TITLE IX AND ATHLETICS: FROM THEN TO NOW

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INTRODUCTION:

Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally funded education programs and activities. Long considered to be the bedrock of gender equity in athletics, the U.S. Department of Education Office for Civil Rights and the courts have taken seriously their respective roles in enforcing Title IX's athletic equity provisions.[2] Indeed, institutions of higher education have unequivocal statutory, regulatory, and other legal obligations to ensure that they operate intercollegiate, club, and intramural athletics free from sex discrimination.[3] This manuscript, a companion document to "Title IX and Sexual Misconduct: From Then to Now"[4], focuses exclusively on gender equity in athletics, laying out the statutory, regulatory, and sub-regulatory history of Title IX from 1972 to the present, and highlighting some of the pivotal court cases that have shaped Title IX athletic equity litigation. The manuscript is intended as a resource for attorneys who are new to the practice of higher education law.

DISCUSSION:

I. Title IX's History

On June 8, 1972, Congress enacted Title IX, which amended the Civil Rights Act of 1964 to prohibit sex discrimination in education programs and activities. But for certain exceptions, it generally provides:

> 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.[5]

Until Title IX became law, there existed no federal law prohibiting sex discrimination in education programs and activities, except those tied to federal contracts.[6] Title IX passed both chambers

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[2] *See* U.S. Dep't of Educ. Office for Civil Rights, "Annual Report to the Secretary, the President, and the Congress" (July 2020) (363 athletics equity complaints resolved or received in 2019); U.S. Dep.'t of Educ. Office for Civil Rights, "Annual Report to the Secretary, the President, and the Congress" at 17 (March 2020) (14,218 athletics equity complaints resolved or received in FY 2017-18); U.S. Dep.'t of Educ. Office for Civil Rights, Securing Equal Educational Opportunity: Report to the President and Secretary of Education at 24 (2016) (OCR received 6,251 Title IX athletics complaints in 2015).

[3] 20 U.S.C. §1681 *et seq.*; Federal Register, Vol. 40, No. 108, 24128-24144 (June 4, 1975) (implementing regulations).

[4] Holly Peterson, "Title IX and Sexual Misconduct: From Then to Now" (NACUA, November 4, 2022).

[5] 20 U.S.C. §1681 *et seq*.

[6] Eight years earlier, Congress had enacted Title VI, which prohibited discrimination in educational programs based on race, color, and national origin, but the statute was silent on sex discrimination.

of Congress, with votes of 275-125 (House) and 86-6 (Senate), and by the signature of President Nixon, took effect on June 23, 1972.

A. Regulations and Administrative Enforcement

1. 1975 Regulations Promulgated

On July 21, 1975, pursuant to the delegated authority in 20 U.S.C. §1682, the Department of Health, Education, and Welfare (HEW) promulgated regulations to implement Title IX. The regulations, which took effect after a notice and comment period that elicited over 9700 public comments[7], prohibited differential treatment based on sex in education programs or activities, including in athletics.[8] Specifically with respect to athletics, the regulations stated:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by recipient, and no recipient shall provide any such athletics separately on such basis.[9]

The regulations obligated recipient institutions to provide "equal athletic opportunity for members of both sexes" and in so doing, set forth 10 factors, which included:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities 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 services; [and]
(10) Publicity. [10]

The first factor related to the effective accommodation of the interests and abilities of both sexes would later be referred to colloquially as the "effective accommodation" factor. Factors 2-10 would later be referred to as "equal treatment and benefits" factors.[11]

Title IX, especially as it related to equal athletic opportunity, was a contentious topic for its day. The preamble to the regulations addressed a good bit of the opposition, foreclosing anticipated workarounds. For example, section 70 made clear that intercollegiate athletics was considered part of an institution's education program or activity, regardless of whether federal funds flowed directly to the athletics program.[12] Similarly, the preamble clearly and unequivocally stated that Title IX covered all

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[7] Federal Register, Vol. 40, No. 108, 24128-24144 (June 4, 1975). Preamble at §2.
[8] *Id.* §86.41.
[9] *Id.* §86.41(a).
[10] *Id.* §86.41(c).
[11] OCR added two additional areas of review in its 1979 Policy Interpretation, discussed in Part A.2 *infra.*
[12] Preamble at §70. *See also* Civil Rights Restoration Act of 1987, 20 U.S.C. §1687 (1988).

intercollegiate athletics, regardless of whether a particular sport generated revenue for the institution. [13] From time to time, these arguments seeking to reduce the scope of the law's reach with regard to intercollegiate athletics continue to be resurrected in public discourse, but they are long outdated and do not reflect sound legal arguments.

2. 1979 Policy Interpretation

On December 11, 1979, having received over 100 athletic equity complaints impacting 50 different higher education institutions, the U.S. Department of Health, Education, and Welfare published guidance in the Federal Register titled, "Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics" (hereinafter "1979 Policy Interpretation").[14] The Department had previously published a draft of the guidance, which elicited over 700 comments, each of which was responded to in an Appendix affixed to the 1979 Policy Interpretation. Broadly, the 1979 Policy Interpretation "provide[d] a framework within which the complaints [would] be resolved" and "provide[d] institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs."[15]

The 1979 Policy Interpretation was organized into 3 sections: Compliance in Financial Assistance (Scholarships) Based on Athletic Ability, Compliance in Other Program Areas, and Effective Accommodation of Student Interests and Abilities.

a. Compliance in Financial Assistance (Scholarships) Based on Athletic Ability

The first section focused exclusively on the regulatory requirement that financial assistance be awarded on a "substantially proportional basis to the number of male and female participants in an institution's athletic program."[16] The Department explained that it would calculate proportionality by "dividing the amounts of aid available for the members of each sex by the numbers of male and female participants[17] in the athletic program and comparing the results."[18] It further explained that legitimate, non-discriminatory measures of assistance (e.g., a greater amount of financial aid for a team at a public institution with more out-of-state students or reasonable professional decisions concerning team development) would not result in a finding of non-compliance.[19] It defined assistance broadly as grants, work-related aid or loans, and other assistance and distinguished between the dollar amount of assistance

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[13] Preamble §§73-74. On this point, the preamble addressed the Tower Amendment, a bill proposing to exempt revenue-generating sports from Title IX, consistent with a proposal submitted by the National Collegiate Athletic Association (NCAA). Memorializing the legislative history in the preamble, which showed that the Tower Amendment died in committee, the Department clearly and unambiguously concluded, "There is no basis under the statute for exempting [revenue-generating] sports or their revenues from coverage of title IX." *Id.* §74.

[14] Federal Register, 44 Fed. Reg. 74,418 (Dec. 11, 1979).

[15] *Id.* Part II.

[16] *Id.* Part VII.A.

[17] Importantly, as the guidance evolved over time, OCR made clear that the calculation is based on the number of men and women participating and not on participants. In other words, participation is counted according to spots filled even though multiple spots may be occupied by the same student (the duplicated count). To illustrate, if an institution provides athletic scholarships, "it must provide reasonable opportunities for such awards for members of each sex *in proportion* to the number of students of each sex participating in interscholastic sports.'" 34 C.F.R. § 106.37(c) (emphasis added). *See also* 44 Fed. Reg. 71413, 71415-23 (1979) (Policy Interpretation); U.S. Dep.'t of Educ., Dear Colleague Letter: Bowling Green State University (July 23, 1998).

[18] *Id.* at VII.A.2.

[19] *Id.*

awarded and the total amount of aid available, explaining that compliance would be evaluated solely with respect to the total amount of aid available.[20]

b. Compliance in Other Program Areas

The second section focused on compliance in other areas, corresponding with factors 2-10 in the regulations, such as equipment and supplies; games and practice times, travel and per diem, coaching and academic tutoring, assignment and compensation of coaches and tutors, locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services.[21] The guidance set forth additional factors to evaluate equal athletic opportunity in each of these areas.[22] The Department indicated that it would measure compliance "by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes" and making a determination as to whether the program components are "equal or equal in effect."[23] Like before with the evaluation of proportional financial assistance, differential treatment, benefits, or opportunities could be explained through legitimate, nondiscriminatory reasons, such as unusual aspects of specific sports, special circumstances of a temporary nature, voluntary affirmative action measures, or "unique demands or imbalances," such as elevated event management costs related to a specific sports team.[24]

c. Effective Accommodation of Student Interests and Abilities

The third section focused on effective accommodation of student interests and abilities (factor 1 in the regulations), which includes opportunities for intercollegiate competition and competitive team schedules.[25] Here, the guidance set forth three factors for evaluating compliance: (1) the determination of athletic interests and abilities of students; (2) the selection of sports offered[26], and (3) the levels of competition available including opportunity for team competition.[27]

Overall compliance under this section was evaluated based on 3 disjunctive factors ("the three-part test" or the "three-prong test"): "(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; *or* (2) where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; *or* (3) where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be

[20] *Id.*at VII.A.3.
[21] *Id.* at IV.
[22] *Id.* at VII.B.3.
[23] *Id.* Identical program components were not required, though any differences must be "negligible." *Id.*
[24] *Id.* at VII.B.2.
[25] *Id.* at Part VII.C.5.
[26] With regard to the selection of sports, the guidance differentiates between contact and non-contact sports, either requiring institutions to permit the excluded sex to try out for a sex-segregated team or sponsor a separate team for the previously excluded sex, unless the institution has determined that the excluded sex has demonstrated insufficient interest or ability to compete. *Id.* at Part VII.C.2.
[27] *Id.* at Part VII.C.2.

> demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program."[28] The three-part test would become the crux of dozens of enforcement actions and court cases over the course of the next few decades.
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> In addition, compliance was evaluated based on the quality of competition offered to members of both sexes. Specifically, OCR looked at: "(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or (2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex."[29]

With some refinements, the 1979 Policy Interpretation remains in effect today and is used to evaluate compliance both in administrative enforcement actions and in litigation.

3. 1996 Policy Clarification

On January 16, 1996, the U.S. Department of Education Office for Civil Rights issued a Dear Colleague to clarify the three-part test used to evaluate effective accommodation of student interests and abilities.[30] Though not subject to formal notice-and-comment rulemaking, OCR circulated the draft to 4500 interested parties and received 200 comments that informed the resulting clarification.[31]

Preliminarily and most notably, the guidance clarified that an institution would be deemed in compliance with the regulatory expectation that institutions effectively accommodate student interests and abilities if the institution demonstrates that it has met any part of the three-part test.[32] Thereafter, the guidance specified additional factors used by OCR to evaluate compliance under each part of the three-part test.

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments

Here, OCR's analysis begins by ascertaining the number of participation opportunities afforded to male and female athletes.[33] The guidance expressly defines "participants" and delimits a finite timeline during which OCR will evaluate who will be deemed a "participant" for compliance purposes. Specifically, the Policy Interpretation defined participants as athletes:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; 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

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[28] *Id.* at Part VII.C.5.a (emphasis added).
[29] *Id.* at Part VII.C.5.b.
[30] U.S. Dep.'t of Educ. Office for Civil Rights, "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (Jan. 16, 1996)("1996 Policy Clarification").
[31] Guidance Preamble at 1.
[32] Letter at 4. "[I]nstitutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sex." Preamble at 2.
[33] *Id.* at 5.

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.[34]

OCR instructed that "an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates."[35]

Next, OCR evaluates whether athletic opportunities are substantially proportionate, a determination that is made on a case-by-case basis, taking into account the unique circumstances of each institution, such as enrollment fluctuations or circumstances in which "the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team."[36] Because institutions can show compliance by meeting any part of the three-part test, recipients need not demonstrate substantial proportionality and instead can demonstrate compliance by satisfying either of the remaining parts of the three-part test.

(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 [the underrepresented] sex

Under Part 2 of the three-part test, OCR begins its analysis by evaluating the entire history of the athletic program, with a focus on "whether . . . program expansion was responsive to the developing interests and abilities of the underrepresented sex."[37] OCR lists various factors that it considers when evaluating compliance under this part, for example, an institution's record of adding or upgrading intercollegiate sports for the underrepresented sex.[38] Those efforts to expand opportunities, to the extent that they exist, must be continuing to demonstrate compliance under Part 2, and OCR again lists factors relevant to ascertaining whether a recipient institution has sufficiently continued its efforts.[39] Because compliance under this part is tied to efforts that are "demonstrably responsive to the developing interest and abilities of the members of the [underrepresented] sex," OCR also clarifies that recipient institutions can demonstrate compliance through periodic, nondiscriminatory assessments of interest and ability.[40] Here, OCR cautioned that where an institution eliminates a team for the underrepresented sex, even if the action is undertaken for legitimate reasons such as budgetary constraints, that action may impede an institution's ability to demonstrate "a history and continuing practice of program expansion."[41]

(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 [the

[34] *Id.* at 5 (quoting 44 Fed. Reg. at 71415).
[35] *Id.* at 5-6. Although this Policy Clarification is instructive on how to count participants, litigants, armed with expert witnesses, continue to argue about who counts, a perennial question that neither courts nor OCR regional offices have been able to resolve with instructive certainty. *See, e.g., Balow v. Mich. State Univ.,* 24 F.4th 1051 (6th Cir. 2022)(discussing whether spots slated for "novice" rowers amount to genuine participation opportunities).
[36] *Id.* at 6.
[37] *Id.* at 7.
[38] *Id.* at 7.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 7-8.

underrepresented] sex have been fully and effectively accommodated by the present program."

With respect to Part 3 of the three-part test, OCR clarified that institutions should evaluate effective accommodation of the interests and abilities of the underrepresented sex based on an analysis of the interests and abilities of enrolled students, not prospective students.[42] Importantly here, OCR explains that "underrepresentation alone is not the measure of discrimination" because there may be legitimate, nondiscriminatory reasons for the underrepresentation.[43] To that end, OCR explains that it will look to 3 additional factors to evaluated Part 3: (1) unmet interest in a particular sport, (2) sufficient ability to sustain a team in the sport, and (3) a reasonable expectation of competition for a team.[44] OCR expands on each of these considerations in the remainder of the guidance, signaling that a compliance review under this Part would likely require extensive interviews and access to evidence of other compliance indicators.

4. 1998 Dear Colleague Letter and Enforcement Action Against Bowling Green State University

On July 23, 1998, OCR issued a "Dear Colleague Letter" to the higher education community (a forwarded technical assistance letter to Bowling Green State University) on the regulatory requirement that athletic scholarships be awarded substantially proportionate to the participation rates of male and female student athletes.[45] In evaluating substantial proportionality, the Department defined "disparity" as "the difference between the aggregate amount of the money athletes of one sex received in one year, and the amount they would have received if their share of the entire annual budget for athletic scholarships had been awarded in proportion to their participation rates"[46] and instructed that as a first step in evaluating compliance, it would account for any legitimate, nondiscriminatory factors such as in-state and out-of-state tuition differentials at public institutions or other factors.[47] The Department further explained that compliance permitted "small variance[s] from exact proportionality" and in so doing, instructed that a variance of less than 1% would give rise to a "strong presumption" that the disparity is reasonable, whereas a disparity greater than 1% would give rise to a "strong presumption" that the recipient institution was not in compliance with Title IX.[48]

5. 2003 Policy Clarification

On July 11, 2003, the U.S. Department of Education Office for Civil Rights issued another clarification of the 3-part test through a "Dear Colleague" letter. Through this clarification, OCR re-emphasized that "each prong of the [three-part] test is a viable and separate means of [Title IX] compliance."[49] It also deemed team elimination to be a disfavored approach to Title IX compliance and instructed that it would "seek remedies that do not involve the elimination of teams."[50] Last, OCR

[42] *Id.* at 9.
[43] Preamble at 3.
[44] Letter at 9.
[45] U.S. Dep.'t of Educ., Dear Colleague Letter: Bowling Green State University (July 23, 1998).
[46] *Id.* at 3. By way of example using a hypothetical institution, it would be expected that male athletes would receive 60% of allocated aid if men accounted for 60% of the institution's student athletes. *Id.*
[47] *Id.*
[48] *Id.* at 4.
[49] 2003 Clarification at 2.
[50] *Id.* Later, courts uniformly would acknowledge that institutions do not have unlimited budgets and that team eliminations, in many instances, were the only way for a financially-strapped institution to achieve substantial proportionality. *See* Part I.B. *infra.*

expressed a commitment to rigorous enforcement balanced by technical assistance, clarified that private sponsorship of athletic teams was still permitted, and committed to ensuring consistency among the various enforcement regions.[51]

6. 2005 Policy Clarification and User's Guide (Rescinded)

On March 17, 2005, the U.S. Department of Education Office for Civil Rights published a guidance document titled, "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part 3" (hereinafter "2005 Policy Interpretation")[52], along with a companion document, "A User's Guide to Developing Student Interest Survey's Under Title IX" (hereinafter, "User's Guide")[53]. Because the Department withdrew the Policy Clarification in 2010, recipient institutions should not rely on the 2005 Policy Guidance.

7. 2008 Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance

On September 17, 2008, the U.S. Department of Education Office for Civil Rights issued a short Dear Colleague Letter on "Athletic Activities Counted for Title IX Compliance."[54] The guidance clarified which activities would be considered a "sport" subject to Title IX compliance by laying out a series of factors that would be considered on a case-by-case basis, including:

(a) "Whether practice opportunities are offered consistent with established varsity sports in the institution's athletics program"[55];
(b) "Whether the regular season competitive opportunities differ quantitatively and/or qualitatively from established varsity sports [and] whether the team competes against intercollegiate or interscholastic varsity opponents in a manner consistent with established varsity sports"[56];
(c) Whether pre- and post-season competition is offered consistent with established varsity sports[57]; and
(d) "Whether the primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels rather than to support or promote other athletic activities."[58]

For each consideration, the 2008 guidance offered additional factors that may be probative of Title IX compliance.[59]

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[51] *Id.* at 2-3.
[52] U.S. Dep.'t of Educ. Office for Civil Rights, "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part 3" (March 17, 2005)("2005 Policy Interpretation").
[53] U.S. Dep.'t of Educ. Office for Civil Rights, "A User's Guide to Developing Student Interest Survey's Under Title IX" (March 17, 2005)(User's Guide).
[54] U.S. Dep.'t of Educ. Office for Civil Rights, Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance (Sept. 17, 2008)(hereinafter 2008 Guidance).
[55] *Id.* at 2-3.
[56] *Id.* at 3.
[57] *Id.*
[58] *Id*.
[59] *See id.* at 2-3. See *Navarro v. Florida Inst. of Tech.*, No. 6:22-cv-1950 (M.D. Fla. Feb., 17, 2023), discussed in Part B.17 *infra* for a discussion of how the 2008 Dear Colleague Letter applies to esports.

8. 2010 Policy Clarification

On April 20, 2010, the U.S. Department of Education issued another "Dear Colleague" through which it withdrew the 2005 Policy Interpretation and the corresponding User's Guide and issued superseding guidance related to Part 3 of the three-part test.[60] Generally, the guidance restored compliance metrics based on multiple indicators, as opposed to administration of a single survey to gauge the interests and abilities of the underrepresented sex.[61] To that end, OCR again set forth a broad range of indicators implicating unmet interest and ability, including:

- Nondiscriminatory methods for assessment[62];
- Whether a viable team for the underrepresented sex had been eliminated;
- Multiple indicators of interest, including student requests for particular sports, requests for a club sport to be elevated to an intercollegiate sport; club and intramural participation, interviews with interested persons, the results of surveys or questionnaires tailored to gauge interest among students and admitted students, intercollegiate athletics participation, and participation rates in high school sports or other amateur or community leagues;[63]
- Multiple indicators of ability, including the athletic experience and accomplishments of underrepresented students, opinions of coaches and others with athletic expertise, and whether the competitive experience of a club or intramural team demonstrates potential for varsity competition;[64] and
- Frequency of conducting assessments, which again, is evaluated based on a fact-specific inquiry.[65]

The guidance further specified that while a survey may serve as one tool to gauge interest and ability, OCR has "not endorsed or sanctioned any particular survey"[66] (though, in this same guidance, OCR offered suggested content for survey design, targeted population, response rates, confidentiality protections, and frequency of administration)[67], will consider the survey as merely one part of an institution's compliance efforts under Part 3, and "will not accept an institution's reliance on a survey alone . . . to determine whether it is fully and effectively accommodating the interests and abilities of underrepresented students."[68]

OCR again set forth multiple indicators to assess whether there exists a sufficient number of interested and able student athletes from the underrepresented sex to sustain a team.[69] Indicators include the minimum number of athletes needed for a particular sport, input from athletic directors and coaches, and the size of a particular sport's team in the governing athletic association or conference.[70] Finally,

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[60] U.S. Dep.'t of Educ. Office for Civil Rights, "Dear Colleague Letter" (Apr. 20, 2010) (hereinafter 2010 Guidance).
[61] *Id.* at 2.
[62] *Id.* at 4. See additional examples of nondiscriminatory methods of assessment at 5.
[63] *Id.* at 6.
[64] *Id.* at 6-7.
[65] *Id.* at 7.
[66] *Id.* at 9.
[67] *Id.* at 9-12.
[68] *Id.* at 8.
[69] *Id.* at 12.
[70] *Id.* at 12.

OCR listed criteria for evaluating whether there existed a reasonable expectation of competition for a proposed team.[71]

9. OCR Enforcement Action, Rutgers University (2015)

In 2007, OCR initiated a compliance review to determine whether Rutgers, the State University of New Jersey, effectively accommodated the interests and abilities of male and female athletes in its intercollegiate athletic program and whether it provided equal treatment and benefits to male and female athletes in all aspects of its athletics program.[72] The resulting 50-page letter of findings details how to go about evaluating substantial proportionality with respect to interest and abilities and financial aid. The letter also illustrates the level of detail that OCR expects from colleges and universities in their efforts to evaluate equal treatment and benefits under Title IX.

First with respect to substantial proportionality, OCR calculated participation opportunities relative to enrollment and measured whether any statistical disparity translated into raw numbers showing that the University could have fielded an additional team for the underrepresented sex.[73] Translating this into actual numbers, OCR found a .7% statistical disparity in the 2011-12 school year, which meant that the University had space for 10 additional female athletes.[74] However, because the average team size at Rutgers was 24, an additional 10 athletes would not have been enough to field an additional team.[75] Thus, Rutgers was deemed to be in compliance for the 2011-12 school year. In addition to evaluating substantial proportionality, OCR evaluated whether Rutgers afforded equivalent levels of competition and issued summary findings that reflected OCR's then-determination that Rutgers was in compliance.

OCR also analyzed whether athletic financial assistance was awarded in a substantially proportional manner. Strictly applying the 1% test from the 1998 Bowling Green Letter, OCR found that Rutgers disproportionally awarded financial aid to male and female student athletes in the 2011—12 academic year (1.1% disparity), corrected that disparity the following year (.2% disparity), and again fell out of compliance in the 2013-14 year with a 1.2% disparity *favoring female athletes.*[76] Importantly, OCR noted consistently with existing guidance that Rutgers could rebut the presumption of a violation with evidence of legitimate, nondiscriminatory factors explaining the disparity (in this case, a stipulation that 9 male student athletes left the university mid-year during the 2013-14 academic year), and that they would consider this additional evidence upon full development of the record.

The findings also illustrate how OCR evaluates treatment and benefits under factors 2-10 of the regulations. OCR conducted site-visits, reviewed documents, and interviewed players, coaches, and others to arrive at the following conclusions:

(a) Equipment and Supplies: With respect to equipment and supplies, OCR determined that there was insufficient evidence to establish a Title IX violation.[77] Although the women's tennis team had to provide their own racquets, and although women's teams had to launder their practice gear and uniforms more than men's teams, women were able to store their

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[71] *Id.*
[72] Letter from Timothy C.J. Blanchard, U.S. Dep.'t of Educ. Office for Civil Rights to Robert Barchi, President, Rutgers re: Rutgers Athletics Compliance Review, Case No. 02-08-6001 (July 28, 2015).
[73] *Id.* at 5.
[74] *Id.*
[75] *Id.* at 5-6. *But see Balow v. Michigan State Univ.*, 24 F.4th 1051 (6th Cir. 2022)("average" team size is not correct measure of a viable team).
[76] Rutgers Letter at 8-9.
[77] *Id.* at 13.

equipment and supplies in more favorable spaces than men's teams, thus offsetting any disparity and resulting in a determination of compliance.[78]

(b) Scheduling of Games and Practice Times: With respect to the scheduling of games and practice times, OCR determined that there was insufficient evidence to establish a Title IX violation.[79] Here, OCR looked at the number of practice opportunities, opportunities for post-season competition, pre-season competition, the length of practices, and the quantity and quality of the practice and competitive opportunities for male and female students.[80] Though it found a "significant disparity" favoring men with regard to the number of competitive events and length of practices (e.g., "men's teams could have played 14 more competitive events if they played the maximum allowed, while women's teams could have played 44 more competitive contests"[81]), it nonetheless found that the advantages afforded to women's teams insofar as they had more opportunities to compete during prime time offset any advantages afforded to male athletes within this component.[82]

(c) Travel and Per Diem Allowance: OCR found that there were sufficient disparities in travel and per diem allowances to support a Title IX violation but in so doing, also illustrated how legitimate, nondiscriminatory favors can excuse certain gendered disparities.[83] At the time that OCR initiated the compliance review, the football team was the only team to travel via chartered jet.[84] While this practice reflected disparate treatment, it was excused for legitimate, nondiscriminatory reasons, namely, that the football team was too large to travel on commercial jets.[85] While OCR found dining arrangements to be equivalent and found that female athletes were slightly advantaged with respect to the number of athletes assigned to each hotel room, it nonetheless issued a finding of noncompliance based on significant and unexplained disparities with respect to the amount of travel funds expended by men's teams.[86]

(d) Academic Tutoring and Assignment and Compensation of Tutors: With respect to academic tutoring, OCR determined that there was insufficient evidence to establish a Title IX violation.[87] Though OCR noted that male student athletes benefitted disparately from their access to more qualified tutors, it found that the disparity was explained by the legitimate academic needs of the students, as opposed to impermissible sex discrimination.[88] This finding was bolstered by interviews with female student athletes, who did not report concerns about the quality of academic tutoring provided.[89]

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[78] *Id.* at 12-13.
[79] *Id.* at 17.
[80] *Id.*
[81] *Id.* at 14.
[82] *Id.* at 17.
[83] *Id.* at 21.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 24.
[88] *Id.*
[89] *Id.*

(e) Coaching and Assignment and Compensation of Coaching: With respect to coaching, OCR determined that there was insufficient evidence to establish a Title IX violation.[90] Finding slight favor for women with respect to head coaches and slight favor for men with respect to assistant coaches, OCR concluded that these advantages offset one another.[91] In a partially-redacted portion of the letter of findings, though OCR found a significant disparity in the allocation of coaching funds for the 2011-12 academic year (just 35.5% of the coaching funds were allocated to women's teams despite women comprising 47.8% of student athletes[92]), the disparities could be explained by non-sex-based, permissible factors such as the range and nature of coaching duties, coaching experience, the size of the team, supervisory responsibilities, and levels of competition.[93] Taking these legitimate factors into consideration, OCR found no violation.

(f) Locker Rooms, Practice, and Competitive Facilities: With respect to locker room, practice, and competitive facilities, OCR issued a finding of non-compliance based on unjustified disparities favoring male athletes in the availability and exclusivity of locker rooms, the preparation and maintenance of practice and competitive facilities.[94] Findings regarding the exclusive use of practice and competitive facilities (favoring male student athletes) were offset by disparities regarding numbers of lockers (female student athletes).[95]

(g) Medical and Training Facilities and Services: With respect to medical and training facilities, OCR determined that there was insufficient evidence to establish a Title IX violation.[96] Though OCR found that male student athletes more readily had access to medical personnel and trainers, that disparity was explained by objective criteria related to high-risk sports with greater injuries, and this explanation was deemed to be a legitimate, non-discriminatory explanation for the differential treatment.[97] Any disparities with respect to training, weight, and conditioning facilities offset.[98]

(h) Housing and Dining Facilities and Services: With respect to housing and dining facilities, OCR determined that there was insufficient evidence to establish a Title IX violation.[99] Although the football team received catered meals prior to home games, OCR determined that this disparity was justified by legitimate, non-discriminatory factors, including the size of the team.[100]

(i) Publicity: With respect to publicity, OCR issued a finding of non-compliance based on unjustified disparities favoring the promotion of men's athletics.[101] This finding was based

[90] *Id.* at 27.
[91] *Id.*
[92] *Id.* at 26.
[93] *Id.* at 27.
[94] *Id.* at 32.
[95] *Id.*
[96] *Id.* at 37.
[97] *Id.* Recent courts have taken a more aggressive stance, more carefully scrutinizing access to medical services both under Title IX and negligence theories.
[98] *Id.*
[99] *Id.* at 41.
[100] *Id.*
[101] *Id.* at 44.

on observations that the sports information personnel who managed team publicity for women's sports had far fewer years of experience (4) than those assigned to men's teams (8); disparate national television coverage or coverage on other television shows, broadcasts, radio shows, or web streams; and the quantity and quality of printed publications.[102]

(j) Provision of Support Services: With respect to the provision of support services, OCR issued a finding of non-compliance based on a single finding that an assistant coach of a women's team was not afforded a cubical and that men's teams were afforded more office space and better amenities.[103] That men's teams received greater secretarial and clerical assistance was explained by the size of the football team, not an impermissible factor.[104]

(k) Recruitment of Student Athletes: With respect to recruitment, OCR determined that there was insufficient evidence to establish a Title IX violation.[105] While OCR found a slight disparity favoring men with respect to financial resources available for recruitment, and a slight disparity in favor of women with respect to official campus visits, other aspects of the investigation yielded a conclusion that treatment and benefits related to recruitment were substantially equal.[106]

The Rutgers Letter of Findings illustrates OCR's strict, comprehensive, and detail-oriented approach to Title IX enforcement in the athletics equity space. However, as is true with all resolution agreements, the findings and ultimate resolution are institution-specific, especially here where courts and OCR regional offices have applied different standards to some of the very issues resolved in the Rutgers Agreement.[107]

10. OCR Resource on Title IX and Athletic Opportunities in Colleges & Universities (Feb. 2023)

In February of 2023, the U.S. Department of Education Office for Civil Rights published a Resource for Students, Coaches, Athletic Directors, and School Communities on Title IX and Athletic Opportunities in Colleges and Universities.[108] This resource closely tracks the Department's previous guidance and provides worksheets to help compliance officers and counsel measure school enrollment, the percentage of male and female participants in an athletic program, and the percentage of scholarship aid awarded to male and female student athletes, among other things.[109]

11. 2023 NPRM on Transgender Athlete Participation in Sports (April 13, 2023)

On April 6, 2023, the U.S. Department of Education Office for Civil Rights published a notice of proposed rulemaking in the Federal Register titled, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male

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[102] *Id.* at 42-43.
[103] *Id.* at 46.
[104] *Id.*
[105] *Id.* at 48.
[106] *Id.*
[107] *See, e.g., Balow v. Michigan State Univ.,* 24 F.4th 1051 (6th Cir. 2022)(finding error in district court's analysis that relied on average team size to determine whether another team for the underrepresented sex could be supported).
[108] U.S. Dep.'t of Educ, Office for Civil Rights, Title IX and Athletic Opportunities in Colleges and Universities: A Resource for Students, Coaches, Athletic Directors, and School Communities (Feb. 2023).
[109] *See id.* at 7, 9, and 10.

and Female Athletic Teams.[110] The proposed rule would amend §106.41 of the Title IX regulations to state,

> If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.[111]

This rule would preempt any conflicting and irreconcilable provisions in state laws that prohibit trans-athlete participation on athletic teams. The Department received over 150,000 comments during the notice and comment period and announced via a blog[112] that they anticipate publishing a final rule in October 2023.

12. Other Enduring Title IX Compliance Issues

OCR rigorously enforces Title IX gender equity provisions. A March 2020 report from OCR to the Secretary, President, and Congress revealed that the office received 3596 athletics equity complaints and resolved 10,622 complaints in fiscal year 2017-18.[113] The volume of complaints is particularly striking when considered in the context of the national dialogue related to Title IX over the last 12 years, which has been entirely consumed by sexual harassment and sexual violence. Notably, statistics from the same fiscal year reveal that OCR received and resolved far fewer complaints related to sexual violence/harassment (1745 complaints received and 1822 complaints resolved) than athletics equity complaints.[114]

Importantly though, despite OCR's robust enforcement, gender equity and transgender athlete participation in athletics are not the only areas of Title IX compliance that impact athletics operations. Certainly, colleges and universities have the same legal obligations to address and remedy sexual misconduct in athletics as they do in other areas of college and university life.[115] Unique issues present in Title IX investigations involving athletics. For example, in addition to complying with the 2020 Regulations, the NCAA Board of Governors Policy on Sexual Violence adds additional transparency obligations related to the recruitment of student athletes.[116]

Also, in light of the U.S. Supreme Court's 2021 decision in *National Collegiate Athletic Association v. Alston*[117], which allows student athletes to profit off of their name, image, and likeness (NIL), institutions should be mindful of how various benefits conferred through NIL policies and practices may implicate Title IX's gender equity in athletics provisions. This could be an emerging area

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[110] U.S. Dep.'t of Educ., "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams" (April 13, 2023).
[111] *Id.*
[112] U.S. Dep.'t of Educ., "A Timing Update on Title IX Rulemaking" (blogpost, May 26, 2023).
[113] U.S. Dep.'t of Educ. Office for Civil Rights, "Annual Report to the Secretary, the President, and the Congress" at 17 (March 2020) (14,218 athletics equity complaints resolved or received in FY 2017-18). *See* statistics from other fiscal years *supra* n.2.
[114] *Id.*
[115] *Cf.* 34 C.F.R. §§ 106.31 *et seq*.
[116] Nat'l Collegiate Athletic Ass'n, Board of Governors Policy on Sexual Violence (Revised April 27, 2021).
[117] 594 U.S. ____ (2021).

ripe for Title IX enforcement. Colleges and university counsel should closely monitor the evolution of Title IX compliance in the athletics context.

B. Gender Equity Litigation

This section of the manuscript focuses on Title IX gender equity litigation. All courts have afforded *Chevron* deference to the 1975 regulations and accompanying subregulatory guidance, including the Department of Education's 1979 Policy interpretation. [118] Accordingly, unlike in the Title IX sexual misconduct context, where material distinctions have differentiated administrative enforcement standards and private rights of action over the years,[119] in the athletic equity space, the two standards have been applied consistently. Of the cases litigated, most concern the 3-part test, which with limited exceptions[120], has been applied consistently over the years. A handful of other cases noted below explore other aspects of Title IX compliance, such as equal opportunities under one of the other 10 regulatory factors.

1. Cannon v. Univ. of Chicago (U.S. 1979)

In 1979, the U.S. Supreme Court issued an opinion in *Cannon v. University of Chicago*[121], wherein it held that Title IX is enforceable through a judicially implied private right of action.

2. Grove City v. Bell (U.S. 1984) and the Civil Rights Restoration Act of 1987

Grove City v. Bell[122], and the Civil Rights Restoration Act of 1987[123] which overturned it, address the scope of Title IX's coverage. In *Grove City*, Grove City College endeavored to avoid Title IX coverage by declining to participate in direct institutional aid and federal student assistance programs. However, GCC accepted Basic Education Opportunity Grants (BEOGs) disbursed by the U.S. Department of Education through its alternative aid program.[124] When GCC refused to certify Title IX compliance, the Department terminated its aid.[125] GCC filed a lawsuit, arguing that the Department exceeded its authority because no federal funds flowed directly to any GCC education program or activity.[126] Though the Court held that the receipt of BEOGs triggered Title IX coverage, the court tethered that coverage only to the institution's student financial aid program, and not to the institution as a whole.[127]

Grove City only remained intact for 3 years. In 1987, Congress passed the Civil Rights Restoration Act over a presidential veto. The Act clarified that receipt of federal funds subjected institutions to Title IX coverage on an institution-wide basis.[128] While the law itself did not focus on

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[118] *See, e.g., Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046-47 (8th Cir. 2002); *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 271 (7th Cir. 1994); *Cohen v. Brown Univ.*, 991 F.2d 888, 896-97 (1st Cir. 1993).
[119] *Compare, e.g.,* 2014 Guidance (deeming institutions to be on notice if a responsible employee knew or should have known of prohibited conduct) *with Davis v. Montgomery County Board of Education*, 526 U.S. 629 (1998) (adopting actual knowledge as a heightened standard for private rights of action).
[120] *See, e.g., Berndsen v. North Dakota Univ. System*, 7 F.4th 782 (8th Cir. 2021).
[121] 441 U.S. 677 (1979).
[122] 405. U.S. 555 (U.S. 1984), *ovtn'd by* Civil Restoration Act of 1987.
[123] Civil Rights Restoration Act of 1987, 20 U.S.C. §1687 (1988).
[124] 405 U.S. at 559.
[125] *Id.* t 561.
[126] *Id.* at 562.
[127] *Id.* at 573-74.
[128] Civil Rights Restoration Act of 1987, 20 U.S.C. §1687 (1988).

athletics, the Congressional floor debate regarding Title IX's application to athletics aligns with the principles underlying the Civil Rights Restoration Act insofar as various representatives made clear Congress' intent that Title IX continue to bind institutions to commitments to equal athletic opportunity through the vehicle of institution-wide Title IX coverage tethered to federal funds.[129]

3. Cohen v. Brown University (1st Cir. 1993)

Cohen v. Brown University[130] is often considered to be the first Title IX gender equity case of consequence, though it is important to observe that the 1st Circuit decided this case on a motion for preliminary injunction, not on the merits. This case, which interprets the plain language of the 3-part test, began when Brown University cut its women's gymnastics and volleyball teams, as well as its men's golf and water polo teams, to remediate a budgetary shortfall.[131] At the time, 36.7% of Brown's athletic opportunities were afforded to female athletes, though they comprised 48% of student enrollment.[132] After the program elimination, female student athletes retained only 36.6% of roster positions. Members of the women's gymnastics and volleyball teams sought a preliminary injunction, alleging that the program elimination amounted to a Title IX violation.[133] The court rejected Brown's defense that it was only required to accommodate female athletes by "allocate[ing] athletic opportunities to women in accordance with the ratio of interested and able women. . . regardless of the number of unserved women or the percentage of the student body they comprise."[134] Instead, the court adopted the plain meaning of the Department of Education's 1979 policy interpretation to hold that Brown must "fully accommodate" the interests and abilities of the underrepresented sex.[135] The court found this to be true even when a university otherwise satisfies the "financial assistance" and "athletic equivalence" standards.[136] Said differently, "an institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects."[137]

Cohen also clarified a then-unsettled question about the burden of proof in a Title IX athletics equity lawsuit. Defendants tried to argue that the Title VII paradigm should apply to Title IX athletics equity cases. The court disagreed, again invoking the 1979 Policy Interpretation to clarify, "a Title IX plaintiff makes out an athletic discrimination case by proving numerical disparity, coupled with unmet interest, each by a fair preponderance of the credible evidence, so long as the defendant does not rebut the plaintiff's showing by adducing preponderant history-and-practice evidence."[138]

Nearly 30 years later, the litigation continues, though the parties recently executed an Amended Settlement Agreement that expires by its terms on August 31, 2024.[139]

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[129] For a summary of the floor debate, see *Cohen v. Brown University,* 991 F.2d 888, 894 (1st Cir. 1993)(summarizing floor remarks from Senators Byrd, Hatch, and Riegle regarding Title IX's coverage of athletics).
[130] 991 F.2d 888 (1st Cir. 1993).
[131] *Id.* at 892.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 899.
[135] *Id.* at 899-900.
[136] *Id.* at 897.
[137] *Id.*
[138] *Id.* at 902.
[139] Cohen v. Brown Univ., 16 F.4th 935, 952 (1st Cir. 2021).

4. Williams v. School District of Bethlehem (3d Cir. 1993)

Williams v. School District of Bethlehem[140] examines whether a sport can be offered to a single sex without running afoul of the 1975 regulations. The Title IX regulations allow sex-segregated athletic teams, with one caveat: "[W]here a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport."[141] The regulations define "contact sport" as "boxing, wrestling, rugby, ice hockey, football, basketball *and other sports the purpose or major activity of which involves bodily contact.*"[142] In *Williams,* plaintiffs, the parents of a ninth grade boy, sought a permanent injunction to require the school district to allow their son to play competitively on the women's field hockey team. At trial, experts disputed whether field hockey was properly classified as a contact sport, and the district court ultimately found as a matter of law that field hockey was not a contact sport and in so doing, issued the injunction.[143] The Third Circuit reversed, finding that disputed material facts introduced by competing experts precluded summary judgment.[144] The court also remanded to the district court the question of whether boys had "previously limited" athletic opportunities.[145] Though the court properly scoped that question based on the full gamut of athletic offerings in the district, as opposed to looking at whether boys had "previously limited" opportunities to participate in field hockey,[146] it erred by holding that athletic opportunities for boys were limited insofar as they were only permitted to try-out for the boys' athletic teams, whereas girls' were permitted to try out for boys' and girls' teams.[147] There, the court reasoned, "'Athletic opportunities' means real opportunities, not illusory ones."[148] In making this finding, the court also acknowledged that a contrary analysis "would require blinders to ignore the motivation for promulgation of the regulation on athletics," that is, equal athletic participation opportunities for girls.[149]

5. Favia v. Indiana University of Pennsylvania (3d Cir. 1993)

Favia v. Indiana University[150] explored whether class certification and/or the graduation of the original named plaintiffs, together or separately, warranted modification of a preliminary injunction to allow the university to field a women's soccer team in lieu of reinstating the women's gymnastics team. Plaintiffs, female field hockey and gymnastics athletes at Indiana University of Pennsylvania (IUP), filed a Title IX lawsuit against IUP after it discontinued women's field hockey and gymnastics for financial reasons.[151] IUP was unable to demonstrate that it met any part of the 3-part test, prompting the trial court to issue a preliminary injunction requiring the University to reinstate women's gymnastics and field hockey. At the same time, the district court certified a class of "all present and future women students at I.U.P. who participate, seek to participate, or are deterred from participating in intercollegiate

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[140] 998 F.2d 168 (3d Cir. 1993).
[141] Title IX Regulations, 34 C.F.R. §106.41(b)(1975).
[142] *Id.* (emphasis added).
[143] *Williams*, 998 F.2d at 170.
[144] *Id.* at 173-74.
[145] *Id.* at 175.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] 7 F.3d 332 (3d Cir. 1993).
[151] *Id.* at 333, 335.

athletics."[152] Two months later, well beyond the 10-day period specified in the Federal Rules of Civil Procedure, IUP moved to modify the injunction.[153] Specifically, it asked the court to allow it to field a women's soccer team, instead of women's gymnastics, both for financial reasons and because a women's soccer team would bring the proportion of female athletes relative to their enrollment more in line with Title IX. The district court denied the motion, and IUP appealed. Although the Third Circuit was sympathetic to IUP's arguments that the proposed modification would provide increased opportunities for female student athletes and provide the University with funds that it could use to recruit additional student athletes[154], it nonetheless affirmed the district court's decision. Specifically, it held that despite the named plaintiffs' graduation, the district court "did not clearly abuse its discretion by seeking to preserve the athletic program that was at the center of the underlying litigation," since class plaintiffs might still desire to compete in women's gymnastics.[155] Also, though ample evidence demonstrated that the proposed modification would result in increased athletic opportunities for women, other evidence showed that the substitution would create a funding gap, potentially moving IUP further from Title IX compliance.[156] For those reasons, the court affirmed the district court's denial of defendants' request to modify the injunction.

Notably, the court distinguished *Cook v. Colgate University*[157] in its opinion. There, 5 members of the women's ice hockey club team sought to have the team recognized as a varsity sport. The district court granted a preliminary injunction, and Colgate appealed. While the litigation was pending, the plaintiffs graduated. Most importantly, no class was ever certified. On appeal, finding that no plaintiff would be able to benefit from the desired relief, the court vacated the injunction and deemed the case moot.[158]

6. Roberts v. Colorado State Board of Agriculture (10th Cir. 1993)

Roberts v. Colorado State Board of Agriculture[159] applied the 3-part test in the context of a program elimination. Plaintiffs, female softball players at Colorado State University, brought this Title IX action to challenge CSU's decision to eliminate women's fast-pitch softball as a varsity sport. Applying the 3-part test from the Department of Education's 1979 Policy Interpretation, the court concluded that (1) a 10.5% disparity in athletic opportunities for male and female athletes did not amount to substantial proportionality, (2) CSU had not shown a history of *continued* program expansion, despite introducing women's sports in the 1970s, and (3) CSU failed to show that it fully accommodated the interests and abilities of female student athletes.[160] Specific with respect to Prong 3, though the court faulted the district court for improperly assigning the burden of proof to the defendants,[161] the court nevertheless found that based on the evidence on record, plaintiffs sufficiently carried the burden of demonstrating by a preponderance of the evidence that CSU failed to fully accommodate their interests and abilities.[162] Notably, the court also concluded that a showing of intentional discrimination was not required, a point of

[152] *Id.* at 335-36.
[153] *Id.* at 336.
[154] *Id.* at 342.
[155] *Id.* at 342.
[156] *Id.* at 343.
[157] 992 F.2d 17 (2d Cir. 1993).
[158] *See also Graham v. State University of New York*, No. 21-1927 (Jan. 4, 2023) (fining that the court lacked jurisdiction over the student plaintiffs' Title IX claims because the named plaintiffs' NCAA eligibility had expired).
[159] 998 F.2d 824 (10th Cir. 1993).
[160] *Id.* at 829-32.
[161] *But see Balow v. Mich. State Univ.,* 24 F.4th 1051 (6th Cir. 2022)(assigning burden of proof to Michigan State).
[162] *Id.* at 831-32.

law that would be revisited a few years later by the Fifth Circuit in *Pederson v. Louisiana State University*, discussed below.[163]

7. Kelley v. University of Illinois (7th Cir. 1994)

In *Kelley v. University of Illinois*[164], the Seventh Circuit, in applying the 3-part test, concluded that athletic programs could come into compliance with Title IX under the substantial proportionality prong by eliminating a team for the overrepresented sex. The University of Illinois, facing a budgetary deficit and continued underrepresentation of female student athletes despite an OCR finding of non-compliance a decade earlier, cut four men's athletic teams, including the men's swimming team, in a cost-effective effort to come into compliance with Title IX. Notably, the University retained the women's swimming team, though it was not a revenue-generating sport. The members of the men's team filed suit, seeking an injunction to prohibit the University from cutting the team. The court held that "[t]he University's decision to retain the women's swimming program—even though budget constraints required that the men's program be terminated—was a reasonable response to the requirements of the applicable regulation and policy interpretation."[165] The court also dismissed plaintiffs' equal protection claims as a collateral attack on Title IX.[166]

8. Gonyo v. Drake University (S.D. Iowa 1995)

Gonyo v. Drake University[167] resolves an apparent conflict between the regulatory requirement that scholarships and grants-in-aid be awarded "to members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics"[168] and the regulatory requirement that institutions provide equal athletic opportunities to both sexes.[169] Faced with a budgetary crisis, Drake University reduced its athletic budget and eliminated the men's wrestling team.[170] At the time, 75% of school's participation opportunities were occupied by male student athletes, while men comprised only 42% of the undergraduate student body.[171] At the same time, while overrepresented with respect to participation equity under Title IX, the men contended that they had not been awarded their fair share of scholarship dollars, noting that more money had been awarded to Drake's female student-athletes. After stating that Drake had committed to honoring all of the plaintiffs' scholarship awards even after their participation opportunities were extinguished, the court noted that there was a serious question with regard to standing and that even where standing could be established, that on balance, the restoration of the program would have minimal impact on the scholarship disparity and would "undermine the underlying purpose of Title IX, which is to protect the class for whose benefit the statue was enacted." According to the court, "Drake [was] trying to remedy disparity in its athletic programs by encouraging greater athletic participation by women through scholarship offerings to them. It is women, not men, who have historically been and still are underrepresented in Drake's athletic program."[172] Though recognizing that scholarships are an important aspect of fashioning equal opportunities in athletics, the court

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[163] *Id.* at 832. *Compare Pederson v. Louisiana State Univ.,* 213 F.3d 858 (5th Cir. 2000)(showing of intentional discrimination required).
[164] 35 F.3d 265 (7th Cir. 1994).
[165] *Id.* at 270.
[166] *Id.* at 272.
[167] 879 F. Supp. 1000 (S.D. Iowa 1995).
[168] 34 C.F.R. §106.37.
[169] 34 C.F.R. §106.41.
[170] *Id.* at 1004.
[171] *Drake University*, 879 F.Supp. at 1004.
[172] 837 F.Supp at 996.

concluded that the remedial purpose of Title IX was best served by allowing the participation test to prevail over the scholarship test given the unique facts of this case and in so doing dismissed plaintiffs' claims.[173]

9. Neal v. Board of Trustees of California State University (9th Cir. 1999)

Like other circuits before it, the Ninth Circuit similarly found that an institution could demonstrate substantial proportionality under the 3-part test by "making gender conscious decisions to reduce the proportion of roster spots assigned to men."[174] In *Neal v. California State University-Bakersfield*, the Board of Trustees of CSU Bakersfield approved an across-the-board reduction in roster spots for male athletes, including a reduction in the number of roster slots assigned to the men's wrestling team.[175] The Board approved this course of action in an effort to come into compliance with a consent decree, mandating that CSU alter the proportions of male and female athletes consistent with the requirements of a state law that was modeled after Title IX.[176] The Board intentionally chose this course of action due to budgetary constraints and diminishing state funding for higher education institutions. Members of the men's wrestling team filed a lawsuit, seeking to enjoin defendants from reducing the size of the wrestling squad. Like the courts before it, the court validated the Board's chosen course, holding that "[i]f a university wishes to comply with Title IX by leveling down programs [of the overrepresented gender] instead of ratcheting them up, as [California State University] has done here, Title IX is not offended."[177]

10. Pederson v. Louisiana State University (5th Cir. 2000)

Pederson v. Louisiana State University[178] examines Title IX compliance by applying 3-part test and an intentional discrimination analysis. This case began when LSU denied a request to add women's fast pitch softball as a varsity sport. At the time, 71% of student athletes were male, though only 51% of enrolled students were male. With these demographics, the University could not demonstrate substantial proportionality (part 1), and there was no evidence on record demonstrating a history of program expansion (part 2) or that LSU had undertaken meaningful efforts to assess the interests and abilities of the underrepresented sex (part 3). Notably, observing that "Title IX claimants must additionally prove intentional discrimination,"[179] the court analyzed whether the district court erred in absolving LSU of liability despite a finding of "arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics." Reversing the district court, the Fifth Circuit concluded that the "archaic assumption" harbored by various LSU athletic administrators about women in sports decidedly demonstrated an intent to discriminate, and that LSU did not offer a legitimate, nondiscriminatory reason for its outdated behavior.[180]

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[173] *Id.* at 1006.
[174] 198 F.3d 763, 765 (9th Cir. 1999).
[175] *Id.* at 765.
[176] *Id.* at 765. The State law differed from Title IX insofar as it allowed a variance of 5% when assessing substantial proportionality. *Id.*
[177] *Id.* at 770.
[178] 213 F.3d 858 (5th Cir. 2000).
[179] *Id.*
[180] *Id.* In addition to archaic assumptions, the Dean also referred to women as "honey", "sweetie", and "cutie", opined that soccer was a more "feminine sport" and that female athletes "would look cute running around in their soccer shorts", and that he would voluntarily add more women's sports only if forced to.

11. Chalenor v. University of North Dakota (8th Cir. 2002)

In *Chalenor v. University of North Dakota*[181], like so many cases before it, the University of North Dakota, facing serious budgetary constraints propelled by tuition shortfalls and a Governor's order to reduce institutional budgets, cut the men's wrestling team to come into compliance with Title IX, with one notable distinction from previous cases: a private donor volunteered to fund the men's wrestling team.[182] Applying the 3-part test, the Eighth Circuit agreed with its sister circuits that a university can come into compliance with the substantial proportionality part of the test by decreasing athletic opportunities for the overrepresented sex.[183] That the men's wrestling team was privately funded was of no consequence because a public university cannot avoid federal compliance obligations by accepting private donations since they would still be obligated provide any benefits, including those funded though the use of outside donations, equitably as required under Title IX.[184]

12. Miami University Wrestling Club v. Miami University (6th Cir. 2002)

In *Miami University Wrestling Club v. Miami University*[185], in recognition that colleges and universities do not have unlimited budgets, the Sixth Circuit adopted the holdings of its sister circuits to hold that universities can comply with the substantial proportionality prong of the 3-part test by eliminating teams of the overrepresented sex. In 1998, facing serious budgetary constraints and a contemporaneous Title IX audit evidencing a disparity among male and female athletes relative to their proportion in the overall enrollment, Miami University decided to cut the men's wrestling, tennis, and soccer teams, prompting male student athletes to file a Title IX complaint. In a short decision, the 6th Circuit affirmed dismissal of plaintiffs' Title IX claims, finding that they never alleged that Miami University failed to provide equal athletic opportunities based on gender; to the contrary, it was undisputed that Miami eliminated the men's teams in a fiscally-restrained effort to come into compliance with Title IX.[186] Like the *Kelley* court, the court also dismissed plaintiffs' equal protection claims as a collateral attack on Title IX.[187]

13. McCormick v. School District of Mamaroneck (2d Cir. 2004)

McCormick v. School District of Mamaroneck[188] explored whether noncompliance with a single program component—in this case, the ability to compete for a championship (regulatory treatment and benefit factor 2 related to the "[s]cheduling of games and practice time")—could give rise to at Title IX violation. Plaintiffs, suing on behalf of their minor children who were female high school soccer players, sought declaratory and injunctive relief to compel the school district to offer girls soccer in the Fall, when student athletes had an opportunity to compete in regional and state championships and otherwise reserve Spring for club soccer and Olympic development opportunities. The Second Circuit first looked at whether a "disparity" existed, defining "disparity" as "a difference, on the basis of sex, in benefits, treatment, services, or opportunities that has a negative impact on athletes of one sex when compared with benefits, treatment, services, or opportunities available to athletes of the other sex."[189] Applying this

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[181] 291 F.3d 1042 (8th Cir. 2002).
[182] *Id.* at 1043.
[183] *Id.* at 1048.
[184] *Id.*
[185] 302 F.3d 608 (6th Cir. 2002).
[186] *Id.* at 615.
[187] *Id.* at 614.
[188] 370 F.3d 275 (2d Cir. 2004).
[189] *Id.* at 293.

definition, the court found that a foreclosed opportunity to compete in a regional or state championship amounted a disparity that had not been offset by any efforts to afford advantages to the disadvantaged sex.[190] The court next looked at the significance of the disparity, deeming fundamental to the sport the "chance to be champions."[191] Finally, the court determined that the District's purported legitimate justifications for the disparity (lack of practice field space, the need to hire another coach, and a shortage of officials) did not excuse the scheduling disparity, and in so holding, noted that "the fact that money needs to be spent to comply with Title IX is obviously not a defense to the statute."[192]

14. Biediger v. Quinnipiac University (2d Cir. 2012)

In *Biediger v. Quinnipiac University*[193], the Second Circuit applied the instructions in the U.S. Department of Education's 1996 Policy Interpretation and the 2008 Dear Colleague Letter to count whether Quinnipiac offered opportunities to female athletes in substantial proportion to their enrollment, and in so doing, created new rules about counting (or not counting, to be more specific) injured athletes, red-shirted athletes, athletes who do not otherwise make "substantial contributions" to their respective sports, and unrecognized or emerging varsity sports.

This case originated in 2009, when Quinnipiac announced plans to discontinue the women's volleyball, men's golf, and men's outdoor track and field teams while elevating women's competitive cheerleading to varsity status. Members of the women's volleyball team filed a Title IX lawsuit, seeking a permanent injunction to prohibit Quinnipiac from discontinuing the team. At trial, plaintiffs' counsel argued that Quinnipiac artificially inflated women's team rosters in 2 material ways: (1) by separately counting participation opportunities for female cross country athletes, whose participation on the cross country team was conditioned on their off-season participation on the indoor and outdoor track teams and (2) by counting the 30 members of the competitive cheer team, which plaintiffs argued was not a "sport" for the purposes of Title IX compliance. Citing the express language 1996 Policy Guidance, defendants argued that they counted properly since (1) "an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates," (2) competitive cheer is a sport, and (3) even if they are wrong on both points, a 3.62% disparity in the proportion of athletic opportunities afforded to male and female athletes did not amount to a Title XI violation.

The Second Circuit disagreed and affirmed the district court's award of an injunction. Though the court acknowledged that athletes may be counted more than once if they participate in more than one sport, it found that some of the roster spots assigned did not reflect genuine participation opportunities for female athletes. In determining whether a participation opportunity was real or illusory, the court deemed athletes who competed in more than 50% of each team's competitive activities as making a "substantial contribution" to the team and in making that finding, deemed those athletes eligible to be counted more than once. However, injured athletes, athletes who were red-shirted for the season, or athletes who contributed to less than 50% of a team's competitive activities could not be counted more than once.[194] Please note that this finding was limited to this case due to the lack of documentation around the day-to-day documented participation of the individual student athletes. As a general matter, red shirt students are

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[190] *Id.* at 294.
[191] *Id.* at 295.
[192] *Id.* at 297.
[193] 691 F.3d 85 (2012).
[194] *But see* 1979 Policy Interpretation (including in count athletes, "[w]ho, because of injury, cannot meet [the other regulatory definitions of "athlete"] but continue to receive financial aid on the basis of athletic ability.")

routinely counted, provided they practice regularly with their teams and enjoy a meaningful participation experience.

The Second Circuit also affirmed the district court's holding that competitive cheerleading at Quinnipiac was not yet supported at a level necessary to be considered a Title IX countable sport, primarily based on the fact that the NCAA had not yet sponsored competitive cheer as an NCAA championship or emerging sport, that OCR had not yet found cheer to be a sport, the team was not provided with post-season competition comparable to the types of opportunities offered through other sports, and no uniform set of rules or competitive scoring governed competitive cheerleading. Because competitive cheerleading was deemed to be an activity and not to be a sport, the court ruled that the 30 female participants on the team could not be counted towards Title IX compliance.

Finally, noting that statistical disparities would be evaluated on a case-by-case basis, and observing that a 3.62% statistical disparity equated to 38 potential roster spots, the Second Circuit affirmed the district court finding that the disparity was significant and noncompliant, insofar as Quinnipiac could have easily fielded an additional women's athletic team, which could though need not include the recently eliminated women's volleyball team.[195]

15. Balow v. Michigan State University (6th Cir. Feb. 2022)

Balow v. Michigan State University[196] relies on OCR's 1996 Policy Clarification to explain how to count genuine participation opportunities. On October 22, 2020, Michigan State University (MSU) announced that it was cutting the men's and women's swimming and diving teams. Eleven female student athletes sought to enjoin MSU from eliminating the women's team, arguing that the action would bring MSU out of compliance with Title IX. The district court denied plaintiffs' motion for a preliminary injunction. The Sixth Circuit vacated the district court's decision and remanded the matter with instructions on how to count equal participation opportunities. Preliminarily, the Sixth Circuit faulted the district court for relying on percentages, rather than numbers, to evaluate the participation gap.[197] The court instructed, "While the percentage gap may be relevant, substantial proportionality should be determined by looking at the gap in *numerical* terms, not as a percentage."[198] It further clarified that "[a] school may fail to achieve substantial proportionality even if its participation gap is only a small percentage of the size of its athletic program."[199] Next, the district court erroneously compared the participation gap to the size of an average team at MSU, not the size of a viable team, which would have been the correct standard.[200] Quoting the 1996 Policy Guidance, the court stated, "[A] viable team is not an average one, but is instead one 'for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team."[201]

16. Portz v. St. Cloud State University (8th Cir. 2021, D. Minn. Sept. 2022)

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[195] For an example of the kinds of expert evidence that may be probative of substantial proportionality, see *Ohlensehlen v. Univ. of Iowa*, 509 F.Supp. 3d 1085 (S.D. Iowa 2020).
[196] 24 F.4th 1051 (6th Cir. 2022).
[197] *Id.* at 1057-59.
[198] *Id.* at 1059 (emphasis in original).
[199] *Id.*
[200] *Id.* at 1060.
[201] *Id.* at 1061 (quoting 1996 Policy Clarification).

Portz v. St. Cloud University[202] offers helpful instruction on how to conduct a treatment-and-benefits analysis (regulatory factors 2-10) when an athletic program offers different tiers of programmatic offerings (Division 1 vs. Division 2 sports, for example). Facing a budgetary shortfall, St. Cloud State University discontinued six sports teams, including women's tennis and Nordic skiing, and implemented a roster-management plan to ensure Title IX compliance.[203] Members of the women's tennis and Nordic skiing program, on behalf of a class of plaintiffs, filed suit alleging Title IX violations. Important to this case was a district court finding that the University operated a 3-tiered sports program, with different levels of support afforded to the teams in each tier.[204] That is where the district court's analysis derailed. It improperly assessed treatment and benefits among the tiers, rather than considering how the University distributed treatment and benefits across the entire athletics program.[205] On remand, with instructions to evaluate treatment and benefits on a program-wide basis, the court determined that female athletic opportunities were offered in substantial proportion to male athletic opportunities relative to enrollment data.[206] However, though making findings that St. Cloud State remediated compliance problems related to most unequal treatment and benefits, including in equipment and supplies, locker rooms, and practice facilities, the court reinstated a permanent injunction only with respect to unequal travel and per diem allowances.[207] On May 30, 2023, the United States District Court for the District of Minnesota awarded over $1.7 million in attorney's fees and costs to plaintiffs.

17. Graham v. State University of New York at Albany (Jan. 4, 2023)

Graham v. State University of New York at Albany[208] is an equal opportunity case that demonstrates how the *McDonnell Douglas* burden shifting framework grafts onto Title IX gender equity lawsuits. Plaintiff-Appellant Gordon Graham, the head coach of the women's varsity tennis team at SUNY-Albany, filed a Title IX claim against the University after it discontinued the women's tennis team and declined to renew his contract.[209] Applying the *McDonnell Douglas* burden shifting framework and assuming *arguendo* that plaintiff-appellant set forth sufficient evidence to establish the prima facie elements of a Title IX gender equity, the Second Circuit affirmed the district court's decision that plaintiff-appellant failed to proffer evidence that rebutted the legitimate business reasons underlying the University's decision to discontinue the team.[210] Specifically, the University explained that it discontinued the women's tennis team because (1) the America East Conference, the previous conference home of the SUNY-Albany women's tennis team, discontinued sponsoring women's tennis, (2) substantial logistical and financial burdens foreclosed the option of a conference transfer, and (3) operating as an independent entity without a home conference would deprive the women's tennis team of a full and fair opportunity to compete in national competition.[211] Because plaintiff-appellant did not introduce evidence to rebut the rationale underlying SUNY-Albany's business decision, the Second Circuit affirmed dismissal of the Title IX gender equity claims.

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[202] 16. F. 4th 577 (8th Cir. 2021).
[203] *Id.* at 579.
[204] *Id.* at 582. The district court also erred by failing to consider treatment and benefits allocated to the women's volleyball team, which defendants argued received the finest facilities and best resources. *Id.* at 584.
[205] *Id.* at 583.
[206] *Portz v. St. Cloud State Univ.*, No. 16-1115 (D. Minn. Sept. 7, 2022).
[207] *Id.* at *20.
[208] *Graham v. State Univ. of New York at Albany*, No. 21-1927 (2d Cir. Jan. 4, 2023).
[209] *Id.* at *3.
[210] *Id.* at 6.
[211] *Id.* at 7.

This is just a sampling of Title IX athletics equity cases. There are several others out there, and even more enforcement actions, all of which are instructive on how to operationalize OCR's guidance in the athletics equity context.

C. Conclusion

On June 23, 2022, we celebrated the 50th anniversary of Title IX. In those 50 years, the United States celebrated when Brandi Chastain scored a penalty kick against China in the World Cup, a moment that would forevermore be cemented in our minds as iconic Americana. We were glued to our television sets as we watched injured gymnast Kerry Strugg land a vault to secure gold for the United States in the 1996 Olympics. We watched with awe over the years as Serena Williams accumulated 23 grand slam singles titles in tennis, arguably securing a position as the best tennis player of all time. This is just a sampling of great moments in women's sports and doesn't even begin to capture off-court successes of female doctors, lawyers, politicians, and professionals who attribute many of their leadership qualities, in part, to the skills acquired while playing sports at a younger age. Those moments, athletic or otherwise, may not have been possible without Title IX. While it is sometimes easy to lament the compliance obligations and financial burdens imposed by this statute, we should never forget the opportunity, promise, and joy that Title IX has brought to so many lives.