of classifying a person by sex or gender are often more complicated than the media or public perceive them to be.<sup>151</sup> “[The transgender population] experience[s] a persistent and authentic difference between their birth sex and their understanding of their own gender.”<sup>152</sup> Because of this dissonance, “some transgender individuals choose to undergo hormone therapy or have sexual reassignment surgery as part of their transition.”<sup>153</sup>

#### **A. Continued Struggle of the Transgender Rights Movement in the Modern Era**

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<sup>148</sup> James Mattis, Military Service by Transgender Individuals, Memorandum for the President, February 22, 2018.

<sup>149</sup> Lauren Camera, *Supreme Court Will Not Hear Challenge to School Transgender Bathroom Policy*, US NEWS & WORLD REPORT (May 28, 2019), <https://www.usnews.com/news/education-news/articles/2019-05-28/supreme-court-will-not-hear-challenge-to-school-transgender-bathroom-policy>.

<sup>150</sup> House Votes to Block Funding for Trump’s Transgender Military Ban, CNNPOLITICS, <https://www.cnn.com/2019/06/19/politics/house-blocks-funding-trump-transgender-military-ban/index.html> (last visited Jul 26, 2019).

<sup>151</sup> James McGrath, *Are You a Boy or a Girl - Show Me Your REAL ID*, 9 NEV. L.J. 368, 369 (2009).

<sup>152</sup> Chelsea Shrader, *Uniform Rules: Addressing the Disparate Rules That Deny Student-Athletes the Opportunity to Participate in Sports According to Gender Identity*, 51 U. RICH. L. REV. 637, 640 (2017).

<sup>153</sup> *Id.*

For example, the Department of Defense (“DOD”) did an exhaustive study on transgender personnel openly serving in the military and the challenges associated with their service.<sup>154</sup> The DOD found that much of the current debate surrounding transgenderism needed more study before it could recommend a more inclusive policy to allow transgender individuals to serve beyond the limited criteria it recommended.<sup>155</sup> The DOD noted the fact that much of its own policies, procedures, and structure, was built around a binary viewpoint on gender.<sup>156</sup> Some examples of this binary structure are the requirements for uniforms, grooming standards, physical fitness, living quarters, and medical care.<sup>157</sup> Thus, the DOD believed it did not possess an adequate qualitative framework to support transgender troops outside a limited field of circumstances.

Much of the current transgender struggle is the result of a largely misinformed public.<sup>158</sup> For example, the evaluation of one’s sex in the modern era has largely been conducted at birth by the appearance of one’s genitalia.<sup>159</sup> Parental decisions to surgically remove or adjust the genitalia while the child is an infant has sometimes gone against the future adult’s wishes.<sup>160</sup> Thus, the

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<sup>154</sup> DOD, Report and Recommendations on Military Service by Transgender Persons (Feb. 2018).

<sup>155</sup> *Id.* at 44.

<sup>156</sup> *Id.* at 28-30.

<sup>157</sup> *Id.* at 2, 28-30.

<sup>158</sup> McGrath, *supra* note 151, at 368-69.

<sup>159</sup> *Id.* at 369 (citing Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999)).

<sup>160</sup> Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 60–62 (2006) (citing Am. Acad. of Pediatrics, *Evaluation of the Newborn with Developmental Anomalies of the External Genitalia*, 106 PEDIATRICS 138, 141 (2000)).

individual undergoing these procedures may encounter gender identity issues that are legitimate and based on unique medical and biological circumstances not accounted for under the Title IX proportionality prong of compliance.

The OCR issued two letters commenting how transgender people should be treated with respect to the use of “sex-segregated” facilities, single sex athletic teams, and other Title IX issues unrelated to athletics.<sup>161</sup> The first letter was published in 2016, as a response to increased inquiries from educational institutions throughout the country.<sup>162</sup> The 2016 letter expressly states that transgender students' gender identities should determine which facilities they may utilize and implies that their gender identities should determine the athletic teams for which they are eligible.<sup>163</sup> The subsequent letter, published in 2017, was a response to the courts rejecting the 2016 letter, because they found it to be reaching beyond the current Title IX statutes and regulations.<sup>164</sup>

The most recent litigation around Title IX and transgender students does not appear to involve athletics as of yet. However, courts have commented on cases surrounding Title IX's

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<sup>161</sup> Catherine E. Lhamon, Assistant Sec’y for Civil Rights, & Vanita Gupta, Principal Deputy Assistant Attorney General for Civil Rights, U.S. Dep’t of Justice, Dear Colleague Letter on Transgender Students, 3-4 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [hereinafter 2016 Letter]; Sandra Battle, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., & T.E. Wheeler, Acting Assistant Attorney General for Civil Rights, U.S. Dep’t of Justice, Dear Colleague Letter, Office for Civ. Rights, Dep’t of Educ. 1-2 (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [hereinafter 2017 Letter].

<sup>162</sup> 2016 Letter, *supra* note 161, at 1.

<sup>163</sup> *Id.* at 1, 3-4.

<sup>164</sup> 2017 Letter, *supra* note 161, at 1-2.

requirements of facilities and transgender students before and after the “Dear Colleague” letters from 2016 and 2017, respectively.

For example, in *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*, the court found that “the University's policy of separating bathrooms and locker rooms on the basis of birth sex [was] permissible under Title IX and the United States Constitution.”<sup>165</sup>

By contrast, on remand after the revocation of the 2017 letter, the court in *Grimm v. Gloucester County School Board*, stated that a claim under Title IX can be “properly brought . . . ‘on the basis of sex’—that is, based on his transgender status.”<sup>166</sup> The court noted further that such a claim must demonstrate the specific connection between denying access to facilities based solely on one’s transgender status and subjecting them to discrimination under a “gender stereotyping theory[.]”<sup>167</sup>

The United States Supreme Court has not addressed transgender discrimination within the college setting under Title IX. However, it is likely that many of the issues pertaining to the usage of facilities by transgender students will be examined similarly to the usage of athletic facilities by transgender student athletes. Additionally, the legislature and the OCR do not have a clear mandate for how to treat Title IX claims of discrimination from transgender students in athletics or the traditional education setting.

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<sup>165</sup> *Johnston v. U. of Pittsburgh of Commw. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 678 (W.D. Pa. 2015).

<sup>166</sup> *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 747 (E.D. Va. 2018).

<sup>167</sup> *Id.* at 747–48.

There are relevant questions of fairness on where transgender athletes should participate in their athletic activities.<sup>168</sup> These questions have complicated answers that are largely tied to the biological circumstances of an individual whose gender identity is more complicated than the traditional binary notions of male and female.<sup>169</sup> It is important to understand the scrutiny that these circumstances require is not what Title IX's binary proportionality standard currently provides.

### **B. Lower Graduation Rates & Fewer Developmental Opportunities for Elite Athletics**

Data shows that male student-athletes between the years of 2007-2016 graduated at a rate of 80%,<sup>170</sup> while female student-athletes graduated at a rate of 89%.<sup>171</sup> The NCAA estimated in 2018 that student athletes as a whole graduate 2% more than the general student body.<sup>172</sup> When a law forces a school to decrease athletic opportunities for the sole purpose of arbitrary compliance, such a law is hurting the public by decreasing the student athlete factor that is correlated with successful graduation rates. Furthermore, there are many intangible qualities to physical activity that benefit "one's health, . . . [confidence], and social connectedness."<sup>173</sup> These qualities may be

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<sup>168</sup> B.A. Jones et al., *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 *SPORTS MED.* 701, 702 (2017).

<sup>169</sup> *Id.* at 702.

<sup>170</sup> Jozsa, *supra* note 110, at 91.

<sup>171</sup> *Id.* at 93.

<sup>172</sup> Michelle Brutlag Hosick, *College Athletes Graduate at Record High Rates*, NCAA(2018), <http://www.ncaa.org/about/resources/media-center/news/college-athletes-graduate-record-high-rates> (last visited Jul. 26, 2019).

<sup>173</sup> Agnes Elling & Kiki Collot d'Escury, *Transgender Athletes in Competitive Sport*, 54 (Eric Anderson & Ann Travers, 2017).

more challenging to develop for students if there are fewer opportunities to participate in college athletics.

An area of concern that may be overlooked is the reduction of an athletic pipeline for traditionally Olympic sports. The reduction in the number of men's college gymnastics programs has raised a concern about the future of the sport at the college level and beyond.<sup>174</sup> In 1997, the NCAA had to amend its own rules to allow for an NCAA championship of traditionally acknowledged Olympic sports such as men's gymnastics because the required number of teams at the time was forty and there were only twenty-eight men's gymnastics teams.<sup>175</sup> The intangible benefits associated with the continuation of traditionally perceived Olympic sports will likely decline if Title IX remains in its current state.

#### **WHAT IS THE PROPOSED SOLUTION?**

The proposed solution here is to move towards integration of team sports—where it is practical to do so—but to also remove the proportionality standard of compliance for Title IX that developed from the OCR policy letters.

Society has classified women's sports and men's sports in different leagues of competition largely based on a recognition of biological differences. However, such segregation, depending on the context, requires research to be conducted in order to assess if it is indeed warranted. For example, The United States Marine Corps ("USMC") recently conducted a study on the impact of

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<sup>174</sup> Ben Barnhart, *Bouncing Back: UMass Men's Gymnastics is Off and Running*, UMass magazine online, <https://www.umass.edu/umassmag/archives/2000/winter2000/sport.html>, (last visited Jul. 26, 2019).

<sup>175</sup> Kathy Scanlan, *NCAA/USOC Actions Taken to Save Olympic Sports*, USA Gymnastics, March/April 1997, at 6.

allowing women to serve in combat units traditionally composed of men.<sup>176</sup> Such a study may serve as a starting point to evaluate the successful integration of sports with currently segregated leagues for men and women. Notably, the study found that the segregated male units performed more efficiently and effectively with simulated combat tasks than the integrated units.<sup>177</sup> Despite these results, the Marine Corps has moved forward with allowing women in combat occupation fields that were only available to men.<sup>178</sup> The USMC exists “to secure or protect national policy objectives by military force when peaceful means alone cannot.”<sup>179</sup> If a warfighting organization such as the USMC can integrate both sexes successfully, then our athletic institutions should be able to accomplish the same in the team oriented sports where it is practical to do so.

The OCR has gone to great lengths to inform universities around the country that the other two prongs can be used to demonstrate compliance, but the majority of schools use the proportionality prong out of convenience and predictability.<sup>180</sup> Despite this ongoing effort to encourage the application of the other prongs of compliance, the universities are not utilizing them. Because agencies are free to change their existing policies as long as they provide a reasonable

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<sup>176</sup> Eyder Peralta, *Marine Corps Study: All-Male Combat Units Performed Better Than Mixed Units*, NPR (Sept. 10, 2015, 12:00 PM), <https://www.npr.org/sections/thetwo-way/2015/09/10/439190586/marine-corps-study-finds-all-male-combat-units-faster-than-mixed-units>.

<sup>177</sup> *Id.*

<sup>178</sup> Shawn Snow, *Few Female Marines are Joining the Infantry, But That Was Expected, Top Marine Says*, Marine Corps Times (Oct. 11, 2018), <https://www.marinecorpstimes.com/new/your-marine-corps/2018/10/11/few-female-marines-are-joining-the-infantry-but-thats-expected-top-marine-says/>.

<sup>179</sup> U.S. Marine Corps, Marine Corps Operations, MCDP 1-0 at 71 (2001).

<sup>180</sup> Golden *supra* note 45, at 320-21.

explanation for the change,<sup>181</sup> the proposal here is to publish a new policy letter revoking the proportionality prong of the Three-Part test. Eliminating the proportionality prong will encourage and develop other methods of compliance based on local and qualitative factors, which may benefit local students.

The law should be hesitant to apply a hard binary standard of compliance on transgender athletes, because in present day society it is unclear how transgender athletes are evaluated using the proportionality prong. The Department of Education is currently budgeted for \$62 billion<sup>182</sup> in the 2020 budget proposed by President Trump, while the DOD is budgeted for \$718 billion.<sup>183</sup> If the DOD did not believe it had adequate resources or information to currently support transgender troops, then it is unlikely the Department of Education can solve the challenges associated with the proportionality standard's application to transgender athletes in college athletics.

Despite the fact that it would likely be unfair to place male and female weightlifters in the same competitive leagues in the pursuit of equality, the current path of arbitrarily forced equality does not appear to be the best answer either. Even if many of the currently segregated sports remain that way or become integrated, it is unclear where transgender athletes can partake in athletics fairly. These issues are not simple, and a mandatory solution attempting to simplify a complicated issue can create complexities that would have otherwise not existed.

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<sup>181</sup> *Encino Motorcars, LLC v. Navarro et al.*, 136 U.S. 2117, 2125 (2016).

<sup>182</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB, *A Budget for a Better America: Promises Kept. Taxpayers First* (2019).

<sup>183</sup> *Id.* at 23.



## CONCLUSION

It is apparent that there is at least a correlation between the decline of some men's college sports and the commercialization of college athletics due to the manner in which Title IX's proportionality prong has been applied. It is therefore recommended that the proportionality prong of Title IX compliance be revoked or repealed. The proportionality prong violates the spirit of the law when it leads to the elimination of educational athletic opportunities instead of creating them.

Statistics demonstrate that women now participate in college sports at a much higher rate than before Title IX's enactment.<sup>184</sup> As a society, we need to identify when and how to determine the success of female integration in higher education, specifically with college athletics.

Title IX's intent was to "provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work."<sup>185</sup> This does not indicate a specified end state or measure for ultimate success.

Therefore, despite the fact that the law has increased gender equality in college athletics for women, it is unclear how its success is defined in the long run. Congress may have intended Title IX's mission to be a continuous one that evaluates gender equality as long as possible because a specified end state has not been defined. However, society must ask how to measure the progress

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<sup>184</sup> Reinbrecht, *supra* note 84, at 250-51.

<sup>185</sup> *Neal v. Bd. of Trustees of California State Universities*, 198 F.3d 763, 766 (9th Cir. 1999) (Quoting the bill's sponsor—Senator Birch Bayh 118 Cong. Rec. 5808 (1972)).

of gender equality in light of the recent advances women are making throughout our civilization as well as how to encompass those within the transgender populace.

Future research or consideration for Title IX discussion should be geared towards a more deliberate analysis on where transgender student athletes fit within the Title IX spectrum due to their unique medical and biological circumstances. The law as it is currently written does not provide guidance for transgender athletes nor allow for their consideration without legislation from the bench. Legislatures and researchers need to address this issue. Additionally, the Title IX Athletics Investigator's Manual was omitted from this analysis for the purposes of brevity. Future scholarship should include an evaluation of the Title IX Athletics Investigator's Manual and its impact on the past and future case law.