

TITLE IX and ATHLETICS

February, 2000

FOR RELEASE
January 18, 1996

Contact: Rodger D. Murphey
(202) 401-0774

Civil Rights Office Clarifies Intercollegiate Athletics Policy

In response to inquiries from college presidents and athletics associations, the U.S. Department of Education's Office for Civil Rights (OCR) has issued a final clarification of its policy on Title IX and intercollegiate athletics.

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs and activities. Under Title IX, if an institution that is a recipient of federal funds sponsors an athletic program, it must provide equivalent athletic opportunities for males and females. The clarification resulted from discussions with interested parties over a two-year period and from consideration of nearly 300 written comments.

"My conversations with the university community and with athletic associations and other groups have confirmed that there has been some confusion over one segment of the requirements of Title IX as it applies to sports," said Norma Cantú, assistant secretary for civil rights. "In an effort to be as helpful as possible to colleges, student athletes and others who deal with this issue, OCR has worked to provide substantive, specific and meaningful guidance to clarify the standards that have been applied by four administrations. This clarification confirms that OCR's focus continues to be on increasing opportunities for all students."

Cantú said the legal obligations spelled out in this clarification of the Title IX policy guidance have been in effect since 1979, noting that every federal court which has addressed the issue since then has approved of the standards provided by OCR.

The policy guidance includes a three-part test that OCR uses to assess an institution's compliance with Title IX in intercollegiate athletics:

- Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- 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 that is demonstrably responsive to the developing interests and abilities of the members of that sex; or
- Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

If an institution has met any part of this standard, OCR will find the institution in compliance with the participation provision of Title IX in the area of athletics.

Cantú said it is important to note that, contrary to claims by some who have advocated that OCR abandon the three-part test that was first applied in 1979, the test does not establish or endorse quotas. Cantú reiterated in her letter transmitting the clarification that there are three separate avenues for compliance and stressed there are no "strict numerical formulas or 'cookie cutter' answers" to questions that are "inherently case- and fact-specific." She noted that OCR has "tried to allow for as much flexibility as possible in the clarification, while remaining true to the Congressional mandate of Title IX.

The final clarification is the result of a number of discussions with interested parties over a two-year period and consideration of the nearly 300 written comments received by OCR on a draft that was issued

Sept. 20, 1995.

The guidance is being sent to over 4,500 interested parties, including the presidents of all colleges and universities that have intercollegiate athletic programs.

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NOTE TO EDITORS: A copy of the clarification of Title IX athletics is available upon request.

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THE PANTAGRAPH (Bloomington, IL.)

December 15, 1999, Wednesday

SECTION: NEWS; Pg. A6

LENGTH: 781 words

HEADLINE: Appeal rejected in ISU **Title IX** case

BODY:

Men who once were wrestlers and soccer players for **Illinois State University** have lost an appeal in their lawsuit challenging the elimination of their sports in 1995 under **Title IX** gender equity rules.

The U.S. 7th Circuit **Court** of Appeals recently affirmed the lower **court's** dismissal of the **case**. The next step for the plaintiffs would be the U.S. Supreme **Court**, according to ISU attorney Tom Schanzle-Haskins.

While declining to predict what the Supreme **Court** would do, ISU's attorney noted the high **court** declined last year to hear a very similar **case** involving Brown University.

Don Anderson, a Chicago lawyer representing 16 men against ISU, was unavailable for comment Tuesday.

The three-judge appellate panel heard the **case** Oct. 27. The initial dismissal came in February.

The program cuts and the addition of a women's soccer team were part of ISU's effort to bring the ratio of male and female athletes closer to that of the student body as a whole.

Anderson has said ISU could have retained wrestling and men's soccer while adding women's soccer to comply with **Title IX**. According to the law, the gender ratio need not be balanced as long as both sexes have sports in all the areas in which there is significant interest and/or on-campus talent, Anderson has said.

Schanzle-Haskins said proportionality is the clearest test for **Title IX** compliance and several legal precedents uphold that interpretation.

Davis Lodge, trash

trucks win approval

The Bloomington City Council on Monday resolved two matters that have lingered since October.

The council:

- Voted to pay a local architectural firm, Francois & Associates, \$30,000 to design restoration at Davis Lodge on the shore of Lake Bloomington. Work at the log structure could cost up to \$300,000. The planning cost represents a commitment to proceed after the council delayed action in October. A committee studied whether the cabin should be razed instead.

- Voted without discussion to pay \$422,388 for four McNeilus-brand garbage packer trucks. The price is offset by the sale of four city trucks for \$56,304 to Rantoul Truck.

In October, a union-management committee recommended a bid for McLain EZ Pack Goliath packers at \$365,868, but stated that it preferred McNeilus and found it outperformed McLain. All bids at that time were discarded and the item was rebid.

No companies offering the McLains were in the second round of bids. A benefit of the McNeilus packer is its ability to efficiently compact trash while the garbage truck is moving to its next stop.

Officer cleared of wrongdoing in wreck

An investigation into a motorist who reportedly failed to yield to a police car and contributed to an accident has ended without action against the officer or other motorists.

The officer, Stephen Petrilli, 23, was cleared of wrongdoing by a supervisor. He suffered minor injuries when his squad car hit a cement pole support in the 800 block of West College Avenue Friday morning.

Petrilli was in pursuit of a speeding car with his squad car's emergency lights activated when he was forced to swerve to avoid another car. The squad car then struck a cement block outside Fast Stop, 817 W. College Ave. A store security camera caught the accident on tape but was not able to help identify the other motorist involved.

It was the fourth accident involving a Normal police car in approximately six weeks. Normal Police Chief Walt Clark said he will attempt to curb the number of accidents incurred by his department.

Fall from ladder led

to accidental death

Authorities believe a Bloomington man who died last week accidentally fell to his death when he was attempting to climb down a ladder.

Joey Brasewell, 31, died Friday from injuries he suffered when he fell about 20 feet from a residence at 1010 W. Prairie St. in Bloomington, according to McLean County Coroner Dan Brady.

Brasewell occasionally worked for Renovations and More, which had been hired to do a siding job at the Prairie Street residence, but there was no work for him that day. Brasewell climbed a ladder to talk to an employee and was asked to return to the ground.

Brasewell apparently fell as he attempted to descend the ladder, Deputy Coroner Tony Becker said. He fell onto a porch roof and then to the ground. He died from internal injuries. A coroner's inquest will be scheduled.

If you have an item you would like to have included in Update, send it to Metro Editor Mark Pickering or Assistant Metro Editor Julie Gerke at The Pantagraph, 301 W. Washington St., Bloomington, IL 61701-2907. Requests also can be faxed to (309) 829-7000, or e-mailed to newsroom@pantagraph.com.

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LOAD-DATE: December 15, 1999



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Chicago Tribune

October 28, 1999 Thursday, CHICAGO SPORTS FINAL EDITION

SECTION: SPORTS; Pg. 5; ZONE: N

LENGTH: 416 words

HEADLINE: EX-ILLINOIS ST. MALE ATHLETES CHARGE DISCRIMINATION OVER
CANCELLATION OF THEIR SPORTS

BYLINE: By Rick Hepp, Tribune Staff Writer.

BODY:

Lawyers for former **Illinois State University** male athletes whose sports were disbanded as part of the school's efforts to comply with a gender-equity law said in a Chicago courtroom Wednesday that they were discriminated against under the very same law.

The ex-athletes on ISU's men's soccer and wrestling teams sued the university in 1995, claiming they were the victims of reverse discrimination. That year ISU eliminated the two sports and added a women's soccer team to comply with **Title IX**, the 1972 federal law that bars gender discrimination in sports at universities that receive federal funds.

During a hearing before members of the 7th U.S. District **Court** of Appeals, lawyers argued against an earlier ruling by a lower **court** that ISU did nothing wrong because it eliminated the programs specifically to come into compliance with **Title IX**. The lawyers said that ruling violated the law itself.

"If you single out a program for elimination because of the gender of the participants, then you are violating (**Title IX**) on its face," said Don Anderson, who represented the athletes.

In his rebuttal, ISU attorney Thomas Schnazle-Haskins said the university dropped the two men's programs and added women's soccer so that ISU would be in compliance with **Title IX** before it was reviewed by the NCAA in 1995.

"Now we stand here being sued with the very statute to which we complied," he said.

Responding to a claim that ISU could have added women's soccer without eliminating the men's teams, Schnazle-Haskins said the school still would not have had enough women athletes to meet the quota set by **Title IX**.

"If we would have added a host of women's sports, it might have done that," he said, but "budget considerations" kept ISU from adding more sports.

The lower **court's** ruling was based on a 1993 **case** in which male swimmers sued the University of Illinois for reverse discrimination after the school announced it was dropping men's and women's swimming because of budget constraints.

When it later decided to keep women's swimming to comply with **Title IX**, the male swimmers filed suit.

In that **case** a **court** ruled that schools might consider gender when deciding which athletic teams to drop to improve opportunities for an underrepresented gender. The **court** also said schools are not required to have parallel men's and women's teams.

The three-judge panel will have up to a year to decide whether to send the ISU **case** back to the lower **court** that dismissed the suit.

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The Chronicle of Higher Education

January 7, 2000

SECTION: ATHLETICS; Pg. A64

LENGTH: 1003 words

HEADLINE: 2 Appeals **Courts** Uphold Right of Universities to Reduce Number of Male Athletes

BYLINE: WELCH SUGGS

BODY:

Two universities have won the right to reduce the number of male athletes on varsity teams -- or even to drop the teams -- to meet the requirements of **Title IX** of the Education Amendments of 1972. Federal appeals **courts** ruled last month in favor of California State University at Bakersfield and **Illinois State University** in lawsuits brought by male athletes against the institutions.

The decisions are setbacks for groups trying to change the way universities comply with **Title IX**, which forbids discrimination by gender at institutions receiving federal funds.

In 1979, the U.S. Department of Education's Office for Civil Rights issued a policy interpretation that gives universities a three-part test to determine whether they are offering women enough opportunities to participate in sports. Colleges can follow the policy by fulfilling any one of the three criteria: having equivalent proportions of female athletes and female students, a condition known as substantial proportionality; demonstrating a "history and continuing practice" of expanding athletics programs for women; or showing that the athletic interests and abilities of women are being accommodated fully.

Along with **Title IX**, Bakersfield and the other Cal State campuses are operating under a consent decree that required them to ensure that their teams were within five percentage points of meeting the substantial-proportionality test by the end of the 1998-99 academic year. The Cal State system signed the consent decree after being sued by the California chapter of the National Organization for Women, which claimed that the campuses had far too few female athletes to be in compliance with **Title IX**.

Members of Bakersfield's wrestling team had won a preliminary injunction in February from a federal district **court** forbidding the university to drop their sport or limit the number of wrestlers, the first such **court** victory for athletes. However, a three-judge panel of the U.S. **Court** of Appeals for the Ninth Circuit refused to uphold the injunction last month.

Lawyers for the wrestlers and other advocates have argued that substantial proportionality, and by extension the consent decree, required a quota that discriminates against men.

"The **courts** are stubbornly refusing to apply the law as it's written," said Mark Martel, the lead lawyer on the **case** and a former wrestler at Stanford University. "The presumption underlying this thinking is that any time two different groups are participating in something at different rates, there is discrimination, and it has to be eliminated."

In September 1997, a group of wrestlers, led by Stephen Neal, filed for a temporary restraining order to block the university's decision to place limits on the number of men allowed on the team, alleging that it was discriminating against men on the basis of sex. Mr. Neal later won national-collegiate and world heavyweight championships.

The proportionality tests used in the consent decree and the first part of the **Title IX** policy interpretation

"have no rational basis absent a showing that men and women have equal interest and ability to participate in intercollegiate athletics." wrote the group's lawyers.

Judge Robert E. Coyle issued the temporary restraining order and then granted a preliminary injunction to the wrestlers last February, ruling that "relying on proportionality to cap the men's athletic teams at CSUB in order to comply with the consent decree constitutes implementation of a quota based on gender in violation of **Title IX**."

However, many other **courts** have ruled that dropping men's teams and imposing roster caps are acceptable ways of complying with **Title IX**. **Those courts** have found that women have historically been underrepresented in athletics programs at Brown, Colorado State, and Louisiana State Universities, among others. In its unanimous opinion in the Bakersfield **case**, written by Judge Cynthia Holcomb Hall, the appeals-**court** panel vehemently agreed with the other **courts**.

The defendants' interpretation of **Title IX** "would have allowed universities to do little or nothing to equalize men's and women's opportunities if they could point to data showing that women were less interested in sports," Judge Hall wrote. But "a central aspect of **Title IX's** purpose was to encourage women to participate in sports."

Rudy Carvajal, Bakersfield's director of athletics, released a statement saying that the university was pleased that the **court** had followed the lead of other appeals **courts**.

A spokesman for the athletics department said officials had not decided whether to reimpose the cap.

Judge Hall closed her opinion with a strong statement defending **Title IX**. Noting the excitement caused by the U.S. victory in the Women's World Cup last summer, she said that "**Title IX** has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics."

Mr. Martel, the plaintiffs' lawyer, said he would appeal the **case** to the entire Ninth Circuit.

In Illinois, a three-judge panel of the U.S. **Court** of Appeals for the Seventh Circuit unanimously dismissed a lawsuit brought by former men's soccer players and wrestlers against Illinois State after it eliminated their sports.

In 1995, Illinois State dropped the two men's sports and added women's soccer in order to meet substantial-proportionality guidelines. The male athletes sued the university that fall, charging that because it had decided to eliminate the teams on the basis of sex, it had violated **Title IX**.

The university responded that trying to achieve substantial proportionality was the only way it could afford to come into compliance with **Title IX**. The athletes' suit was dismissed by a lower **court** in February, and they appealed to the Seventh Circuit. They will next appeal for a hearing before the full **court**, lawyers said.

LANGUAGE: ENGLISH

LOAD-DATE: January 04, 2000



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December 16, 1999, Thursday

SECTION: Pg. 1

LENGTH: 852 words

HEADLINE: Court Permits Limits on Men's Teams to Create Chances for WomenDeck: Ninth Circuit Vacates Injunction, Says School's **Title IX** Compliance Didn't Violate Men's Rights

BYLINE: By KENNETH OFGANG, Staff Writer/Appellate Courts

BODY: A public university may limit the size of its men's athletic teams in order to comply with federal regulations designed to ensure equal opportunity for women, the Ninth U.S. Circuit Court of Appeals ruled yesterday.

A three-judge panel overturned a district judge's injunction barring **California State University-Bakersfield** from limiting the size of its men's wrestling team to 25. The appellate judges said the school didn't violate the rights of the male athletes by adopting the limit as part of a plan to increase the number of places for women on school teams to 55 percent.

Women have been 60 percent or more of the school's student body for a number of years.

Earlier Settlement

CSU adopted the plan, based on Department of Education **Title IX** guidelines, as part of a settlement of an earlier suit by the California Chapter of the National Organization of Women. **Title IX** of the 1972 federal education law prohibits federally funded schools from discriminating on the basis of sex, and the DOE regulations require that students be given "equal athletic opportunity."

"**Title IX** has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics," Judge Cynthia Holcomb Hall wrote for the panel. "Today we join our sister circuits in holding that **Title IX** does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies."

Before the challenged plan was adopted, men made up 61 percent of the varsity teams at the Bakersfield school and received 68 percent of the athletic scholarship money.

At the time of the men's suit, which was joined by the National Wrestling Coaches Association and supported by other wrestling groups, the men's team had only 21 members. But in asking Chief U.S. District Judge Robert Coyle of the Eastern District of California for the preliminary injunction, they expressed the fear that the school would eventually eliminate the team entirely as part of its gender-equity efforts.

Coyle ruled that capping the size of men's teams violates the male athletes' rights to equal opportunity under **Title IX**. There was a strong argument that the caps also violated the Equal Protection Clause, Coyle said without ruling on the question.

But Hall said the district judge misconstrued the law. The university, she said, was entitled to make gender-conscious decisions in order to reconcile its obligation to prospective women athletes with the budgetary constraints that prevented it from offering every capable athlete a place on a team.

Proportionality Argued

Hall rejected the argument that the university went too far by insisting that equity be determined in close proportion to total enrollment rather than to the relative interest of men and women in participating. That contention, Hall wrote, has been rejected by several other circuits and is "fundamentally inconsistent with the purpose of **Title IX**."

The statute is "dynamic," not "static," the jurist wrote.

"**Title IX** has altered women's preferences, making them more interested in sports, and more likely to become student athletes," she elaborated. "Adopting Appellees' interest-based test for **Title IX** compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed **Title IX's** enactment."

Hall noted that Congress considered, but didn't pass, legislation backed by House Speaker Dennis Hastert, a former wrestling coach, among others which would have blocked the DOE regulations in order to prevent schools from having to shift resources from men's sports to women's. That fact exemplifies congressional intent to permit institutions like CSU to do what it did, the judge wrote.

The injunction was also erroneous, Hall went on to say, because the district judge failed to defer to the enforcing agency's interpretation of **Title IX**.

Judge Susan Graber and Senior Judge William Canby Jr. joined in the opinion.

University of Nebraska law professor Josephine Potuto, who authored an amicus brief in support of the male wrestlers, said the interpretation of **Title IX** by the Ninth Circuit panel and others "is bad law and likely unconstitutional."

Potuto, who described herself as "a huge supporter of athletic opportunities for women," said the decision was "really pernicious." It allows schools to "monkey around with numbers" in order to justify depriving men of athletic opportunities, she said, and to cut the number of male athletes without having to increase the number of women athletes.

CSU spokeswoman Colleen Bentley-Adler said the university was "delighted" with the decision. "It shows that CSU is on the right path and it does validate [the university's handling of] some of the gender-equity issues we've been dealing with," she told the MetNews.

The case is *Neal v. Board of Trustees of the California State Universities*, 99 S.O.S. 9775.

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The Atlanta Journal and Constitution

December 19, 1999, Sunday, Home Edition Eighth day in the series on gender inequity in high school sports.

SECTION: Sports; Pg. 10E

LENGTH: 605 words

HEADLINE: SPECIAL REPORT: THE GENDER GAP;
DID YOU KNOW?

BYLINE: Mike Fish, David A. Milliron, Staff

SOURCE: AJC

BODY:
KEEPING TABS

Like colleges and universities, which annually report participation and scholarship statistics to the U.S. Department of Education, the nation's high schools eventually might be required to provide information to document compliance with federal **Title IX** law.

Sen. Edward Kennedy (D-Mass) said he plans to reintroduce the Educating America's Girls Act during the next legislative session. Among other things, it would amend the National Educational Statistics Act to require the collection of participation data, by gender, of secondary school students in physical education and athletics programs.

The proposal was first introduced this year by Sens. Kennedy, Tom Daschle (D-S.D.), Susan Collins (R-Maine) and Olympia Snowe (R-Maine).

"In order to determine in what ways girls are affected by athletic participation, it is vital that accurate data on girls participation be collected and made available," Kennedy said.

COURT RULING

In a decision with possible ramifications for high schools, a federal court ruled last week that dropping men's athletics teams to make way for women's squads is constitutional. A panel of the U.S. Circuit Court of Appeals in San Francisco ruled 3-0 in a case brought by members of the **California State-Bakersfield** wrestling team, who sued after the university put a cap on recruitment for its men's teams.

The court said cuts may be taken to comply with **Title IX** of the federal Education Act of 1972, which was designed to balance the amount of money spent on men's and women's sports.

When the suit was filed in 1996, women students at the school outnumbered males 64 percent to 36 percent, but men dominated the rosters of varsity sports teams.

In the ruling, the court rejected the wrestling team's argument that the representation of women on teams should be proportional to their interest in playing varsity sports rather than to their numbers in the total student population.

GIRLS RULE

Iowa has separate athletics governing bodies, but because the National Federation of State High School Associations permits one representative per state, the boys group is recognized nationally, not the Iowa Girls Athletic Union. Has it hindered girls sports? Quite the opposite.

When **Title IX** was passed in 1972, Iowa already was in compliance and didn't need to add sports for girls. Today, it offers 10 girls varsity sports to nine for boys.

Even more telling, 74,600 Iowa high school girls participated in sports last year, compared with 45,678 in Georgia. Georgia has more than twice the number of public high school students as Iowa.

An Atlanta Journal-Constitution analysis found that Iowa has not been the subject of an athletics-related **Title IX** complaint. It is one of four states, plus the District of Columbia, sharing that distinction.

FILING A COMPLAINT

A complaint can be filed with the Office for Civil Rights by anyone who believes that an educational institution that receives federal financial assistance has discriminated against someone on the basis of race, color, national origin, sex, handicap or age. The person or organization filing the complaint need not be a victim of the alleged discrimination.

By mail:

61 Forsyth St.

Suite 19T70

Atlanta, GA 30303

By telephone: (404) 562-6350

By e-mail:

OCR_Atlanta@ed.gov

On the Internet:

www.ed.gov/offices/OCR/

YOU MAKE THE CALL

Your local varsity football team plays a 10-game schedule. Can the junior varsity schedule nine games?

No. At the sub-varsity level, schools may schedule only 70 percent of the games allotted to the varsity teams.

LOAD-DATE: December 19, 1999



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The Journal of American Citizenship Policy Review

November, 1997 / December, 1997

SECTION: FEATURES; Pg. 46

LENGTH: 4069 words

HEADLINE: The Gender Refs; Federal regulators want equal opportunity for female collegiate athletes. Do they care whether colleges have to cut men's teams to achieve it?

BYLINE: By Elizabeth Arens; Elizabeth Arens is a junior at Princeton University, where she is the editor of the Princeton Tory and a member of the varsity women's squash team.

BODY:

When the men's varsity swimming and diving team at the University of California at Los Angeles performed in competition, they gave spectators more than a glimpse of athletic grace -- they showed how disciplined greatness can emerge from eager but untrained youth. The team consistently finished among the nation's top 10. Over the years, it had secured 41 national titles in individual events and a National Collegiate Athletic Association (NCAA) championship. Members of the squad have won an astonishing 22 Olympic medals.

No more. The Olympic-size pools at UCLA are now closed to the male swimmers who set so many records there. In an apparent effort to achieve "gender equity" in collegiate athletics, university officials dropped the men's squad in 1993, making room for women's teams in soccer and water polo. The UCLA team was one of 16 NCAA men's swimming squads eliminated since 1993.

These programs join more than 200 men's athletics teams eliminated nationwide over the last several years. According to a survey by the NCAA, that amounts to a net loss of more than 17,000 opportunities for men in collegiate athletics.

Many of these teams are victims of misguided egalitarianism. Colleges and universities are misapplying a federal anti-discrimination statute to artificially equalize the number of men and women participating in collegiate athletics. Thanks to pressure from the Clinton administration and the federal courts, schools are destroying men's athletics programs across the country. They are capping the sizes of teams, terminating long-standing programs, and driving thousands of male students off the playing fields. And they are doing so without regard to the level of interest in sports demonstrated by female students or to the resources of the schools they attend.

The source of this mischief is a distorted interpretation of **Title IX**, enacted by Congress as part of the 1972 Education Amendments. Intended to ensure that schools do not discriminate in providing athletic opportunities for their students, it states that "no person shall, on the basis of sex, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal aid." On the face of it, it was a benign anti-discrimination statute.

In the hands of federal judges and officials at the U.S. Department of Education, however, the statute has become toxic for collegiate athletics. The department's Office of Civil Rights (OCR) has decided to judge compliance with the law not by whether colleges are practicing clear-cut discriminating but rather by they are failing to achieve "proportionality." In this case, proportionality means attaining a gender ratio among varsity athletes equal to that of the student body.

If that sounds like a quota, it is. Though the OCR's interpretation of the law was first issued in 1979, its application remained uncertain due to a Supreme Court decision in the mid-1980s. The mass elimination

of men's teams began in the 1990s. "It's become really horrific since Clinton came into office," says Leo Kocher, a professor and wrestling coach at the University of Chicago. "The people in the OCR have really begun to interpret this as a quota law."

Federal courts have been only too eager to go along, cementing proportionality into law. Consider *Cohen v. Brown*, the most prominent **Title IX** case so far, which the Supreme Court declined to review this spring. After Brown University eliminated two men's and two women's teams for budgetary reasons, female athletes sued in 1992 seeking to reinstate the women's teams.

Federal district judge Raymond Pettine ruled, and the appeals court affirmed, that as long as the proportion of women athletes was lower than the proportion of women students, Brown could not eliminate viable women's teams. Pettine further ordered Brown to "balance" its athletic program so that the proportion of female athletes equaled the proportion of female students. Other cases involving Colorado State University and Indiana University of Pennsylvania, among others, have yielded substantially similar results.

"**Title IX** is being applied as an affirmative action statute requiring a certain quota of female athletes," says Anita Blair, general counsel at the Independent Women's Forum, "Congress never, ever intended it to be interpreted in this manner."

Capping Men's Teams

One way to achieve proportionality at a university is to place limits on the number of players on men's teams. Penn State, San Francisco State, the University of California at Berkeley, and the University of Colorado are just some of the schools that have placed such caps on men's participation. Coach T. J. Kerr's wrestling team at **California State** University at Bakersfield was capped at 25 members; he used to carry 37.

"You really need a large team," he says. "Nobody [gets cut] in wrestling, because the sport is so difficult physically that the athletes drop out on their own." David Marsh, the coach of men's and women's swimming at Auburn University, says he's "under a lot of pressure to keep the men's numbers down. I've had to turn down men who I otherwise would have kept on the team in order keep the numbers off."

"When they cap men's teams, then you know it's purely to satisfy a quota," Kocher says. "When you get rid of those last seven guys, the savings is negligible -- they're nonscholarship, they probably wouldn't make the traveling team. They're just out there for the love of the sport."

Many teams, even those that excel, also face capricious budget cuts. Kerr's team at Bakersfield, for example, boasted four All-American wrestlers and placed third as a team in the 1996 NCAA wrestling championships. Now it's struggling to survive thanks to gender-driven budgeting. "They've cut my budget by 60 percent" Kerr says. "It's really put a damper on my program." It has affected the lives of his players as well. "Last year I had to cut 10 guys that I was planning to have wrestle for me. They couldn't even practice with the team. Those kids left the school within a year."

The pursuit of gender "equity" in athletics makes little sense at a school like Bakersfield. Its student body is 64 percent female, but many of these women are students in their 40s or 50s who married young, had families, and later returned to college. Few exhibit any interest in participating in varsity athletics. But after the National Organization for Women (NOW) sued the **California State** University system in 1993, Bakersfield agreed to achieve proportionality in finance and participation by the 1998-89 school year.

At the time of the consent decree between NOW and the university system, 60 percent of varsity athletes at Bakersfield were male. "They were going to have to reverse that within five years," Kerr explains. To reach that goal, he says, the president recommended the elimination of men's wrestling and swimming teams last year. "They were trying to cut our two best sports -- our flagship teams."

The team was saved temporarily, Kerr says, but "we're still fighting for our lives." He says the athletic

its student population is 60 percent female, only 47 percent of its 299 varsity athletes are women -- a proportionality gap of 13 percentage points. "We've had a lot of open spots that were not occupied on the rosters of women's teams," says Andy Jennings, the director of athletics.

In Auburn's swimming program, which maintains a men's team of 26 and a women's team of 21, the coach has had difficulty enlarging his women's team. "We're encouraged to increase women's participation," says Marsh, "but it's difficult. There's substantially less interest on the women's side."

Mary Curtis, the associate athletic director and the coordinator of **Title IX** compliance at the University of Iowa, says that she has little difficulty attracting qualified female athletes. "There are more than enough athletes out there," she says. "But if you don't spend the recruiting money, you're not going to get the athletes."

But Marsh's experience suggests that money is not the only issue. Auburn offers 14 scholarships for female swimmers and only 10 for men, but still has fewer female swimmers. Marsh sees a clear unfairness in the allocation of scholarship funds. "An Olympic-level athlete on the men's side will receive significantly less than a female athlete of comparable ability. It's discouraging to the men, and it's not the greatest for the dynamics between my two teams."

In its defense in the *Cohen* case, Brown University submitted evidence suggesting that the pool of interested, qualified female athletes at the university and in the nation at large is significantly smaller than that for males. The evidence included a 1992 survey by the National Federation of State High Schools Association, which found that 3.5 million boys but only 2 million girls were members of high school varsity teams.

Brown also submitted for evidence College Board questionnaires filled out by high-school students who had taken the Scholastic Assessment Test (SAT). Among SAT takers who had requested that their scores be sent to Brown, 50 percent of the male students, but only 30 percent of the women students, had expressed interest in participating in athletics. Brown's applicants at the time were more than 50 percent female, but of the applicants expressing interest in sports, less than 45 percent were women. And at Brown, as in the nation at large, the participants in intramural athletics, which are open to all students, are overwhelmingly male.

Such a survey of students' interest in athletics may not be an accurate measurement of the number who actually plan, and have the training and ability, to play on a varsity athletic team. Together with the data on high school and intramural participation, however, this evidence strongly suggests a real disparity in the levels of interest of each sex -- one that would naturally lead to a gap in the number of male and female varsity athletes. But the proportionality requirement declares, in effect, that interest and ability do not matter. If not enough women can be encouraged to play sports, schools will have to cut down on male participation.

A Good Idea Turns Sour

As it was originally written, **Title IX** did not create this problem. According to many who have been involved in women's athletics since the 1970s, **Title IX** has been a strong, constructive force propelling the growth of women's athletics. Charlotte West, a former president of the Association of Intercollegiate Athletics for Women, says that women's teams received "next to nothing from the universities" before **Title IX**. The funding and attention given to women's teams was "minuscule" compared with the men's, she says. "The treatment of women's teams by the universities was atrocious." West attributes much of the change of the past 25 years to **Title IX**, saying that "until the potential threat was there, it was difficult to get them to move."

In the decade after the passage of **Title IX**, women's collegiate sports boomed. The 1970s saw large gains in the number of women's teams, in the number of participants, and in funding. But recently, growth in the total number of female collegiate athletes nearly stopped, suggesting that the proportionality requirement is doing more to eliminate opportunities for male athletes than to benefit women.

department told him he would have to raise all the money for new scholarships himself. But after he set up an endowment for the team, he was told he couldn't use those funds. "They would have to increase expenditures for the women's teams," Kerr explains, "and they can't find the money to do that."

Decapitating Programs

Bakersfield's teams may have escaped the axe for now, but scores of men's teams have not. Indeed, eliminating men's teams -- or demoting them and leaving them to wither away -- is becoming the *modus operandi* of college officials eager to submit to federal regulators.

Consider the wrestling team at the State University of New York at Albany. Two years ago Albany cut wrestling, along with men's tennis, men's swimming, and women's swimming. Former coach Joe DeMeo has no doubt that compliance with **Title IX** was the motive for eliminating his team. "My athletic director said it was gender equity," he says. DeMeo's team had been another success story, producing five Olympians and suffering only one losing season over the past 18 years. "My athletes were tremendously disappointed," DeMeo says. "They worked really hard to keep the team alive."

Another successful program to die was UCLA's men's gymnastics team. It was demoted in 1993 to club status, where it receives minimal funding and cannot compete in NCAA championships. This program had produced, among others, Peter Vidmar, the winner of two gold medals and a silver medal at the 1984 Olympic games.

"The chancellor of the university told me personally that the team was cut so that [UCLA] could fall in line with **Title IX**," Vidmar says. "The gymnastics team was about second in the country when it was cut, and it had the highest academic average in the athletic department. But apparently these were not valid criteria for keeping the team." Vidmar is concerned about the future of his sport in this country. "I'm excited about all the opportunities for my daughters," he said, "but unless things change, my sons won't have a place to compete in gymnastics -- there won't be any teams left."

With the strict by-the-numbers approach of proportionality, says Bob Boettner, the executive director of the College Swimming Coaches Association, "it's become a simple equation -- you either add women's sports or you eliminate men's sports. When administrators are faced with making ends meet, they'll do the latter." Sports that do not generate income from ticket sales or other sources -- so-called nonrevenue sports -- are usually the first to go: Between 1994 and 1996, NCAA schools eliminated 31 golf programs, 16 swimming programs, 22 tennis programs, 60 track programs, and 24 wrestling programs.

One of the few men's sports nearly immune to elimination is football. "Schools are not going to mess with their football teams," Kocher says. "Those are the big money makers."

Because most athletic departments spend a large portion of their budgets on their football programs, the sport has often been the target of feminists. Donna Lopiano of the Women's Sports Foundation has repeatedly lambasted universities for sacrificing women's sports and men's non-revenue sports in order to protect their football and basketball programs. But football and basketball bring in extra cash for many athletic departments, providing funds for both men's and women's nonrevenue sports. NCAA data indicates that, in Division I-A, men's football and basketball generated income well in excess of their expenses. For all other sports, however, the reverse was true. In addition, many of the most thriving women's programs, such as those at Iowa and Ohio State, are found at schools with successful, profitable football teams.

What Women Want?

As men's opportunities disappear in the name of proportionality, mounting evidence suggests that women students may have less interest than men in participating in collegiate athletics. Disparities in the participation level of men and women exist even where the charge of historic discrimination against women would be very hard to support.

Vassar College, for example, is a former women's college that turned coeducational in 1969. Although

The numbers tell the story. The NCAA's Gender-Equity Study, released in April 1997, shows a drop in male collegiate participants that is several times the increase in female athletes. Between 1994 and 1997, NCAA members cut at least 230 men's programs. From this data, Chicago's Leo Kocher calculates that the 902 NCAA schools lost more than 20,000 opportunities for men to participate in college sports, and gained 5,800 for women.

That averages out to 3.6 men dropped for each woman added. At this rate, the drive for proportionality will even out the number of spots for men and for women at 116,000 apiece -- a net loss of 76,000 opportunities for men and a net gain for women of 22,000 after 1992.

Taking the Low Road

Fearing a lawsuit or an OCR "compliance review," college administrators have been all too ready to dispose of men's teams to meet the federal requirements. "I think many schools have misinterpreted **Title IX**, and I think they've taken the easy way out," says Jean Freeman at the University of Minnesota. She blames universities for "not using their creativity. They don't want to spend their time and energy, so they cut men's teams." Anne James, the women's swimming coach at the University of Arkansas, which dropped its men's team several years ago, agrees that "they're meeting the letter of the law, but not the spirit." Says Kocher, "The law is creating an enormous incentive for the elimination of male athletes."

At the heart of this scandal is the ascendancy of the strict proportionality requirement, slipped into the law by the OCR's 1979 policy interpretation. This requirement is found nowhere in the language of the original statute. In fact, **Title IX** explicitly states that nothing within the law should "be interpreted to require any educational institution to grant preferential or disparate treatment to one sex on account of an imbalance which may exist" in the numbers of each sex participating in a certain activity. Nor do the 1975 **Title IX** regulations, issued by the Department of Health, Education, and Welfare to flesh out the statute, mandate proportionality. On the contrary, these regulations require that schools examine "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."

Under the current interpretation, however, the respective "interests and abilities" of the two sexes are deemed irrelevant to the apportioning of varsity spots. In fact, Judge Pettine in *Cohen v. Brown* refused to admit much of Brown's statistical evidence related to the issue of interest and ability. "Even if it can be empirically demonstrated that, at a particular time, women have less interest in athletics than do men," wrote the judge, "such evidence, standing alone, cannot justify providing fewer athletic opportunities for women than for men." Such a ruling surely represents the triumph of ideology over fairness.

The Holy Grail

Even if proportionality were desirable, university data suggests that it is not an attainable ideal. Many schools already have more women's teams than men's. This was true of Brown even at the time of its **Title IX** lawsuit. Stanford University has 17 women's teams and 15 men's teams; the University of Iowa maintains 12 and 10, respectively. The Southeastern Conference requires its member schools to have at least two more women's sports than men's. Some institutions have begun to add teams in what the NCAA terms "emerging sports for women" -- such as bowling and synchronized swimming -- that are unlikely to generate as much participation as the baseball or wrestling teams they effectively supplanted.

This year the total number of women's teams in the NCAA actually exceeded the total number of men's teams. Despite this effort, however, very few schools have actually achieved proportionality. Brown still had a gap between the female proportion of students and that among athletes of 13.1 percentage points in 1992, the year of the lawsuit. In 1995, women's athletic participation at Stanford was still below 45 percent. Iowa is still not within 5 percentage points of proportionality. UCLA has 9 men's and 11 women's teams, but according to its athletic department, "We're not fully in compliance with **Title IX**

yet." In fact, a *USA Today* study identified only nine NCAA Division I schools where the percentage of women athletes comes close to or exceeds the percentage of female students. Three of these are military schools where women comprise 15 percent or less of the student body.

Why is proportionality so difficult to achieve? The lesser interest of female students is clearly a factor. Another is the large size of football teams, which places schools at an immediate disadvantage. At big-time football schools, teams often have as many as 120 members; no other sport, men's or women's, is comparable. In order to equalize the numbers, schools would need three or four more women's teams than men's (hence varsity bowling and synchronized swimming).

A barrier to achieving financial proportionality is the complicated system by which schools raise money for teams. Many teams receive money directly from booster clubs and alumni donors. Furthermore, certain teams require more funding simply because of the equipment that the sport requires. The Javits Amendment of 1974 directed that **Title IX** regulation must include "reasonable provisions considering the nature of particular sports," but this is an instruction that the OCR has largely ignored.

In his *Cohen v. Brown* decision, Pettine ruled that Brown could comply with **Title IX** in three ways. It could "elevate or create the requisite number of women's positions," it could "demote or eliminate the requisite number of men's positions," or it could "eliminate its athletic program altogether." Thankfully, schools have not chosen to take the third route. But, at a time when many universities are in financial distress, they have often been compelled to take the second. The federal interpretation has set up an artificial, clumsy, thoughtlessly egalitarian standard. The effort to achieve this standard is destroying men's athletic programs and eliminating men's opportunities across the nation.

Three-Pronged Disaster

"Proportionality" did not become the central standard for judging colleges' compliance with gender equity regulations until 1979, when the Office of Civil Rights at the U.S. Department of Education issued a "policy interpretation" to clarify the obligations of schools under **Title IX**. The policy interpretation provides a three-pronged test for compliance with the "effective accommodation" clause of the 1975 regulations.

This test declares that a school is complying with **Title IX** if: (1) "Intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments," or (2) the institution can show a "history and continuing practice of program expansion that is demonstratively responsive to the developing interest and abilities of the underrepresented sex," or (3) in the absence of the first two, the institution can demonstrate that "the interests and abilities of [the underrepresented sex] have been fully and effectively accommodated by the present program."

But this "three-pronged test" is something of an illusion, since prongs two and three do not provide schools with relief from the proportionality requirement. When the test was applied by the federal district court in *Cohen v. Brown*, Brown University automatically flunked the third part of the test, since the act of suing the female athletes demonstrated an interest existed that was not being accommodated. Brown also failed the second part, that involving the history of program expansion: Although Brown had a flourishing women's program of 13 varsity teams, almost all of them had been created in the 1970s. Between 1977 and 1994 Brown had added only one women's team. Because this is the pattern for most schools, they also would be likely to fail that test.

Universities have therefore learned that proportionality is the safest way to bring their athletics programs in compliance with **Title IX**. "Right now we believe we're in compliance with prong two, since we've been expanding our program," says Vassar College athletic director Andy Jennings. "But we can't expand forever. We want to conform [to **Title IX**] from a proportionality standpoint." He says Vassar intends to achieve proportionality within a few years. Says Joe DeMeo, the former wrestling coach at the State University of New York at Albany, "The schools cling to proportionality because it's easy to quantify."

GRAPHIC: Illustration, no caption, by Christopher Bing; Photographs 1 and 2, To comply with federal requirements for equal athletic opportunities, UCLA officials eliminated the school's enormously successful men's gymnastics and swimming teams., Courtesy of the University of California at Los Angeles

LANGUAGE: ENGLISH

LOAD-DATE: December 18, 1997



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The Advocate (Baton Rouge, LA.)

February 10, 2000, Thursday METRO EDITION

SECTION: Sports; Pg. 2-C

LENGTH: 503 words

HEADLINE: LSU to petition for rehearing in discrimination suit today

BYLINE: GLENN GUILBEAU

BODY:

LSU's attorneys plan to file a petition for a rehearing today with the 5th Circuit **Court** of Appeal, which recently ruled that LSU intentionally violated **Title IX**.

The Jan. 27 ruling said that the five female LSU students who originally filed a discrimination suit against LSU in 1994 could seek monetary damages from the university along with any female student who wanted to play soccer or softball at the school after 1993.

Title IX is the federal law that requires equal opportunities for male and female college athletes. LSU, trailing other SEC schools, did not re-institute softball until 1997 and fielded its first soccer team in 1995.

LSU's lawyers dispute the claim that LSU intentionally violated **Title IX**.

"We think we are entitled to a rehearing," said Baton Rouge attorney Shelby McKenzie, who is representing LSU. "But it depends on if the **court** agrees to it." As of Wednesday afternoon, McKenzie was still working on the petition at the Taylor, Porter, Brooks & Phillips office, and a copy of it was not available.

"It will be available tomorrow (Thursday)," McKenzie said. "We plan to file it no later than 3 p.m." Today is the deadline for LSU to appeal the Jan. 27 unanimous decision made by the **appellate court's** three-judge panel.

McKenzie also has plans to ask the U.S. Supreme **Court** to review the **case**.

LSU chancellor Mark Emmert said LSU's problem with the ruling is the word "intentional. We are not going back to the **court** because we are disagreeing with any of the violations or rulings in relation to **Title IX**," Emmert said. "We are in compliance now and have been." LSU athletic director Joe Dean had little to say about the matter Wednesday.

"I don't really know much about it," he said. "I would refer you to our lawyers." In 1996, U.S. District Judge Rebecca Doherty ruled that LSU was not in violation of **Title IX** of the 1972 Education Amendment Act. That ruling came in a suit filed by five female students who claimed LSU denied them equal access and opportunity because the school did not have a women's soccer program.

While the lawsuit was pending, LSU started a women's soccer program and a softball team, which begins its fourth season this weekend. A judge ordered LSU to submit a plan for **Title IX** compliance, but said the university was not intentionally discriminatory. The judge also denied a request to turn the suit into a class action.

On Jan. 27, the 5th Circuit reversed that ruling, said LSU had practiced intentional discrimination and

opened the way for the plaintiffs to seek monetary damages.

The **appellate court** also ordered Doherty to reconsider her ruling on whether the suit could be turned into a class action. An attorney for the plaintiffs, Nancy Rafuse, has said that if the judge makes the suit a class action, thousands of present and former student-athletes could join the suit.

McKenzie called Rafuse's comments about "thousands" joining the lawsuit "an exaggeration."

(The Associated Press contributed to this report.)

GRAPHIC: Mug of Mark Emmert

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December 16, 1999, Thursday

SECTION: Pg. 1

LENGTH: 852 words

HEADLINE: **Court** Permits Limits on Men's Teams to Create Chances for WomenDeck: Ninth Circuit Vacates Injunction, Says School's **Title IX** Compliance Didn't Violate Men's Rights

BYLINE: By KENNETH OFGANG, Staff Writer/**Appellate Courts**

BODY: A public university may limit the size of its men's athletic teams in order to comply with federal regulations designed to ensure equal opportunity for women, the Ninth U.S. Circuit **Court** of Appeals ruled yesterday.

A three-judge panel overturned a district judge's injunction barring California State University-Bakersfield from limiting the size of its men's wrestling team to 25. The **appellate** judges said the school didn't violate the rights of the male athletes by adopting the limit as part of a plan to increase the number of places for women on school teams to 55 percent.

Women have been 60 percent or more of the school's student body for a number of years.

Earlier Settlement

CSU adopted the plan, based on Department of Education **Title IX** guidelines, as part of a settlement of an earlier suit by the California Chapter of the National Organization of Women. **Title IX** of the 1972 federal education law prohibits federally funded schools from discriminating on the basis of sex, and the DOE regulations require that students be given "equal athletic opportunity."

"**Title IX** has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics," Judge Cynthia Holcomb Hall wrote for the panel. "Today we join our sister circuits in holding that **Title IX** does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies."

Before the challenged plan was adopted, men made up 61 percent of the varsity teams at the Bakersfield school and received 68 percent of the athletic scholarship money.

At the time of the men's suit, which was joined by the National Wrestling Coaches Association and supported by other wrestling groups, the men's team had only 21 members. But in asking Chief U.S. District Judge Robert Coyle of the Eastern District of California for the preliminary injunction, they expressed the fear that the school would eventually eliminate the team entirely as part of its gender-equity efforts.

Coyle ruled that capping the size of men's teams violates the male athletes' rights to equal opportunity under **Title IX**. There was a strong argument that the caps also violated the Equal Protection Clause, Coyle said without ruling on the question.

But Hall said the district judge misconstrued the law. The university, she said, was entitled to make gender-conscious decisions in order to reconcile its obligation to prospective women athletes with the budgetary constraints that prevented it from offering every capable athlete a place on a team.

Proportionality Argued

Hall rejected the argument that the university went too far by insisting that equity be determined in close proportion to total enrollment rather than to the relative interest of men and women in participating. That contention, Hall wrote, has been rejected by several other circuits and is "fundamentally inconsistent with the purpose of **Title IX**."

The statute is "dynamic," not "static," the jurist wrote.

"**Title IX** has altered women's preferences, making them more interested in sports, and more likely to become student athletes," she elaborated. "Adopting Appellees' interest-based test for **Title IX** compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed **Title IX**'s enactment."

Hall noted that Congress considered, but didn't pass, legislation backed by House Speaker Dennis Hastert, a former wrestling coach, among others which would have blocked the DOE regulations in order to prevent schools from having to shift resources from men's sports to women's. That fact exemplifies congressional intent to permit institutions like CSU to do what it did, the judge wrote.

The injunction was also erroneous, Hall went on to say, because the district judge failed to defer to the enforcing agency's interpretation of **Title IX**.

Judge Susan Graber and Senior Judge William Canby Jr. joined in the opinion.

University of Nebraska law professor Josephine Potuto, who authored an amicus brief in support of the male wrestlers, said the interpretation of **Title IX** by the Ninth Circuit panel and others "is bad law and likely unconstitutional."

Potuto, who described herself as "a huge supporter of athletic opportunities for women," said the decision was "really pernicious." It allows schools to "monkey around with numbers" in order to justify depriving men of athletic opportunities, she said, and to cut the number of male athletes without having to increase the number of women athletes.

CSU spokeswoman Colleen Bentley-Adler said the university was "delighted" with the decision. "It shows that CSU is on the right path and it does validate [the university's handling of] some of the gender-equity issues we've been dealing with," she told the MetNews.

The case is Neal v. Board of Trustees of the California State Universities, 99 S.O.S. 9775.

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December 16, 1999 Thursday, FINAL EDITION

SECTION: SPORTS; Pg. C6

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HEADLINE: Court backs equal funds for women

BYLINE: FROM STAFF AND WIRE REPORTS

BODY:

Universities receiving federal funds must provide opportunities for women to participate in sports in proportion to their numbers on campus and not their "relative levels of interest" in athletics, a federal **appellate court** in San Francisco ruled on Wednesday.

And schools that can't come up with the money to enlarge their women's teams must shrink their men's teams until the right proportions are achieved, said the 9th U.S. Circuit **Court** of Appeals.

The unanimous decision, reversing a ruling by a federal trial judge in Fresno, was handed down in a **case** filed by male wrestlers at California State University, Bakersfield, which put a cap on recruitment for all of its men's teams.

The **case** raised questions about the proper interpretation of **Title IX** of the U.S. Civil Rights Act, the law that requires equal athletic opportunities for women students, at a time when **courts** have been abandoning affirmative action in favor of strict neutrality toward individuals in school admissions and other programs.

But the 9th Circuit said athletic programs are different. Schools can't ignore sex when deciding the size of their teams because men must try out for a limited number of spots on men's teams and women, on women's teams, the **court** said.

FOUR IN ACC RANKED: Perennial baseball power Florida State leads four ACC teams ranked in the preseason poll by Collegiate Baseball.

The Seminoles, the NCAA runners-up last year with a 57-14

record, were ranked sixth.

Georgia Tech (38-20) was ninth, Clemson (42-27) 11th and North Carolina (41-18) 20th.

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The Chronicle of Higher Education

January 7, 2000

SECTION: ATHLETICS; Pg. A64

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HEADLINE: 2 Appeals **Courts** Uphold Right of Universities to Reduce Number of Male Athletes

BYLINE: WELCH SUGGS

BODY:

Two universities have won the right to reduce the number of male athletes on varsity teams -- or even to drop the teams -- to meet the requirements of **Title IX** of the Education Amendments of 1972. Federal appeals **courts** ruled last month in favor of **California State University at Bakersfield** and Illinois State University in lawsuits brought by male athletes against the institutions.

The decisions are setbacks for groups trying to change the way universities comply with **Title IX**, which forbids discrimination by gender at institutions receiving federal funds.

In 1979, the U.S. Department of Education's Office for Civil Rights issued a policy interpretation that gives universities a three-part test to determine whether they are offering women enough opportunities to participate in sports. Colleges can follow the policy by fulfilling any one of the three criteria: having equivalent proportions of female athletes and female students, a condition known as substantial proportionality; demonstrating a "history and continuing practice" of expanding athletics programs for women; or showing that the athletic interests and abilities of women are being accommodated fully.

Along with **Title IX**, **Bakersfield** and the other Cal State campuses are operating under a consent decree that required them to ensure that their teams were within five percentage points of meeting the substantial-proportionality test by the end of the 1998-99 academic year. The Cal State system signed the consent decree after being sued by the California chapter of the National Organization for Women, which claimed that the campuses had far too few female athletes to be in compliance with **Title IX**.

Members of **Bakersfield's** wrestling team had won a preliminary injunction in February from a federal district **court** forbidding the university to drop their sport or limit the number of wrestlers, the first such **court** victory for athletes. However, a three-judge panel of the U.S. **Court** of Appeals for the Ninth Circuit refused to uphold the injunction last month.

Lawyers for the wrestlers and other advocates have argued that substantial proportionality, and by extension the consent decree, required a quota that discriminates against men.

"The **courts** are stubbornly refusing to apply the law as it's written," said Mark Martel, the lead lawyer on the **case** and a former wrestler at Stanford University. "The presumption underlying this thinking is that any time two different groups are participating in something at different rates, there is discrimination, and it has to be eliminated."

In September 1997, a group of wrestlers, led by Stephen Neal, filed for a temporary restraining order to block the university's decision to place limits on the number of men allowed on the team, alleging that it was discriminating against men on the basis of sex. Mr. Neal later won national-collegiate and world heavyweight championships.

The proportionality tests used in the consent decree and the first part of the **Title IX** policy interpretation

"have no rational basis absent a showing that men and women have equal interest and ability to participate in intercollegiate athletics." wrote the group's lawyers.

Judge Robert E. Coyle issued the temporary restraining order and then granted a preliminary injunction to the wrestlers last February, ruling that "relying on proportionality to cap the men's athletic teams at CSUB in order to comply with the consent decree constitutes implementation of a quota based on gender in violation of **Title IX**."

However, many other **courts** have ruled that dropping men's teams and imposing roster caps are acceptable ways of complying with **Title IX**. **Those courts** have found that women have historically been underrepresented in athletics programs at Brown, Colorado State, and Louisiana State Universities, among others. In its unanimous opinion in the **Bakersfield case**, written by Judge Cynthia Holcomb Hall, the appeals-**court** panel vehemently agreed with the other **courts**.

The defendants' interpretation of **Title IX** "would have allowed universities to do little or nothing to equalize men's and women's opportunities if they could point to data showing that women were less interested in sports," Judge Hall wrote. But "a central aspect of **Title IX's** purpose was to encourage women to participate in sports."

Rudy Carvajal, **Bakersfield's** director of athletics, released a statement saying that the university was pleased that the **court** had followed the lead of other appeals **courts**.

A spokesman for the athletics department said officials had not decided whether to reimpose the cap.

Judge Hall closed her opinion with a strong statement defending **Title IX**. Noting the excitement caused by the U.S. victory in the Women's World Cup last summer, she said that "**Title IX** has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics."

Mr. Martel, the plaintiffs' lawyer, said he would appeal the **case** to the entire Ninth Circuit.

In Illinois, a three-judge panel of the U.S. **Court** of Appeals for the Seventh Circuit unanimously dismissed a lawsuit brought by former men's soccer players and wrestlers against Illinois State after it eliminated their sports.

In 1995, Illinois State dropped the two men's sports and added women's soccer in order to meet substantial-proportionality guidelines. The male athletes sued the university that fall, charging that because it had decided to eliminate the teams on the basis of sex, it had violated **Title IX**.

The university responded that trying to achieve substantial proportionality was the only way it could afford to come into compliance with **Title IX**. The athletes' suit was dismissed by a lower **court** in February, and they appealed to the Seventh Circuit. They will next appeal for a hearing before the full **court**, lawyers said.

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December 5, 1999, Sunday

SECTION: Final; Pg. B1

LENGTH: 1328 words

HEADLINE: Stuck in a Near Fall, BYU Slammed by Iowa; Dual Falls Well Short of Goal

BYLINE: MICHAEL C. LEWIS, THE SALT LAKE TRIBUNE

BODY:

The wrestling program at Brigham Young University has been sentenced to die, and only \$ 7 million in donations or a landmark Supreme **Court** decision can save it now.

But while the Cougars already have their heads wedged into the guillotine, they are not simply waiting for the blade to fall. As might be expected of men who train daily for combat, the Cougs are fighting back, struggling and straining against the leverage of reality in the hope of pulling off the ultimate reversal.

"This is going to be the story of all stories," said Coach Mark Schultz.

The first chapter already has been written, with the formation of the Utah Amateur Wrestling Foundation. It was officially organized in October, six months after BYU said it would eliminate wrestling and men's gymnastics because it said those sports are too expensive and do not exist at enough schools in the new Mountain West Conference.

Former Cougar wrestler Ross Brunson was elected to head the foundation, and he negotiated an agreement with BYU. If the foundation can raise \$ 7 million, the school told Brunson it will reconsider its decision. The money could be put into a trust fund and the interest could be used to fund the wrestling program. Even at only 5 percent interest, that would produce \$ 350,000 annually, more than the \$ 250,000 that goes to wrestling now.

To fuel the fund-raising, the wrestlers organized a dual meet against the No. 2-ranked Iowa Hawkeyes in the Delta Center on Saturday night. Iowa won the dual 33-6.

Former BYU athletic director and All-America wrestler Rondo Fehlberg -- the man who announced the program cuts in April -- arranged a private donation to pay the \$ 80,000 rental fee for the Delta Center, and the Cougs had hoped to sell out the 19,911-seat arena and set a wrestling attendance record.

"We want to make a statement that there are people here in the state who will support wrestling," Brunson said.

As it turned out, 5,877 fans paid at least \$ 5 apiece to watch the Hawkeyes while former Olympian Dan Gable watched from the Iowa sideline. Gable won a gold medal in the 1984 Olympics in Los Angeles, and later coached Schultz before Schultz and his late brother, Dave, won golds at the 1992 Barcelona Games.

And while a few thousand dollars is not going to make a huge difference on the ledger, the fans that the money represents might have an effect on the BYU administration when it meets with Brunson and other wrestling supporters at the end of May for an accounting of the foundation's progress.

Brunson said he already has pledges of more than \$ 1 million, and that if even the foundation falls short of the \$ 7 million next spring, it might make raise enough money and demonstrate enough support to keep the sport alive at least another few years while more donations are sought and influential decisions are made in **court**.

"I admire what they're trying to do," said BYU Athletic Director Val Hale.

'War on Men': The larger issue is the role of **Title IX** in the elimination of men's sports. Schultz and his supporters complain that the federal gender equity law is being applied illegally, because of an interpretation by the Office of Civil Rights. The law prohibits discrimination based on gender, yet that is what wrestlers and other male athletes in so-called minor collegiate sports say has been happening to them over the last decade.

"It has been a direct attack against men," said Schultz. "It's a war on men . . . and it's the war we have to win."

The number of college wrestling programs today is only about half of the more than 700 that existed in 1972, said Schultz, largely because of **Title IX**.

Fehlberg denied a direct link to **Title IX** when he announced the plan to cancel wrestling at BYU, "but indirectly it came into play, because so many wrestling and men's gymnastics programs have been eliminated at other schools in the past decade," he said. "We've ended up with a situation where there are only a couple of programs in each conference. And that makes a sport difficult to sustain."

When the Office of Civil Rights first issued an "interpretation" of **Title IX** in 1979, it laid out a three-point test for determining if a school was complying with the law.

Proving "proportionality" in the number of athletic opportunities open to men and women was one of the tests, and it quickly became the favorite method of demonstrating compliance because it was the easiest and least open to expensive legal challenges, said attorney Mark Martel, a former wrestler and coach who represents a wrestler suing the California Board of Trustees over its attempt to limit the number of wrestlers at Cal State-Bakersfield.

The idea was that the number of athletic opportunities --or scholarships, really -- should be proportional to the number of men and women enrolled in the school. A school with 55 percent women, then, ought to have 55 percent of its athletic scholarships for women.

Case Law: But a **court case** involving Brown University in 1993 changed everything.

Based on the ruling in that **case**, the Office of Civil Rights in 1996 changed its definition of "opportunities" to mean "actual participants," said Martel.

That meant that a school that might have been in compliance by allowing a proportional number of scholarships for men and women was suddenly not in compliance if not all of the women's scholarships were being filled, said Martel. Most schools then had to cut men's sports even more, he said, because fewer women went out for sports, and the result was a quota system that violates **Title IX** itself.

The number of scholarships "should basically reflect who wants to play," said Martel. "That's what the law requires."

Whether the law agrees remains to be seen.

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Discusses the backlash against the legal requirements governing sex discrimination in intercollegiate athletic programs in the context of the history and enforcement of **Title IX**

BODY:

d. Reverse Discrimination Claims in the **Courts**. Every **court** to date that has considered reverse discrimination claims challenging the three-part test has rejected these claims.[180] Such claims have been brought by male athletes where, for budgetary reasons, universities have sought to downsize their athletic programs but have been unable to cut women's teams without bringing themselves further out of compliance with **Title IX**. [181] Such claims have also arisen where universities, in defending against **Title IX** suits by female athletes brought under the three-part test, have challenged the three-part test as sanctioning reverse discrimination against male athletes.[182] In both contexts, the reverse discrimination claims have alleged violations of the rights of male students under both **Title IX** and the Equal Protection Clause of the Fourteenth Amendment.[183] Where an institution provides male students with a disproportionately greater share of athletic opportunities than female students, neither **Title IX** nor the Equal Protection Clause will support a claim that dropping a men's team or adding a women's team constitutes unlawful discrimination against men.

i. Reverse discrimination claims under **Title IX**. Claims by male athletes challenging the elimination of a men's sport under **Title IX** are subject to the same three-part test that **courts** have applied to **Title IX** claims by female athletes. However, because the three-part test focuses on the opportunities provided to the underrepresented sex, at most institutions discrimination claims brought by male athletes will not succeed under **Title IX**. For example, male athletes who sue their university for dropping a men's sport will not be able to carry their burden of proof on the first prong if the athletic opportunities allocated to men overall are not substantially fewer than men's share of enrollment. Because a school need only comply with one of three parts of the test to comply with **Title IX**, reverse discrimination claims will fail under prong one of the test where men are not the underrepresented sex, without regard to prongs two or three.

Court decisions have applied this analysis in rejecting **Title IX** challenges brought by male athletes to university decisions eliminating men's teams. For example, in *Kelley v. University of Illinois*, [184] male swimmers challenged the University's decision to eliminate varsity men's **swimming**, while retaining the varsity women's **swimming** program, under both **Title IX** and the Equal Protection Clause of the Fourteenth Amendment. The decision had been motivated, in part, by the University's \$600,000 deficit in its athletic budget. Men's **swimming** was selected for termination specifically because it was a historically weak program, was not widely offered at high schools, and did not have a large spectator

following. Because the University recognized that dropping a women's sport would place it at risk of violating **Title IX** given the disproportionately fewer athletic opportunities available to women at the University, it chose not to eliminate women's **swimming**.^[185] In applying the three-part test to the plaintiffs' **Title IX** claim, the Seventh Circuit ruled that the male swimmer's rights were not violated because men were not the underrepresented sex, and therefore could not succeed on prong one of the test.

Similar reasoning was applied to reject a **Title IX** claim by male athletes in *Gonyo v. Drake University*.^[186] In *Gonyo*, male wrestlers challenged their University's decision to discontinue its men's varsity wrestling team on both **Title IX** and equal protection grounds.^[187] Drake had dropped its men's wrestling program as part of a plan to reduce its athletic budget. Like the **University of Illinois**, Drake's decision to drop the men's sport was made in the context of an athletic program that provided substantially more athletic opportunities for men than women. Men were 42.8% of the student body at Drake, yet received 75.3% of the total varsity athletic slots at the University.^[188] In granting summary judgment against the plaintiffs, the **court** ruled that Drake's elimination of a men's team did not establish a **Title IX** violation because men were significantly overrepresented in the total athletic program.^[189]

The **courts'** rejection of **Title IX** claims by male athletes challenging the elimination of a particular men's sport where men remain overrepresented in the overall athletics program properly reflects **Title IX's** focus on the rights of men and women as athletes, rather than as members of particular teams.^[190] This balance reflects the policy determination that an overall program comparison is a superior and more flexible test than requiring team-by-team equivalence -- a standard which would require the men's and women's athletic programs to mirror one another. A team-by-team approach would frequently disadvantage women because the greater opportunities and benefits provided to men who play football would have no counterpart in the women's athletics. Moreover, men and women may have differing levels of interest in particular sports, and a team-by-team comparison may not properly reflect those different interests.^[191] For example, at a particular institution, women may have more interest in playing volleyball than soccer, while men may prefer soccer to volleyball. Rather than requiring that institution to offer the same sport to both groups, the current standard permits the school to offer volleyball to women and soccer to men, while treating both sets of athletes comparably. Consequently, male athletes challenging their university's decision to drop their sport under **Title IX** will not succeed where the opportunities provided to male athletes overall are underrepresentative.

Courts have also rejected reverse discrimination arguments by universities challenging the three-part test itself as a violation of **Title IX** in defending against **Title IX** suits by female athletes. In defending such **cases**, universities have argued that **courts** should reject the DOE's three-part test as a valid interpretation of **Title IX** because it violates section 1681(b) of the Act. Section 1681(b) provides that:

Nothing contained in subsection (a) of this section shall be interpreted to require any education institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area. Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.^[192]

Both Brown University and Colorado State University argued that the three-part test mandates statistical balancing in violation of this provision. But both the First and Tenth Circuits rejected this argument on the ground that the three-part test provides three independent avenues for **Title IX** compliance and does not mandate proportionality.^[193]

In addition to the reasoning of the First and Tenth Circuits, the argument that the three-part test constitutes preferential treatment in violation of section 1681(b) should be rejected for another reason. This section was designed to prohibit quotas in university admissions and hiring,^[194] and does not apply to the use of substantial proportionality as a measure of equity in the context of intercollegiate

athletics, which by virtue of offering sex-separate teams itself requires a particular gender ratio of participants.[195] An institution which provides intercollegiate athletic opportunities for each gender in numbers substantially proportionate to enrollment is not granting preferential or disparate treatment to the members of either sex, as prohibited under section 1681(b). Because intercollegiate athletics is a sex-segregated activity, gender is already a requirement for participation on an athletic team. Rather than requiring preferential or disparate treatment based on gender, requiring the offering of substantially proportionate opportunities in this context is a measure of equal treatment and nondiscrimination.

ii. Reverse discrimination claims under the Equal Protection Clause.[196] Claims that **Title IX's** three-part test requires reverse discrimination against male athletes are also unsupported by the Equal Protection Clause of the United States Constitution. Both male plaintiffs alleging that a university decision to discontinue their team violates equal protection,[197] and institutions claiming in defense of **Title IX** suits that the application of the three-part test discriminates against men, have raised such claims.[198] Neither challenge is consistent with equal protection principles, and **courts** have rejected such claims in both contexts.

In equal protection challenges by male athletes whose teams have been eliminated, **courts** have ruled that the application of **Title IX** to a university program which results in the elimination of a men's team, with no corresponding elimination of a women's team, does not violate equal protection. For example, in *Kelley*, the **Court** of Appeals for the Seventh Circuit upheld the three-part test as applied to the University based on Congress' broad powers to remedy past discrimination.[199] The **court** concluded that, to the extent that the three-part test requires a school to consider gender in reducing its athletic offerings, such consideration of gender is substantially related to the important government interest of remedying sex discrimination in intercollegiate athletics and therefore complies with equal protection.[200] Similarly, the **court** in *Gonyo* rejected the equal protection claim of the male wrestlers, holding that the consideration of gender in decreasing athletic programs complies with equal protection because it properly assists members of the underrepresented sex, as is permissible under the Supreme **Court's** decision in *Mississippi University for Women v. Hogan*. [201]

Institutions defending **Title IX** claims have also failed to establish that the three-part test violates equal protection.[202] In *Cohen*, Brown argued that by requiring the full and effective accommodation of the athletic interests of the underrepresented sex, without regard to whether the institution is fully accommodating the interests of overrepresented sex, the three-part test accords preferential treatment to women in violation of equal protection.[203] The **Court** of Appeals for the First Circuit rejected this argument for two reasons. First, the **court** rejected Brown's view of the three-part test as conferring preferential treatment. The **court** observed that Brown's characterization of the test as preferential treatment assumes that, given equal opportunity, women are less interested in participating in varsity sports than men.[204] The **court** explicitly rejected this assumption. Second, the **court** held that even if the test did constitute a gender preference, it would still pass constitutional muster because it fits within Congress' design to remedy extensive discrimination against women in intercollegiate sports.[205] Like the **courts** in *Kelley* and *Gonyo*, the First Circuit relied on *Metro Broadcasting v. FCC* [206] in support of its deference to Congress' broad powers to remedy past discrimination.[207]

Both rationales relied on by **courts** in rejecting reverse discrimination challenges to the propriety of the elimination of men's teams and to the three-part test are justified under equal protection principles. First, neither the three-part test nor its application to a university's decision to reduce its athletic offerings constitutes a gender-based classification which disadvantages men as a group under the Equal Protection Clause. In the world of intercollegiate athletics, a decision to drop a team will always have a gender-based component because of the existence of sex-separate teams. Because reverse discrimination claimants do not challenge the sex-based classification of separate men's and women's athletic teams,[208] their challenge rests on the characterization of a decision to drop a men's team as a gender-based classification that disadvantages men.[209] However, dropping a men's athletic team is not a gender-based classification that disadvantages men when men continue to retain the lion's share of athletic opportunities. Rather, such a decision is a gender-based classification that lessens the existing gender-based preference in favor of men, and therefore does not discriminate against men under the Equal Protection Clause.

Second, even if the three-part test or its application to athletic cutbacks was viewed as a gender-based classification that disadvantages men for equal protection purposes, it would still be constitutionally permissible because it is designed to remedy past discrimination against women in intercollegiate sports.[210] **Courts** rejecting reverse discrimination claims on this ground have relied in part on Congress' broad powers to remedy discrimination upheld under *Metro Broadcasting*. [211] This past term, in *Adarand Constructors, Inc. v. Pega*, [212] the Supreme **Court** overruled its holding in *Metro Broadcasting* that Congress is entitled to greater deference than state and local governments in enacting race-based affirmative remedial measures. However, the **Court's** recent decision in *Adarand* should not change the result in reverse discrimination challenges to the three-part test or its applications.

As an initial matter, *Adarand* should have no effect on the analysis of gender-based classifications designed to remedy discrimination against women. In *Adarand*, the **Court** applied strict scrutiny to race-based affirmative remedial measures enacted by Congress, which is the standard used by **courts** to evaluate racial discrimination. As long as gender-based classifications which discriminate against women are subjected to a lesser standard of intermediate scrutiny, it would defy common sense to apply strict scrutiny to gender-based classifications designed to remedy discrimination against women.[213]

Moreover, even if strict scrutiny were extended to gender-based discrimination against women, [214] the use of gender as a factor in determining how to decrease athletic offerings in an athletics program that provides more offerings to men should easily survive even strict scrutiny. Analyzed under strict scrutiny, a gender-based classification would be permissible if it was narrowly tailored to serve a compelling government interest.[215] Remedying ongoing discrimination against women in an athletics program is undoubtedly a compelling state interest.[216] Unlike the race-based affirmative action plan in *Croson*, which did not survive strict scrutiny because it was premised on correcting general societal discrimination rather than discrimination in the affected industry, [217] the use of gender in this context directly addresses the discrimination by the affected institution itself.

The use of gender in cutting athletic offerings which are already slanted toward men is also narrowly tailored toward furthering the compelling state interest in remedying the school's discrimination against women athletes. Because intercollegiate athletics, unlike the construction industry involved in *Croson*, provide sex-segregated opportunities, gender is a necessary component of any plan to redress discrimination in the allocation of athletic opportunities between men and women.[218] Indeed, where an institution has decided to reduce athletic offerings in a program that provides more opportunities to men, the fit between the use of a gender-based classification to reduce men's rather than women's opportunities, and the goal of remedying ongoing institutional discrimination against women, could not be closer.

Despite widespread allegations of reverse discrimination by opponents of **Title IX's** three-part test for compliance, such claims are not supported by legal principles. The frustration and hardship experienced by male athletes who have lost their sports in budget cuts that have not similarly eliminated women's teams is entirely understandable, but so is the frustration and hardship suffered by female athletes who have never had the opportunities afforded their male counterparts. Cuts in men's programs do not amount to reverse discrimination when men retain the lion's share of athletic opportunities. While allegations of reverse discrimination are to be expected in an environment of program cutbacks, especially if the university making the cuts blames gender equity as the culprit behind such eliminations, such claims and allegations are both legally and factually untenable.

2. Football is Unique: The Third Sex Rationale. Another argument advanced by **Title IX** opponents to weaken the standards that have been applied by the DOE and the **courts** is that the three-part test does not take into account the unique particularities of the sport of football.[219] Because the average football squad has between 85 and 100 players, football's large numbers are blamed for the failure of many schools to satisfy the substantial proportionality prong of **Title IX** compliance.[220] In addition, football proponents claim that football's ability to generate revenue, coupled with the size of the squads and the fact that it is a sport played only by men, justifies taking football out of the mix in calculating whether substantially proportionate opportunities are available to women.[221]

Neither the large size of football teams nor the fact that the sport is played primarily by men justifies

treating it differently than any other sport. The large size of a football squad does not make football players a third sex.[222] Institutions can offer an equivalent number of opportunities for women to participate in athletics by offering several women's teams. Precisely because football provides so many opportunities for men to play sports, many institutions will have to offer more sports for women than men to provide an equal opportunity for men and women to participate in athletics. Moreover, while football is played primarily by men, there are a number of sports now played primarily by women in this country, including volleyball, field hockey, and synchronized **swimming** with which to counter such imbalance. There is no shortage of sports for women to play to balance out the opportunities provided to male athletes by football. Indeed, the three-part test is sufficiently flexible to take into account the different sizes of sports and different sports interests of men and women by evaluating equal opportunity on a program-wide basis, rather than on the basis of a team-by-team comparison.[223]

Finally, the argument that football's revenue-producing capabilities justify an exemption from **Title IX** is also unpersuasive. In fact, the vast majority of NCAA football programs lose more money than they bring in.[224] Over 80% of football programs run a net deficit.[225] Even in Division I-A and IAA, the most competitive divisions which are beneficiaries of lucrative television contracts, 62% of football programs on average have annual deficits of \$1 million in Division I-A and \$664,000 in Division I-AA.[226] Moreover, it is unclear why the capacity of an educational program to earn a profit should entitle it to special treatment under **Title IX**. Congress rejected precisely such a rationale in 1975 in defeating the Javits Amendment.[227]

C. Behind the Backlash: the Continuing Bias Against Female Athletes

The intensity of the current backlash against **Title IX** enforcement, and the tenacity with which institutions have defended against **Title IX** challenges, indicate an entrenched and persistent resistance among some proponents of the status quo to gender equity in athletics. The financial investments institutions have made in fighting gender equity alone demonstrates their commitment to the status quo. Colorado State University spent over \$500,000 in attorney's fees in their unsuccessful defense of a lawsuit instead of reinstating women's varsity softball at a fraction of the cost.[228] Brown has spent over \$100,000 in expert witness fees alone seeking to prove that men are inherently more interested in sports than women, independent of the fewer sports opportunities available to women.[229]

The grudging reluctance with which schools are only now, slowly and over twenty years after the passage of **Title IX**, reallocating their priorities and resources to provide women with more equitable opportunities reflects a deeply imbedded view that sports participation for men is a right, while for women it is a privilege. As one district **court** astutely recognized "[m]any institutions of higher education apparently hold the opinion that providing equality to women in athletics is both a luxury and a burden. The feeling seems to be that to afford such equality to women is a gift and not a right." [230] This view is so entrenched in our popular culture that its expression goes virtually unnoticed. For example, in reporting the victory of the women student-athletes in the recent decision against Brown University, the New York Times stated that the decision "could prompt new challenges by women's programs at other Universities. More important, it could lead to streamlining or outright elimination of some men's sports to bring support for male and female athletic programs into proportion." [231] The assessment of the New York Times of the relative importance of men's and women's sport opportunities reflects a value judgment of which the reporter who made it may not have been consciously aware. The consistently hostile reaction to the progress of women in gaining increased athletic opportunities reflects deeply held views of gender stereotypes -- strong women athletes don't fit with the image of women as vulnerable sex objects [232]. Only through continued exposure to female athletes will these stereotypes and the hostility to the gains of women under **Title IX** give way to acceptance of real equality for women in intercollegiate athletics.

III. CONCLUSION

In the past few years, women have made significant and long-awaited progress in achieving an equal opportunity to participate in intercollegiate athletics. **Courts** have unanimously adopted the DOE's three-part test for compliance with **Title IX**. As a result, women have succeeded in obtaining **court** orders requiring their schools to add additional women's teams and preventing their schools from cutting

teams. But because of these successes, and a more conservative political environment in Congress, **Title IX** has come under attack by proponents of college football and other men's sports claiming that, as interpreted by the DOE and the **courts**, the law discriminates against men. Their argument is premised on the assertion that men are more interested in sports than women, and therefore deserve disproportionately more athletic opportunities. This assertion is unsupported by the evidence and has been soundly rejected in the **courts**.

Nevertheless, it remains to be seen whether arguments for weakening **Title IX** will succeed in the new Congress. If history is any guide, proponents of gender equity will ultimately prevail in maintaining strong legal protections for women in intercollegiate athletics. It will not be an easy battle, however. The primary advocates of weakening **Title IX**, organizations representing college football interests, have strong supporters in Congress, and the continuing emphasis of society on the importance of sport opportunities for men as opposed to women will only help their cause. In the final round, the battle will depend on the political strength of female athletes and their parents, a group that will not easily relinquish its hard-won progress toward gender equity. Given the enormous health, confidence, and other benefits female athletes obtain from sports competition,[233] much more is at stake than mere access to the playing field.

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BIBLIOGRAPHY: 180. See *Kelley v. University of Ill.*, 35 F.3d 265 (7th Cir. 1994) *Roberts II*, 998 F.2d 824 (10th Cir. 1993) *Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa 1995). At least one such challenge was settled out of **court** without any **court** decision in the **case**. See *Caruso v. Broyles*, No. 93-5089 (W.D. Ark. filed May 27, 1993). In *Caruso*, male swimmers sued the University of Arkansas for dropping the men's **swimming** team. The University quickly settled the **case** by reinstating the team. *Id.*

181. See *Kelley*, 35 F.3d at 265 *Gonyo*, 879 F. Supp. at 1000 *Caruso*, No. 93-5089.

182. See *Roberts*, 998 F.2d at 824 *Cohen II*, 991 F.2d 888, 890 (1st. Cir. 1993).

183. U.S. CONST., amend. XIV, section 1.

184. 35 F.3d 265 (7th Cir. 1994).

185. Had the University eliminated women's **swimming**, it would have been out of compliance with **Title IX** under the three-part test. *Id.* at 269. In 1993, female students comprised 44% of the undergraduate enrollment, but only 23.4% of varsity athletes at the University. In addition, dropping women's **swimming** would have put the school out of compliance with prong three, as the University would not be fully and effectively accommodating the athletic interests of the underrepresented sex. Finally, although no **court** has explicitly ruled on this question, dropping women's **swimming** in itself probably would have placed the University in violation of prong two because the elimination of a women's team, despite continuing interest in the program, would be inconsistent with a history of continuing program expansion for the underrepresented sex. As the Seventh Circuit observed, the University's decision not to cut women's **swimming** was "extremely prudent." *Id.*

186. 879 F. Supp. 1000 (S.D. Iowa 1995).

187. *Id.* at 1001.

188. *Id.* at 1002.

189. The **court** also rejected the plaintiffs' **Title IX** challenge to the University's allocation of a greater share of athletic financial assistance to female than male athletes. Men at Drake were 75.3% of varsity athletes, but received 47% of athletic scholarships. *Id.* at 1002. The **court** ruled that the scholarship disparity did not violate the **Title IX** regulations, which require reasonable opportunities for the awarding of athletic scholarships for each gender in proportion to their athletic participation, 34 C.F.R.

section 106.37 (1995). Gonyo, 879 F. Supp. at 1005. In rejecting this claim, the **court** ruled that the scholarship regulation "was never intended to prevent schools from allocating resources in a way designed to encourage participation by an underrepresented gender." *Id.*

190. See 44 Fed. Reg. 71,413, 71,422 (1979) (observing that the **Title IX** regulation requires equal opportunity between men and women on a program-wide basis, and that "**Title IX** protects the individual as a student-athlete, not as a basketball player, or swimmer.").

191. See *Kelley v. University of Ill.*, 35 F.3d 265, 271 (7th Cir. 1994) (recognizing that it was not unreasonable for HEW to reject a team-by-team comparison as "a rigid approach that denies schools the flexibility to respond to the differing athletic interests of men and women.").

192. 20 U.S.C. section 1681(b) (1994).

193. See *Roberts II*, 998 F.2d 824, 829 nn. 5-6 (10th Cir. 1993) *Cohen II*, 991 F.2d 888, 895 (1st Cir. 1993) see also *Kelley v. University of Ill.*, 35 F.3d at 271 (rejecting plaintiffs' argument that the three-part test establishes a gender-based quota system contrary to the mandates of **Title IX**, although not specifically addressing section 1681(b)).

194. HOUSE CONF. REP. NO. 798, 92d Cong., 1st Sess. (1971)m reprinted in 1972 U.S.C.C.A.N. 2608, 2671 see also 117 CONG. REC. 39,261-62 (remarks of Rep. Albert H. Quie (R-Minn.)).

195. See *Cohen III*, 879 F. Supp. at 202 (crediting testimony of plaintiffs' expert that "a university 'predetermines' the approximate number of athletic participants and the male to female ratio" through its athletic offerings).

196. U.S. CONST., amend. XIV, section 1.

197. *Kelley*, 35 F.3d at 265 *Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa 1995).

198. See *Cohen II*, 991 F.2d at 900.

199. *Kelley*, 35 F.3d at 272 (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 565-66 (1990)).

200. *Id.*

201. 458 U.S. 718 (1982) see also *Gonyo*, 879 F. Supp. at 1006.

202. See *Cohen II*, 991 F.2d at 900.

203. *Id.*

204. *Id.*

205. *Id.* at 901.

206. 497 U.S. 547 (1990).

207. *Cohen II*, 991 F.2d at 901.

208. See *Kelley v. University of Ill.*, 35 F.3d 265, 270-71 (7th Cir. 1994) *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1002 (S.D. Iowa 1995). Moreover, the provision of sex-separate intercollegiate athletic teams would easily survive such a challenge as it is directly related to ensuring that women have a meaningful opportunity to compete in intercollegiate athletics. *Mississippi Univ. for Women v. Hogan*, 45 U.S. 718, 728 (1982) (gender-based classifications may be upheld where justified by a compensatory purpose).

209. Hogan, 458 U.S. at 724 (requiring gender-based classifications which disadvantage members of one sex to be substantially related to an important government interest to pass constitutional muster).

210. Id. at 728 ("A gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.").

211. 497 U.S. at 565-66.

212. 115 S. Ct. 2097 (1995).

213. Despite the lack of a legal basis for applying strict scrutiny to gender-based affirmative action programs, however, some **courts** have arguably incorrectly extended the Supreme **Court's** decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which applied strict scrutiny to municipal race-based affirmative action plans, to gender-based affirmative action plans as well. See *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), cert. denied, 114 S. Ct. 1190 (1994) *Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989) *Cone Corp. v. Hillsborough County*, 723 F. Supp. 669 (M.D. Fla. 1989). But see, *Associated Gen. Contractors, Inc. v. City & County of San Francisco*, 813 F.2d 922, 941 (9th Cir. 1987) (refusing to interpret *Croson* as requiring strict, rather than intermediate scrutiny, in evaluating gender-based affirmative action plan).

214. See *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1425 n.6 (1994) (finding it unnecessary to decide whether gender-based classifications should be subject to strict scrutiny) *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 373 (1993).

215. See, e.g., *Adarand*, 115 S. Ct. 2097, 2117 (1995) ("When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this **Court** has set out in previous **cases**.").

216. See, e.g., *United States v. Paradise*, 480 U.S. 149, 167 (1987) (state interest in remedying past discriminatory conduct was sufficiently compelling).

217. See *Croson*, 488 U.S. at 499-504 (striking down a municipal set-aside program requiring contractors to award 30% of the dollar amount of city contracts to minority-owned businesses because it found that the City Council had failed to make specific findings of race discrimination in the local construction industry).

218. Cf. *Croson*, 488 U.S. at 507 (finding race-based plan not narrowly tailored to ending discrimination where race-neutral alternatives were not considered).

219. See Letter from Charles M. Neinas, Executive Director, College Football Association, to Cedric W. Dempsey, Executive Director, National Collegiate Athletic Association (Oct. 10, 1994) (arguing that OCR has not taken into account the unique size and cost of football in interpreting the **Title IX** regulations) (on file with the National Women's Law Center) *Football Coaches Take Aim at Title IX*, USA TODAY (Washington, D.C.), Jan. 12, 1995, at C4.

220. *Football Coaches Take Aim at Title IX*, supra note 219, at C4 (arguing that meeting proportionality would jeopardize football) see also *Scorecard: The Third Sex*, supra note 132, at 15 (noting efforts by football lobby to use large size of football squads to argue for exemption of football from **Title IX**).

221. *Football Coaches Take Aim at Title IX*, supra note 219, at C4 (advocating the exemption of football from the "proportionality" test) *Knight, Football Coaches Put Title IX on Defensive*, supra note 129, at C4.

222. See *Scorecard: The Third Sex*, supra note 132, at 15 (criticizing efforts by the College Football Association and the American Football Coaches Association to exempt football from **Title IX**, and characterizing such efforts as treating football as a third sex).

223. See *Kelley v. University of Ill.*, 35 F.3d 265, 271 n.8 (7th Cir. 1994) (approving of agency's rejection of team-by-team comparison as the measure of compliance, and noting that such a standard would either result in the elimination of football, or requiring schools to provide a football program for women, regardless of whether women would prefer to participate in other sports).

224. Scorecard: The Third Sex, *supra* note 132, at 15.

225. *Id.*

226. DANIEL L. FULKS, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS -- 1993 at 4 (1994).

227. The substitute Javits Amendment required the regulating agency to take into account the unique characteristics of individual sports in promulgating regulations. See *supra* notes 18-19 and accompanying text. Although the football associations are now arguing that the Javits Amendment was never properly implemented because of football's unique size, as discussed above, this is not a legitimate reason for treating the sport differently. In fact, the existing regulations recognize and account for the legitimate differences between football and other sports by permitting institutions to spend more on football uniforms, equipment and facilities as long as the money spent buys comparable quality for the men's and women's athletic programs overall. Consequently, the regulations recognize that football uniforms will cost more than swimsuits, and that money spent on a stadium and crowd control for football games will exceed that spent for volleyball. See *supra* note 31 and accompanying text.

228. Jennifer Gavin, State's Legal Costs Swell, *DENV. POST*, Dec. 26, 1993, at 1A.

229. Sandomir, *supra* note 131, at A1.

230. *Cook v. Colgate*, 802 F. Supp. 737, 750 (N.D.N.Y. 1992), vacated as moot, 992 F.2d 17 (2nd Cir. 1993).

231. Sandomit, *supra* note 131, at A1 (emphasis added).

232. See generally, Mary Jo Kane Media Coverage of the Post **Title IX** Female Athlete: A Feminist Analysis of Sports, Gender, and Power, 3 *DUKE J. GENDER L. & POL'Y* 95 (1996) (arguing that the media portrays female athletes in ways that enforce oppressive stereotypes).

233. See, e.g., Carol Krucoff, Exercise and Breast Cancer, *WASH. POST*, Feb. 7, 1995 (Health), at 16 (citing 1988 study finding that former college athletes had a 35% less chance of developing breast cancer and a 61% less chance of developing reproductive cancer compared to non-athletes) WOMEN'S SPORTS FOUND., MINORITIES IN SPORTS: THE EFFECT OF VARSITY SPORTS PARTICIPATION ON THE SOCIAL, EDUCATIONAL, AND CAREER MOBILITY OF MINORITY STUDENTS 23-23 (1989) (documenting correlation between participation in high school athletics and higher self-esteem, higher grades, higher standardized test scores and lower drop-out rates).

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832 F. Supp. 237, *; 1993 U.S. Dist. LEXIS 12256, **

WILLIAM M. KELLEY, et al., Plaintiffs, v. BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, et al., Defendants.

Case No. 93-1327

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, PEORIA DIVISION

832 F. Supp. 237; 1993 U.S. Dist. LEXIS 12256

September 1, 1993, Filed, Entered

PRIOR HISTORY: [**1] Original Opinion of August 26, 1993, Reported at: 1993 U.S. Dist. LEXIS 14272.

COUNSEL: For WILLIAM M. KELLEY, JOSEPH S ROSSI, ROBERT E SIMS, JEFFREY THOMPSON, MATTHEW GRAMM, JOHN M MULLOY, PETER JUIRIS, DAVID M GARGAS, plaintiffs: John H Otto, ZIMMERLY GADAU SELIN & OTTO, Champaign, IL.

For BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, MORTON W WEIR, in their individual capacities, jointly and severally, RONALD E GUENTHER, in their individual capacities, jointly and severally, KAROL KAHRS, in their individual capacities, jointly and severally, defendants: James C Kearns, Fred K Heinrich, HEYL ROYSTER VOELKER & ALLEN, Urbana, IL.

JUDGES: McDADE

OPINIONBY: JOE B. McDADE

OPINION: [*238] **ORDER** n1

-----Footnotes-----

n1 This Order is a supplement to the Order entered on August 26, 1993, at the close of arguments and testimony concerning the summary judgment motion and includes citations not previously included. This Order also includes certain minor additions to or deletions from the oral Order.

-----End Footnotes-----

Before the Court is Plaintiffs' Motion for a Preliminary Injunction (docket #10); the Defendants' Motion to Dismiss (docket #6) and the Defendants' Motion [**2] for a Protective Order (docket #15). Pursuant to Rule 12(b)(6), the parties have stipulated that the Motion to Dismiss must be converted into a Rule 56 Motion for Summary Judgment because it presents matters outside the pleadings.

Federal Rule 56(c) Summary Judgment is appropriate when there remains no genuine issue of material fact upon which a reasonable jury (or trier of fact) could find in favor of the non-moving party, and the moving party is entitled to judgment as a matter of law. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or [*239] defenses. . . ." Celotex Corp. v. Catrett, 477 U.S. 317, 322-27, 106 S. Ct. 2548, 2552-55, 91 L. Ed. 2d 265 (1986). Thus, although the moving party on a motion for summary judgment is responsible for demonstrating to the court why there is no genuine issue of material fact, the non-moving party must go beyond the face of the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file, to show that a rational jury (or trier of fact) could return a verdict in this party's favor. Celotex Corp. v. Catrett, 477 U.S. 317, 322-27, 106 S. Ct. 2548, 2552-55, 91 L. Ed. 2d 265 (1986); [**3] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55, 106 S. Ct. 2505, 2513-14, 91 L. Ed. 2d 202 (1986); Matsushita Elec.

Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538 (1986). Consequently, the inquiry on summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether the evidence is so one-sided that one party must prevail as a matter of law. Anderson, 477 U.S. at 251-52. Disputed facts are material when they might affect the outcome of the suit. First Ind. Bank v. Baker, 957 F.2d 506, 507-08 (7th Cir. 1992). A metaphysical doubt will not suffice. Matsushita, 475 U.S. at 586. Nonetheless, the Court must view all inferences to be drawn from the facts in the light most favorable to the opposing party. Anderson, 477 U.S. at 247-48. Beraha v. Baxter Health Corp., 956 F.2d 1436, 1440 (7th Cir. 1992). After reviewing the parties' **[**4]** briefs and hearing oral arguments and testimony on the motions, the Court has made the following findings of fact and conclusions of law. They are not meant to be exhaustive.

FACTS

The undisputed facts are as follows. The Court has jurisdiction in this matter pursuant to Title 28 U.S.C. § 1331; Title 28 U.S.C. § 1343(3); Title 38 U.S.C. § 1681(a); Title 42 U.S.C. § 1983; and the Fourteenth Amendment to the United States Constitution. Plaintiffs allege that Defendants discriminated against them on the basis of **sex** by cutting the men's **swimming** team, but not the women's **swimming** team, in violation of Title IX, **20 U.S.C. § 1681**. Plaintiffs also allege that the University's action violated the equal protection clause of the Fourteenth Amendment, pursuant to **42 U.S.C. § 1983**, and **42 U.S.C. § 1985(3)**.

Plaintiffs are males and members of the men's **swimming** team at the University of Illinois. Plaintiffs Kelley, Mulloy, and Thompson **[**5]** will be seniors in the 1993-94 academic year; Plaintiff Sims will be a junior in the 1993-94 academic year; and Plaintiffs Rossi, Juiris, Gramm and Gargar will be sophomores in the 1993-94 academic year.

Defendant Board of Trustees of the University of Illinois is a subdivision of the State of Illinois which operates an educational program receiving federal financial assistance at its Urbana-Champaign campus. Defendant Mortin W. Weir is Chancellor of the University of Illinois' Urbana-Champaign campus and acted in his individual capacity under color of law during the occurrences complained of herein. n2 Defendant Ronald E. Guenther is Director of Intercollegiate **Athletics** at the University of Illinois' Urbana-Champaign campus and acted in his individual capacity under color of law during the occurrences complained of herein. Defendant Karol Kahrs is Associate **Athletic** Director and Director of Women's **Athletics** at the University of Illinois' Urbana-Champaign campus and acted in her individual capacity under color of state law during the occurrences complained of herein.

-----Footnotes-----

n2 Mortin W. Weir retired from his position as chancellor of the University of Illinois on August 20, 1993. See Deposition of Mortin Weir, Exhibit 1 to Defendants' Motion for Summary Judgment.

-----End Footnotes----- **[**6]**

The University of Illinois has had varsity men's **swimming** teams since 1911, and in the 1992-93 academic year 11 scholarships were awarded among 28 male **swimming** team members. The University of Illinois has had varsity women's **swimming** teams since at least 1982, and in the 1992-93 academic year 14 scholarships were awarded among 18 female **swimming** team members.

The men's varsity **swimming** season for the academic year 1993-94 was scheduled to begin **[*240]** in September 1993. On May 7, 1993, however, the University of Illinois announced that it intended to eliminate the varsity programs for men's **swimming** and fencing and men and women's diving, effective July 1, 1993. The announcement stated that "budget constraints" were the primary reason for the **Athletic** Board's decision. Nonetheless, the University indicated that it intended to honor the financial commitments to the student athletes on scholarship who were affected by the cuts.

The Court finds that financial and **budgetary** constraints were the primary considerations involved in the University's decision to eliminate the men's **swimming** team, but that other considerations, such as

compliance with Title IX and the "gender equity" policy of the [**7] Big Ten Conference, also played a role. The University of Illinois is a member of the Big Ten Conference, a group of 11 universities who associate together for the purpose of competing in intercollegiate **athletics**. The Big Ten Conference promulgated what is referred to as a "gender equity" policy requiring member institutions to accept a percentage factor of 60 percent for men and 40 percent for women as the goal for male-female participation in varsity **sports** programs.

Affidavits submitted by Patricia Askew, Director of the Office of Admissions and Records, and Rick Allen, Director of Compliance for the Division of Intercollegiate **Athletics** at the University of Illinois at Urbana-Champaign, indicate that the following statistics represent the numerical composition of the undergraduate student population of men and women compared to the numerical composition of the men and women participating in intercollegiate **sports** during the last three academic years. n3

-----Footnotes-----

n3 At the hearing, the parties stipulated to statistics which are slightly different than those presented in the affidavits. See Deposition of Mortin W. Weir, Exhibit 1, Defendants' Motion for Summary Judgment. Nonetheless, the disparities remain substantially the same for purposes of a decision in this case.

-----End Footnotes----- [**8]

Year 1990-91

	Total	Men	%	Women	%
UG:	26,445	14,925	(56.00%)	11,520	(44.00%)
Sports:	558	421	(75.45%)	137	(24.55%)

Year 1991-92

	Total	Men	%	Women	%
UG:	26,366	14,787	(56.00%)	11,579	(44.00%)
Sports:	550	413	(75.09%)	137	(24.91%)

Year 1992-93

	Total	Men	%	Women	%
UG:	25,846	14,427	(56.00%)	11,419	(44.00%)
Sports:	474	363	(76.58%)	111	(23.42%)

These statistics show that during the past three school years student **enrollment** and total **sports** participation by men and women went down at the University of Illinois campus at Urbana-Champaign. Interesting enough, though, for the academic year 1992-93, men's participation went up by more than a percentage point to 76.58 percent, while women's participation went down by more than a percentage point to 23.42 percent.

TITLE IX

In Count I, Plaintiffs present a legal question which has not been directly decided by [**241] any court in this country to date. Although gender discrimination cases have been filed by female athletes against universities under Title IX, this is [**9] the first case known to the Court which has been brought against a university by men alleging gender discrimination in violation of Title IX.

Resolution of this question has been difficult. The difficulty arises because, in the context of **athletics**,

the plain meaning of Title IX has been limited by the implementing regulations, the policy interpretation of those regulations and the case law interpreting each of these sources. See Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993); Roberts v. Colorado State, 1993 WL 248228 (10th Cir. 1993); Cook v. Colgate University, 992 F.2d 17 (2d Cir. 1993); Favia v. Indiana University of Pennsylvania, 812 F. Supp. 578 (W.D. Penn. 1993); 34 C.F.R. § 106.41 (1993); 44 Fed. Reg. 71413-23 (1979). Quite frankly, these interpretations have converted Title IX from a statute which prohibits discrimination on the basis of **sex** (defined as the **elimination** of or exclusion from participation opportunities), into a statute which provides "equal opportunity for members of both **sexes**." n4

-----Footnotes-----

n4 In fact, Title IX flatly states:

Section 1681. Sex

(a) Prohibition against discrimination

No person in the United States shall, on the basis of **sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . .

20 U.S.C. § 1681(a).

Although § 1681(b) clearly states that § 1681(a) does not require "preferential treatment" for the statistically underrepresented **sex**, the implementing regulations for Title IX, found at 35 CFR § 106.41, interpret § 1681(a)'s prohibition of exclusion on the basis of **sex** as a vehicle to provide "equal opportunity" to members of both **sexes**. The regulations provide in relevant part:

§ 106.41. Athletics

(a) General. 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 a recipient, and no recipient shall provide any such **athletics** separately on such basis.

* * *

(c) Equal Opportunity. A recipient which operates or sponsors interscholastic or intercollegiate, club or intramural **athletics** shall provide equal **athletic** opportunity for members of both **sexes**. In determining whether equal opportunities are available, the Director will consider, among other factors:

(1) Whether the selection of **sports** and levels of competition effectively accommodate the interests and abilities of members of both **sexes**.

-----End Footnotes----- [**10]

"Equal opportunity," however, does not necessarily require "strict numerical equality between the gender balance of a college's **athletic** program and the gender balance of its student body." Cohen v. Brown University, 991 F.2d 888, 894 (1st Cir. 1993). In fact, as interpreted and enforced by the regulations, the University may provide "equal opportunity" to members of each gender in one of three ways: (1) "the participation opportunities for male and female students are in substantially proportionate numbers to

their respective **enrollments**;" (2) the "interests and abilities" of the **sex** which is underrepresented with respect to their undergraduate **enrollment** are "fully and effectively accommodated by the present program;" or (3) the underrepresented gender's interests and abilities will be accommodated by "expansion" of the **athletic** program. 44 Fed. Reg. at 71418.

Program expansion was not the objective in this case; rather, financial constraints motivated and required the University of Illinois to cut programs. Even if the University's decision were not based on financial or **budgetary** reasons, but made solely to move closer to substantial **proportionality** [****11**] (that is, to increase participation opportunities for women to a level equivalent with the percentage of female undergraduate enrollees), the failure to cut women's programs would still be countenanced by Title IX. As stated by the First Circuit Court of Appeals in Cohen v. Brown, 991 F.2d 888, 898, footnote 15:

If in the course of **adding** and upgrading teams, a university attains gender parity between its **athletic** program and its student body, it meets the first benchmark of the accommodation test. But, Title IX does not require that a school pour ever-increasing sums into its **athletic** establishment. [***242**] If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent).

Consequently, due to financial constraints and the need to comply with Title IX, the University chose to drop the men's **swimming** team without **dropping** the women's **swimming** team, because men's participation [****12**] in **athletics** was more than substantially proportionate to their **enrollment**, but women's participation was not. n5

-----Footnotes-----

n5 The desire or concern of the University to comply with the "Gender Equity" Policy of the Big Ten Conference mandating an ultimate goal of 60/40 male/female percentage participation in **athletics** does not preempt compliance with Title IX requirements of equal opportunity for males and females. Accordingly, the University's actions must be measured by Title IX requirements.

-----End Footnotes-----

Under Title IX, the University could cut men's programs without violating the statute because men's interests and abilities are presumptively met when substantial **proportionality** exists. Conversely, women's programs could not be cut because their level of participation was already disproportionate to their respective **enrollment**, and thus the University would be vulnerable to a finding of noncompliance with Title IX if the University failed to "fully and effectively accommodate [women's] interests and abilities." n6 See 44 Fed. Reg. at 71418. [****13**]

-----Footnotes-----

n6 Notably, the University may have violated Title IX by **dropping** the women's diving team, which defendants admit would have been a hard case to defend if the sole woman diver was a plaintiff in this case (at least that is how the Court interprets defense counsel's response).

-----End Footnotes-----

In other words, according to the regulations and the case law, members of the men's **swimming** team have not been discriminated against under Title IX. Even though **elimination** of their program excluded them from varsity participation as individuals, the percentage of all men participating in the varsity program is more than "substantially proportionate" to the percentage of men represented by the undergraduate population. This status did not change following the cut. Cohen v. Brown University, 991

F.2d 888, 906 (1st Cir. 1993); Roberts v. Colorado State, 1993 WL 248228 (10th Cir. 1993); Cook v. Colgate University, 992 F.2d 17 (2d Cir. 1993); Favia v. Indiana University of Pennsylvania, 812 F. Supp. 578 (W.D. Penn. 1993). [**14] See also 44 Fed. Reg. at 71418.

Although the law might be interpreted differently, the Court must give deference to regulations and interpretations promulgated under the authority of Congress and existing case law interpreting Title IX. Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984). Accordingly, Plaintiffs' claim under Title IX fails, and Defendants are entitled to Summary Judgment in Count I.

EQUAL PROTECTION

Plaintiffs also raise equal protection arguments in Counts II and III. Count II alleges that Defendants' decision to eliminate the men's **swimming** team, but not the women's team, created an illegal gender classification which denied Plaintiffs' equal protection of the law under the Fourteenth Amendment, in violation of 42 U.S.C. § 1983. Count III alleges a conspiracy in violation of 42 U.S.C. § 1985(3) in that Defendants, together with unnamed **athletic** directors and associate **athletic** directors, [**15] conspired to deny Plaintiffs' civil rights in violation of Title IX and the Fourteenth Amendment.

To state an equal protection claim, a plaintiff must allege in the pleadings that the government intentionally discriminated against plaintiff by classifying him or her for different treatment under the law than one similarly situated. *See J. Nowak & R. Rotunda, Constitutional Law § 14.2 at 570 (4th ed. 1991).* To violate the equal protection clause, the government must intentionally classify similarly situated individuals for different treatment on the basis of an impermissible characteristic, such as race, national origin, or gender.

[*243] Gender classifications are subject to an "intermediate" standard of scrutiny. To withstand constitutional challenge under this standard, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197, 97 S. Ct. 451, 457, 50 L. Ed. 2d 397 (1976), rehearing denied, 429 U.S. 1124, 97 S. Ct. 1161, 51 L. Ed. 2d 574 (1977).

"In limited [**16] circumstances, a gender based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." Mississippi University for Women v. Hogan, 458 U.S. 718, 728, 102 S. Ct. 3331, 3341, 73 L. Ed. 2d 1090, 1100 (1981). These classifications establish what is commonly referred to as "reverse discrimination" and/or "affirmative action" for the purpose of remedying historical discrimination.

In cases where men have sued alleging gender discrimination under the Fourteenth Amendment, the Supreme Court has upheld these classifications when they serve a compensatory, remedial purpose of eradicating past discrimination against women, i.e., reversing the effects of laws which classified men for benefits under the law and women for burdens. Mississippi University for Women v. Hogan, 458 U.S. 718, 728, 102 S. Ct. 3331, 3341, 73 L. Ed. 2d 1090, 1100 (1981), citing, Schlesinger v. Ballard, 419 U.S. 498, 95 S. Ct. 572, 42 L. Ed. 2d 610 (1975); Califano v. Webster, 430 U.S. 313, 97 S. Ct. 1192, 51 L. Ed. 2d 360 (1977). [**17] However, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying the statutory scheme." Hogen, 458 U.S. at 728. State officials must actually prove that women "lacked opportunities." Hogen, 458 at 729. Once this showing is made, the officials must then satisfy the second prong of the intermediate standard, establishing that the classification is "substantially related" to the achievement of the remedial purpose alleged.

Title IX, as interpreted by the Court, is designed to remedy gender discrimination against underrepresented athletes -- either men or women. n7 In this case, the underrepresented athletes are women. Although the University's decision to eliminate the men's **swimming** team rather than the women's **swimming** team classifies men for different treatment than women on the basis of gender, this action was taken in compliance with Title IX. Compliance with Title IX serves a remedial purpose which qualifies as an important state interest which is substantially related to eradicating historical

discrimination against women [**18] in **athletics** at the University of Illinois. Accordingly, the Court finds that the Defendants have not violated the equal protection clause of the Fourteenth Amendment. Therefore, Summary Judgment is granted on Count II in favor of Defendants.

-----Footnotes-----

n7 Plaintiffs argue that "underrepresented gender" refers to the interest and ability level of either gender rather than disproportional representation among men or women. According to this theory, statistical disparities which merely reflect participation rates do not necessarily indicate that women's interests and abilities are underrepresented. Rather, Plaintiffs contend that without proof of unmet interests and abilities among women athletes, Defendants' decision to cut the men's **swimming** team made them an "underrepresented gender" for purposes of Title IX, by eliminating demonstrated interest and ability among men. Although this argument has logical appeal, it undermines the interplay between the "safe harbor" of "substantial **proportionality**" (i.e., numerical equality) and "accommodation" of the "underrepresented gender's interests and abilities," as alternative forms of compliance with Title IX. 44 Fed. Reg. at 71418.

-----End Footnotes----- [**19]

Plaintiffs cannot prevail in Count III under § 1985(3) unless they can show an equal protection violation. For the reasons stated above, the Court also grants summary judgment in favor of Defendants on Count III.

CONCLUSION

The Court is not unsympathetic to the plight of members on the men's **swimming** team and recognizes that Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results. On the other hand, university **athletic** programs are designed, in their purest intent, to provide an education, coupled with equal access to **athletic** opportunities for men and women -- a [*244] desirable result which had not been achieved prior to Title IX.

Plaintiffs' case has emotional appeal because it graphically demonstrates the inherent unfairness of decisions which classify and isolate one gender for burdens that the other gender is not required to bear. Certainly it must be acknowledged that the members of the men's **swimming** team are innocent victims of Title IX's benevolent attempt to remedy the effects of an historical deemphasis on **athletic** opportunities for women. The Court sincerely sympathizes with the personal loss felt by members of the men's **swimming** [**20] team while recognizing the salutary effects of Title IX for women athletes. Women have paid and continue to pay for discriminatory actions and attitudes which have historically excluded them from the **athletic** opportunities given to men, as represented by current statistical disparities among athletes in universities and colleges across the country. These are the disparities Title IX, and this decision, seek to remedy.

Plaintiffs concede that not only does the University of Illinois have a right to cut programs, but also that the men's **swimming** team does not have a constitutional right to the continuation of the **swimming** program. See Hawkins v. NCAA, 652 F. Supp. 602 (C.D.Ill. 1987). However, Plaintiffs are requesting gender equity, or gender equality, in sharing the loss. This seems a fair request but conflicts with the imperatives of Title IX, which require that women, who have traditionally been underrepresented in college **athletics**, be assured equal **athletic** opportunities. To effectuate this legitimate objective, a sharing of the burden by innocent parties is not impermissible and is rather light in this case when we consider the scope of the total [**21] men's **athletic** programs at the University of Illinois and their disproportionate participation in **athletics** as compared to their undergraduate **enrollment**. Cf. Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976).

In summary, the Court grants Defendants' Motion for Summary Judgment on Counts I, II, and III, rendering Plaintiffs' Motion for a Preliminary Injunction and Defendants' Motion for a Protective Order Moot. The Clerk of the Court is directed to enter judgment in favor of Defendants and against Plaintiffs. Each party is to bear their own costs. This case is terminated.

ENTERED this 1st day of September, 1993.

JOE B. McDADE

United States District Judge

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May 11, 1994 Wednesday, NORTH SPORTS FINAL EDITION

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HEADLINE: ILLINOIS SWIM CASE COULD REDEFINE **TITLE IX**

BYLINE: By Ed Sherman, Tribune Staff Writer.

BODY:

Bill Kelley still practices, holding out hope he will be able to swim again at Illinois. But the most important work for the Illinois **swimming** team currently is taking place in a courtroom, not a pool.

"**Swimming** is something I've done all my life," Kelley said. "It's important to me. I didn't anticipate finishing my career this way."

Whether Kelley's career ends depends on the outcome of a **court** ruling on the Illinois men's swimmers bid to have their team restored. The ramifications, though, go much further than Illinois, as the decision could redefine **Title IX** and prevent schools from dropping men's programs for gender reasons.

Officials on both sides of the gender-equity debate are closely watching the Illinois **case** work its way through the **courts**, perhaps ultimately reaching the Supreme **Court**.

It started last spring when Illinois decided to drop men's **swimming** and men's fencing, while retaining women's **swimming**. The men's swimmers filed suit, claiming they were victims of sex discrimination. A lower **court** ruled in Illinois' favor, but the swimmers appealed, and the **case** was heard in 7th U.S. Circuit **Court** of Appeals last month; a decision is expected soon.

Kelley was supposed to be the Illini captain this year as a senior. If the program is restored next year, Kelley would come back under a NCAA rule that allows athletes five years to complete four years of eligibility.

Nationally, men's programs are rooting for Kelley and Illinois' swimmers. Many believe men's non-revenue sports are being sacrificed as gender equity conscious schools try to create more teams and opportunities for women. Since 1985, 65 men's **swimming** teams have been eliminated. More than 100 wrestling programs have been cut in the last 15 years.

At the time of Illinois' initial decision, Athletic Director Ron Guenther maintained the sports were trimmed (including men's and women's diving programs) because of financial reasons.

The men's swimmers, though, claim the school cut their sport to help reduce overall numbers for male athletes, which would bring Illinois closer to a Big 10-mandated 60/40 ratio of men to women athletes. Currently, 72 percent of Illinois athletes are men, but school officials say the number will be reduced when it cuts back on walk-ons next year.

The swimmers are arguing the move was a violation of **Title IX**, the federal law that calls for equal opportunities for men and women. They are falling back on a portion of the law that says a school shouldn't be required to "grant preferential or disparate treatment to members of one sex on account of an imbalance. . . ."

"This is analogous to a man going to a job, and someone says, 'There's not enough females, some of you males have to go,' " Kelley said. "We're trying to say you can't cut men to get to these ratios."

Kelley also cites interest. He points to a Scholastic Aptitude Test (SAT) survey in which 44 percent of male college-bound students said that they would be interested in playing intercollegiate sports, compared with 24 percent for females.

The National Wrestling Coaches Association filed a brief in the **case**. The association's head, T.J. Kerr, wrestling coach at California State University-Bakersfield, thought it was important for his group to join the cause.

"I liked the argument," Kerr said. "Illinois didn't do anything for gender equity. I hope their **case** gets somewhere, because we've sure taken a beating."

The university's attorney, Jim Kearns, conceded to the **court** that gender equity was a factor in the school's decision; the school wasn't in a position to cut women's sports. However, he says the law clearly is on Illinois' side.

"I feel bad for the swimmers, but this really is a no-brainer," Kearns said.

Ellen Vargas, senior counsel for the National Women's Law Center, said the Illinois swimmers are misinterpreting the law. There's a section of **Title IX** that calls for institutions to pay attention to the needs of the underrepresented sex. At Illinois, male athletes are not the underrepresented sex.

"Men are not being discriminated at the **University of Illinois**, the swimmers are," Vargas said. "Unfortunately, there's not an anti-discrimination law for swimmers." Vargas said her center believed it was important to file a brief in this **case** to help clarify the arguments. "I think their legal theory is dangerous," Vargas said. "That isn't to say that they don't have a legitimate beef with the school, but in my judgment, the legal system doesn't provide a solution for the swimmers."

Even if the Illinois swimmers lose this **case**, representatives of men's non-revenue sports are mobilizing for further action. The Michigan men's gymnastics team was slated to be eliminated after last season. However, a compromise was worked out allowing the team to continue, although it won't be able to give out any new scholarships.

"My thought is that there is a lot of gray area between cutting a program and not cutting a program," said Michigan coach Bob Darden. "I'd like to address that area in between. I think this is a very positive step. I would hope Illinois can look at Michigan to see what we're doing here."

Kelley, though, said Michigan's model didn't appeal to him. He argued if Illinois didn't give out scholarships, the school would be at a competitive disadvantage within the Big 10.

Kelley missed **swimming** this year. He said it became most difficult for him when he was forced to watch the Big 10 championships from the sidelines.

Kelley hopes he will be able to swim in the championships next year. But he knows time and the **court** options are running out.

"I'd just like to swim again," he said.

GRAPHIC: PHOTO GRAPHIC; PHOTO (color): Bill Kelley, who's suing the Illini for dropping men's **swimming**: "We're trying to say you can't cut men to get to these ratios." Photo for the Tribune by Mark Cowan, AP.; **GRAPHIC:** Swimmers' suit challenges gender equity; Sources: Knight-Ridder Tribune, NCAA, news reports.; Chicago Tribune.; See microfilm for complete graphic.

LANGUAGE: ENGLISH

LOAD-DATE: May 11, 1994

*101 F.3d 155, *; 1996 U.S. App. LEXIS 30192, **;
45 Fed. R. Evid. Serv. (Callaghan) 1369*

AMY COHEN, ET AL., Plaintiffs - Appellees, v. BROWN UNIVERSITY, ET AL., Defendants - Appellants.

No. 95-2205

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

101 F.3d 155; 1996 U.S. App. LEXIS 30192; 45 Fed. R. Evid. Serv. (Callaghan) 1369

November 21, 1996, Decided

SUBSEQUENT HISTORY: [**1]

As Amended. Certiorari Denied April 21, 1997, Reported at: 1997 U.S. LEXIS 2554.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. Hon. Raymond J. Pettine, Senior U.S. District Judge.

DISPOSITION: Affirmed in part, reversed in part, and remanded for further proceedings.

COUNSEL: Joan A. Lukey and Walter B. Connolly, Jr., with whom Hale and Dorr, Alison B. Marshall, Miller, Canfield, Paddock & Stone, Beverly E. Ledbetter, General Counsel, Brown University, Julius C. Michaelson, Jeffrey S. Michaelson and Michaelson & Michaelson were on brief for appellants.

Martin Michaelson, with whom Amy Folsom Kett, Suzanne M. Bonnet, Hogan & Hartson L.L.P. and Sheldon E. Steinbach, General Counsel, American Council on Education, were on brief for American Council on Education, Association of American Universities, National Association of Independent Colleges and Universities, and National Association of State Universities and Land-Grant Colleges, amici curiae.

George A. Davidson, Carla A. Kerr, Seth D. Rothman and Hughes Hubbard & Reed on brief for Baylor University, Boston University, Colgate University, College of the Holy Cross, Colorado State University, Fairfield University, George Washington University, John Hopkins University, Lafayette College, [**2] New York University, Saint Peter's College, Southern Methodist University, Tulane University, University of Arkansas, University of Nebraska, University of Notre Dame, and Wake Forest University, amici curiae.

Melinda Ledden Sidak and Anita K. Blair on brief for The Independent Women's Forum, amicus curiae.

Stephen S. Ostrach, Todd S. Brilliant and New England Legal Foundation on brief for American Baseball Coaches Association, College Swim Coaches Association of America, National Wrestling Coaching Association and United States Water Polo, amici curiae.

Lynette Labinger, with whom Roney & Labinger, Amato A. DeLuca, DeLuca & Weizenbaum, Ltd., Raymond Marcaccio, Blish & Cavanagh, Sandra L. Duggan, Sandra L. Duggan, Esq., P.C., Arthur H. Bryant, Leslie A. Brueckner, and Trial Lawyers for Public Justice, P.C. were on brief for appellees.

Deborah L. Brake, with whom Marcia D. Greenberger, Judith C. Appelbaum and National Women's Law Center were on brief for National Women's Law Center, American Association of University Women/AAUW Legal Advocacy Fund, American Civil Liberties Union Women's Rights Project, California Women's Law Center, Center For Women Policy Studies, [**3] Connecticut Women's Education and Legal Fund, Equal Rights Advocates, Feminist Majority Foundation, Girls Incorporated, National Association for Girls and Women in Sport, National Association for Women in Education,

National Coalition for Sex Equity in Education, National Commission on Working Women, National Council of Administrative Women in Education, National Education Association, National Organization for Women Foundation, Now Legal Defense and Education Fund, National Softball Coaches Association, Northwest Women's Law Center, Parents for Title IX, Rhode Island Affiliate American Civil Liberties Union, Women Employed, Women's Basketball Coaches Association, Women's Law Project, Women's Legal Defense Fund, Women's Sports Foundation, and YWCA of the USA, amici curiae.

Deval L. Patrick, Assistant Attorney General, Isabelle Katz Pinzler, Deputy Assistant Attorney General, Dennis J. Dimsey and Lisa W. Edwards, Attorneys, Department of Justice, on brief for the United States, amicus curiae.

JUDGES: Before Torruella, Chief Judge, Bownes, Senior Circuit Judge, and Stahl, Circuit Judge. TORRUELLA, Chief Judge Dissents.

OPINIONBY: BOWNES

OPINION:

[*161] **BOWNES, Senior Circuit Judge.** This [**4] is a class action lawsuit charging Brown University, its president, and its athletics director (collectively "Brown") with discrimination against women in the operation of its intercollegiate athletics program, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), and its implementing regulations, 34 C.F.R. §§ 106.1-106.71. The plaintiff class comprises all present, future, and potential Brown University women students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown.

This suit was initiated in response to the demotion in May 1991 of Brown's women's gymnastics and volleyball teams from university-funded varsity status to donor-funded varsity status. Contemporaneously, Brown demoted two men's teams, water polo and golf, from university-funded to donor-funded varsity status. As a consequence of these demotions, all four teams lost, not only their university funding, but most of the support and privileges that accompany university-funded varsity status at Brown.

Prior to the trial on the merits that gave rise to this appeal, the district court granted plaintiffs' motion [**5] for class certification and denied defendants' motion to dismiss. Subsequently, after hearing fourteen days of testimony, the district court granted plaintiffs' motion for a preliminary injunction, ordering, inter alia, that the women's gymnastics and volleyball teams be reinstated to university-funded varsity status, and prohibiting Brown from eliminating or reducing the status or funding of any existing women's intercollegiate varsity team until the case was resolved on the merits. Cohen v. Brown Univ., 809 F. Supp. 978, 1001 (D.R.I. 1992) ("Cohen I"). A panel of this court affirmed the district court's decision granting a preliminary injunction to the plaintiffs. Cohen v. Brown Univ., 991 F.2d 888, 907 (1st Cir. 1993) ("Cohen II"). In so doing, we upheld the district court's analysis and ruled that an institution violates Title IX if it ineffectively accommodates its students' interests and abilities in athletics under 34 C.F.R. § 106.41(c)(1) (1995), regardless of its performance with respect to other Title IX areas. Id. at 897.

On remand, the district court determined after a lengthy bench trial that Brown's intercollegiate athletics program violates [**6] Title IX and its supporting regulations. Cohen v. Brown Univ., 879 F. Supp. 185, 214 (D.R.I. 1995) ("Cohen III"). The district court ordered Brown to submit within 120 days a comprehensive plan for complying with Title IX, but stayed that portion of the order pending appeal. Id. The district court subsequently issued a modified order, requiring Brown to submit a compliance plan within 60 days. Modified Order of May 4, 1995. This action was taken to ensure that the Order [*162] was "final" for purposes of this court's jurisdiction, and to expedite the appeal process. Id. Finding that Brown's proposed compliance plan was not comprehensive and that it failed to comply with the opinion and order of Cohen III, the district court rejected the plan and ordered in its place specific relief consistent with Brown's stated objectives in formulating the plan. Order of August 17, 1995 at 11. The

court's remedial order required Brown to elevate and maintain at university-funded varsity status the women's gymnastics, fencing, skiing, and water polo teams. *Id.* at 12. The district court's decision to fashion specific relief was made, in part, to avoid protracted litigation over [**7] the compliance plan and to expedite the appeal on the issue of liability. *Id.* at 11. The district court entered final judgment on September 1, 1995, and on September 27, 1995, denied Brown's motion for additional findings of fact and to amend the judgment. This appeal followed.

Brown claims error in certain evidentiary rulings made during the trial and in the district court's order of specific relief in place of Brown's proposed compliance plan. In addition, and as in the previous appeal, Brown challenges on constitutional and statutory grounds the test employed by the district court in determining whether Brown's intercollegiate athletics program complies with Title IX. In the first appeal, a panel of this court elucidated the applicable legal framework, upholding the substance of the district court's interpretation and application of the law in granting plaintiffs' motion for a preliminary injunction, n1 and rejecting essentially the same legal arguments Brown makes here.

-----Footnotes-----

n1 The prior panel upheld the district court's rulings in all respects save one. We held that the district court erred in placing upon Brown the burden of proof under prong three of the three-part test used to determine whether an intercollegiate athletics program complies with Title IX, discussed *infra*. Cohen II, 991 F.2d at 903.

-----End Footnotes----- [**8]

Brown contends that we are free to disregard the prior panel's explication of the law in *Cohen II*. Brown's efforts to circumvent the controlling effect of *Cohen II* are unavailing, however, because, under the law of the case doctrine, we are bound in this appeal, as was the district court on remand, by the prior panel's rulings of law. While we acknowledge that the law of the case doctrine is subject to exceptions, we conclude that none applies here, and that the decision rendered by the prior panel in the first appeal is not, as Brown claims, "legally defective." Accordingly, we decline Brown's invitation to undertake plenary review of issues decided in the previous appeal and treat *Cohen II* as controlling authority, dispositive of the core issues raised here.

We find no error in the district court's factual findings or in its interpretation and application of the law in determining that Brown violated Title IX in the operation of its intercollegiate athletics program. We therefore affirm in all respects the district court's analysis and rulings on the issue of liability. We do, however, find error in the district court's award of specific relief and therefore remand [**9] the case to the district court for reconsideration of the remedy in light of this opinion.

I.

The relevant facts, legal principles, and procedural history of this case have been set forth in exhaustive detail in the previous opinions issued in this case. Thus, we recite the facts as supportably found by the district court in the course of the bench trial on the merits in a somewhat abbreviated fashion.

As a Division I institution within the National Collegiate Athletic Association ("NCAA") with respect to all sports but football, Brown participates at the highest level of NCAA competition. n2 Cohen III, 879 F. Supp. at 188. Brown operates a two-tiered intercollegiate athletics program with respect to funding: although Brown provides the financial resources required to maintain its university-funded varsity teams, donor-funded varsity athletes must themselves raise the funds necessary to support their teams [*163] through private donations. *Id.* at 189. The district court noted that the four demoted teams were eligible for NCAA competition, provided that they were able to raise the funds necessary to maintain a sufficient level of competitiveness, and provided that they continued [**10] to comply with NCAA requirements. *Id.* at 189 n.6. The court found, however, that it is difficult for donor-funded varsity athletes to maintain a level of competitiveness commensurate with their abilities and that these athletes operate at a competitive disadvantage in comparison to university-funded varsity athletes. *Id.* at 189. For example, the district court found that some schools are reluctant to include donor-funded teams in their

varsity schedules n3 and that donor-funded teams are unable to obtain varsity-level coaching, recruits, and funds for travel, equipment, and post-season competition. Id. at 189-90.

-----Footnotes-----

n2 Brown's football team competes in Division I-AA, the second highest level of NCAA competition. Cohen III, 879 F. Supp. at 188 n.4.

n3 Two schools declined to include Brown in future varsity schedules when women's volleyball was demoted to donor-funded status. Cohen II, 991 F.2d at 892 n.2; Cohen I, 809 F. Supp. at 993.

-----End Footnotes-----

Brown's decision to demote the women's volleyball [**11] and gymnastics teams and the men's water polo and golf teams from university-funded varsity status was apparently made in response to a university-wide cost-cutting directive. Cohen I, 809 F. Supp. at 981. The district court found that Brown saved \$ 62,028 by demoting the women's teams and \$ 15,795 by demoting the men's teams, but that the demotions "did not appreciably affect the athletic participation gender ratio." Cohen III at 187 n.2.

Plaintiffs alleged that, at the time of the demotions, the men students at Brown already enjoyed the benefits of a disproportionately large share of both the university resources allocated to athletics and the intercollegiate participation opportunities afforded to student athletes. Thus, plaintiffs contended, what appeared to be the even-handed demotions of two men's and two women's teams, in fact, perpetuated Brown's discriminatory treatment of women in the administration of its intercollegiate athletics program. In the course of the preliminary injunction hearing, the district court found that, in the academic year 1990-91, Brown funded 31 intercollegiate varsity teams, 16 men's teams and 15 women's teams, Cohen I, 809 F. Supp. at [**12] 980, and that, of the 894 undergraduate students competing on these teams, 63.3% (566) were men and 36.7% (328) were women, id. at 981. During the same academic year, Brown's undergraduate enrollment comprised 52.4% (2,951) men and 47.6% (2,683) women. Id. The district court also summarized the history of athletics at Brown, finding, inter alia, that, while nearly all of the men's varsity teams were established before 1927, virtually all of the women's varsity teams were created between 1971 and 1977, after Brown's merger with Pembroke College. Id. The only women's varsity team created after this period was winter track, in 1982. Id.

In the course of the trial on the merits, the district court found that, in 1993-94, there were 897 students participating in intercollegiate varsity athletics, of which 61.87% (555) were men and 38.13% (342) were women. Cohen III, 879 F. Supp. at 192. During the same period, Brown's undergraduate enrollment comprised 5,722 students, of which 48.86% (2,796) were men and 51.14% (2,926) were women. Id. The district court found that, in 1993-94, Brown's intercollegiate athletics program consisted of 32 teams, 16 men's teams and [**13] 16 women's teams. Id. Of the university-funded teams, 12 were men's teams and 13 were women's teams; of the donor-funded teams, three were women's teams and four were men's teams. Id. At the time of trial, Brown offered 479 university-funded varsity positions for men, as compared to 312 for women; and 76 donor-funded varsity positions for men, as compared to 30 for women. Id. at 211. In 1993-94, then, Brown's varsity program -- including both university- and donor-funded sports-- afforded over 200 more positions for men than for women. Id. at 192. Accordingly, the district court found that Brown maintained a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, id. at 211, and that "although the number of varsity sports [*164] offered to men and women are equal, the selection of sports offered to each gender generates far more individual positions for male athletes than for female athletes," id. at 189.

In computing these figures, the district court counted as participants in intercollegiate athletics for purposes of Title IX analysis those athletes who were members of varsity teams for the majority of the last [**14] complete season. Id. at 192. Brown argued at trial that "there is no consistent measure of actual participation rates because team size varies throughout the athletic season," and that "there is no consistent measure of actual participation rates because there are alternative definitions of 'participant' that yield very different participation totals." id. Reasoning that "where both the athlete and coach

determine that there is a place on the team for a student, it is not for this Court to second-guess their judgment and impose its own, or anyone else's, definition of a valuable or genuine varsity experience," the district court concluded that "every varsity team member is therefore a varsity 'participant.'" *Id.* (original emphasis omitted). Thus, the district court held that

the "participation opportunities" offered by an institution are measured by counting the actual participants on intercollegiate teams. The number of participants in Brown's varsity athletic program accurately reflects the number of participation opportunities Brown offers because the University, through its practices "predetermines" the number of athletic positions available [**15] to each gender.

Id. at 202-03.

The district court found from extensive testimony that the donor-funded women's gymnastics, women's fencing and women's ski teams, as well as at least one women's club team, the water polo team, had demonstrated the interest and ability to compete at the top varsity level and would benefit from university funding. n4 Id. at 190.

-----Footnotes-----

n4 The district court noted that "there may be other women's club sports with sufficient interest and ability to warrant elevation to varsity status," but that plaintiffs did not introduce at trial substantial evidence demonstrating the existence of other women's club teams meeting the criteria. Cohen III, 879 F. Supp. at 190 n.14.

-----End Footnotes-----

The district court did not find that full and effective accommodation of the athletics interests and abilities of Brown's female students would disadvantage Brown's male students.

II.

Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation [**16] in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.A. § 1681(a) (West 1990). As a private institution that receives federal financial assistance, Brown is required to comply with Title IX.

Title IX also specifies that its prohibition against gender discrimination shall not "be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist" between the total number or percentage of persons of that sex participating in any federally supported program or activity, and "the total number or percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C.A. § 1681(b) (West 1990). Subsection (b) also provides, however, that it "shall not be construed to prevent the consideration in any . . . proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." *Id.*

Applying § 1681(b), the prior panel [**17] held that Title IX "does not mandate strict numerical equality between the gender balance of a college's athletic program and the gender balance of its student body." Cohen II, 991 F.2d at 894. The panel explained that, while evidence of a gender-based disparity in an institution's athletics program is relevant to a determination of noncompliance, "a court assessing Title IX compliance may not find a violation solely because there is a disparity [*165] between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand." Id. at 895.

Congress enacted Title IX in response to its finding -- after extensive hearings held in 1970 by the House Special Subcommittee on Education -- of pervasive discrimination against women with respect to educational opportunities. 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523 n.13, 72 L. Ed. 2d 299, 102 S. Ct. 1912 (1982).

Title IX was passed with two objectives in mind: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices." Cannon v. [**18] University of Chicago, 441 U.S. 677, 704, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979). To accomplish these objectives, Congress directed all agencies extending financial assistance to educational institutions to develop procedures for terminating financial assistance to institutions that violate Title IX. 20 U.S.C. § 1682.

The agency responsible for administering Title IX is the United States Department of Education ("DED"), through its Office for Civil Rights ("OCR"). n5 Congress expressly delegated to DED the authority to promulgate regulations for determining whether an athletics program complies with Title IX. Pub. L. No. 93-380, 88 Stat. 612 (1974). n6 The regulations specifically address athletics at 34 C.F.R. §§ 106.37(c) and 106.41. The regulation at issue in this case, 34 C.F.R. § 106.41 (1995), provides:

(a) General. 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 a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding [**19] the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection of such teams is based upon competitive skill or the activity involved is a contact sport. However, where 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. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

c) Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests [**20] and abilities of members of both sexes;

(2) The provision of equipment and supplies;

[*166] (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 for coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

-----Footnotes-----

n5 Agency responsibility for administration of Title IX shifted from the Department of Health, Education and Welfare ("HEW") to DED when HEW split into two agencies, DED and the Department of Health and Human Services. The regulations and agency documents discussed herein were originally promulgated by HEW, the administering agency at the time, and later adopted by the present administering agency, DED. See Cohen II, 991 F.2d at 895; Cohen III, 879 F. Supp. at 194-95 n.23. For simplicity, we treat DED as the promulgating agency.

n6 HEW apparently received an unprecedented 9,700 comments on the proposed Title IX athletics regulations, see Haffer v. Temple Univ. of the Commonwealth Sys. of Higher Educ., 524 F. Supp. 531, 536 n.9 (1981) (citing Thomas A. Cox, Intercollegiate Athletics and Title IX, 46 Geo. Wash. L. Rev. 34, 40 (1977) ("Cox")), prompting former HEW Secretary Caspar Weinberger to remark, "I had not realized until the comment period that athletics is the single most important thing in the United States," *id.* (citing Cox at 34, quoting N.Y. Times, June 27, 1975, at 16, col. 4).

-----End Footnotes----- [**21]

In the first appeal, this court held that an institution's failure effectively to accommodate both genders under § 106.41(c)(1) is sufficient to establish a violation of Title IX. Cohen II, 991 F.2d at 897.

In 1978, several years after the promulgation of the regulations, OCR published a proposed "Policy Interpretation," the purpose of which was to clarify the obligations of federal aid recipients under Title IX to provide equal opportunities in athletics programs. "In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at [34 C.F.R. §§ 106.37(c) and 106.41(c)]." 44 Fed. Reg. at 71,415. After considering a large number of public comments, OCR published the final Policy Interpretation. 44 Fed. Reg. 71,413-71,423 (1979). While the Policy Interpretation covers other areas, this litigation focuses on the "Effective Accommodation" section, which interprets 34 C.F.R. § 106.41(c)(1), the first of the non-exhaustive list of ten factors to be considered in determining whether equal athletics opportunities are available to both genders. The Policy Interpretation [**22] establishes a three-part test, a two-part test, and factors to be considered in determining compliance under 34 C.F.R. § 106.41(c)(1). At issue in this appeal is the proper interpretation of the first of these, the so-called three-part test, n7 which inquires as follows:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71,418.

-----Footnotes-----

n7 For clarification, we note that the cases refer to each part of this three-part test as a "prong" or a "benchmark." Prong one is also called the "substantial proportionality test."

-----End Footnotes----- [**23]

The district court held that, "because Brown maintains a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, it cannot gain the protection of prong one." Cohen III, 879 F. Supp. at 211. Nor did Brown satisfy prong two. While acknowledging that Brown "has an impressive history of program expansion," the district court found that Brown failed to demonstrate that it has "maintained a continuing practice of intercollegiate program expansion for women, the underrepresented sex." *Id.* The court noted further that, because merely reducing program offerings to the overrepresented gender does not constitute program expansion for the underrepresented gender, the fact that Brown has eliminated or demoted several men's teams does not amount to a continuing practice of program expansion for women. *Id.* As to prong three, the district court found that Brown had not "fully and effectively accommodated the interest and ability of the underrepresented sex 'to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both [*167] sexes.'" *Id.* (quoting the Policy [**24] Interpretation, 44 Fed. Reg. at 71,417).

On January 16, 1996, DED released a "Clarification Memorandum," which does not change the existing standards for compliance, but which does provide further information and guidelines for assessing compliance under the three-part test. The Clarification Memorandum contains many examples illustrating how institutions may meet each prong of the three-part test and explains how participation opportunities are to be counted under Title IX.

The district court found that Brown predetermines the approximate number of varsity positions available to men and women, and, thus, that "the concept of any measure of unfilled but available athletic slots does not comport with reality." Cohen III, 879 F. Supp. at 203 n.36. The district court concluded that intercollegiate athletics opportunities "means real opportunities, not illusory ones, and therefore should be measured by counting actual participants." *Id.* at 204 (internal quotation marks and citations omitted).

Title IX is an anti-discrimination statute, modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"). n8 See Cannon, 441 U.S. at 696 ("The drafters [**25] of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."). Thus, Title IX and Title VI share the same constitutional underpinnings. See Jeffrey H. Orleans, *An End To The Odyssey: Equal Athletic Opportunities For Women*, 3 *Duke J. Gender L. & Pol'y* 131, 133-34 (1996).

-----Footnotes-----

n8 Title VI prohibits discrimination on the basis of race, color, or national origin in institutions benefitting from federal funds.

-----End Footnotes-----

Although the statute itself provides for no remedies beyond the termination of federal funding, the Supreme Court has determined that Title IX is enforceable through an implied private right of action, Cannon, 441 U.S. at 703, and that damages are available for an action brought under Title IX, Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992). The right to injunctive relief under Title IX appears to have been impliedly accepted by the Supreme Court in Franklin. *Id.* at 64-66, 71-73. In addition, a majority [**26] of the Court in Guardians Ass'n v. Civil

Serv. Comm'n, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), agreed that injunctive relief and other equitable remedies are appropriate for violations of Title VI.

According to the statute's senate sponsor, Title IX was intended 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.

118 Cong. Rec. 5808 (1972) (remarks of Sen. Bayh) (quoted in Haffer, 524 F. Supp. at 541).

III.

In Cohen II, a panel of this court squarely rejected Brown's constitutional and statutory challenges to the Policy Interpretation's three-part test, upholding the district court's interpretation of the Title IX framework applicable to intercollegiate athletics, Cohen II, 991 F.2d at 899-902, as well as its grant of a preliminary injunction in favor of the plaintiffs, id. at 906-07. Despite the fact that it presents substantially the same legal arguments in this appeal as were raised and decided in [**27] the prior appeal, Brown asserts that there is "no impediment" to this court's plenary review of these decided issues. We disagree.

The law of the case doctrine precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided. See 1B James W. Moore et al., Moore's Federal Practice P 0.404[1] (2d ed. 1993) (hereinafter "Moore"). "The doctrine of the law of the case directs that a decision of an appellate court on an issue of law, unless vacated or set aside, governs the issue during all subsequent [*168] stages of litigation in the nisi prius court and thereafter on any further appeal." Commercial Union Ins. Co. v. Walbrook Ins. Co., 41 F.3d 764, 769 (1st Cir. 1994) (citing United States v. Rivera-Martinez, 931 F.2d 148 (1st Cir.), cert. denied, 502 U.S. 862, 112 S. Ct. 184, 116 L. Ed. 2d 145 (1991)). The reviewing court's mandate "constitutes the law of the case on such issues of law as were actually considered and decided by the appellate court, or as were necessarily inferred from the disposition on appeal." Commercial Union Ins. Co., 41 F.3d at 770 (citing 1B Moore at P 0.404[10]). The doctrine requires a trial court on remand [**28] to dispose of the case in accordance with the appellate court's mandate by implementing "'both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces,'" United States v. Connell, 6 F.3d 27, 30 (1st Cir. 1993) (quoting United States v. Kikumura, 947 F.2d 72, 76 (3d Cir. 1991)), and binds newly constituted panels to prior panel decisions on point, e.g., Irving v. United States, 49 F.3d 830, 833-34 (1st Cir. 1995); Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth., 991 F.2d 935, 939 n.3 (1st Cir. 1993).

While we have acknowledged that there are exceptions to the law of the case doctrine, we have emphasized that the circumstances in which they apply are rare. As have a number of other circuits, we have determined that issues decided on appeal should not be reopened "'unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.'" Rivera-Martinez, 931 F.2d at 151 (quoting White v. Murtha, [**29] 377 F.2d 428, 432 (5th Cir. 1967)) (other citations omitted).

Brown's argument that the Supreme Court's recent decision in Adarand Constr., Inc. v. Peña, 132 L. Ed. 2d 158, U.S. , 115 S. Ct. 2097 (1995) ("Adarand"), controls this case necessarily presumes that Adarand constitutes a contrary intervening decision by controlling authority on point that (i) undermines the validity of Cohen II; (ii) compels us to depart from the law of the case doctrine; and (iii) therefore mandates that we reexamine Brown's equal protection claim.

We have narrowly confined the "intervening controlling authority exception" to Supreme Court

opinions, en banc opinions of this court, or statutory overrulings. Irving, 49 F.3d at 834. We have also recognized that this exception may apply "in those rare situations where newly emergent authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel, in light of the neoteric developments, would change its course." *Id.* (internal quotation marks and citation omitted).

The law of the case doctrine is a prudential rule of policy and practice, rather than "an absolute bar [**30] to reconsideration [] or a limitation on a federal court's power." Rivera-Martinez, 931 F.2d at 150-51. Thus, we have not construed the doctrine as "an inflexible straitjacket that invariably requires rigid compliance." Northeast Utils. Serv. Co. v. Federal Energy Regulatory Comm'n, 55 F.3d 686, 688 (1st Cir. 1995). Nevertheless, the doctrine serves important goals and must be "treated respectfully and, in the absence of exceptional circumstances, applied according to its tenor." Rivera-Martinez, 931 F.2d at 151. Accordingly, we have held that only a few exceptional circumstances can overcome the interests served by adherence to the doctrine and these exceptions are narrowly circumscribed. See *id.*; see also United States v. Reveron Martinez, 836 F.2d 684, 687 n.2 (1st Cir. 1988) ("To be sure, there may be occasions when courts can -- and should -- loosen the iron grip of stare decisis. But any such departure 'demands special justification.'") (quoting Arizona v. Rumsey, 467 U.S. 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984)). n9

-----Footnotes-----

n9 The law of the case doctrine is "akin to the doctrines of collateral estoppel, res judicata, and stare decisis," Joan Steinman, *Law Of The Case: A Judicial Puzzle In Consolidated And Transferred Cases And In MultiDistrict Litigation*, 135 U. Penn. L. Rev. 595, 598-99 (1987) (footnotes omitted), and "has been said to lie half way between stare decisis and res judicata," 1B Moore at P 0.404[1] n.3 (internal quotation marks and citation omitted). As applied in the federal courts today, the law of the case doctrine more closely resembles the doctrine of stare decisis. 1B Moore at P 0.404[1]. Both doctrines reflect concerns that have long been recognized as fundamentally important to the rule of law -- e.g., stability, predictability, and respect for judicial authority -- and both doctrines are applied "with more or less rigidity depending on which interest is served." *Id.* at II-2.

-----End Footnotes----- [**31]

[*169] For the reasons that follow, we conclude that no exception to the law of the case doctrine applies here and, therefore, that Cohen II's rulings of law control the disposition of this appeal.

Brown contends that stare decisis does not bind this panel "to the previous preliminary ruling of this Court because it lacks the element of finality," Reply Br. at 24, and that the law of the case doctrine does not prevent a court from "changing its mind," *id.* at n.47.

We acknowledge that we have repeatedly emphasized that conclusions and holdings regarding the merits of issues presented on appeal from a grant of a preliminary injunction are to be understood as statements as to probable outcomes. E.g., A.M. Capen's Co. v. American Trading and Prod. Co., 74 F.3d 317, 322 (1st Cir. 1996); Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 6 (1st Cir. 1991). The concern informing this caveat arises when we are asked to rule on the propriety of a district court's grant of a preliminary injunction (or otherwise issue a preliminary ruling) without benefit of full argument and a well-developed record. In this case, however, the record before the prior panel was "sufficiently [**32] developed and the facts necessary to shape the proper legal matrix were sufficiently clear," Cohen II, 991 F.2d at 904, and nothing in the record subsequently developed at trial constitutes substantially different evidence that might undermine the validity of the prior panel's rulings of law. In considering plaintiffs' motion for a preliminary injunction in Cohen I, the district court (i) "paid meticulous attention to the parties' prospects for success over the long haul;" (ii) "plainly visualized both the factual intricacies and legal complexities that characterize Title IX litigation;" (iii) "held a lengthy adversary hearing and reviewed voluminous written submissions;" and (iv) "correctly focused on the three-part accommodation test." Cohen II, 991 F.2d at 903. Further, as the district court noted in its opinion after the trial on the merits, "nothing in the record before me, now fully developed, undermines the considered legal framework established by the First Circuit at the preliminary injunction stage." Cohen III, 879 F.

Supp. at 194.

Brown offers remarkably little in the way of analysis or authority to support its blithe contention that we are free to disregard [**33] Cohen II in disposing of this appeal. Indeed, Brown argues as if the prior panel had not decided the precise statutory interpretation questions presented (which it clearly did) and as if the district court's liability analysis were contrary to the law enunciated in Cohen II (which it clearly is not). Finding Brown's bare assertions to be unpersuasive, we decline the invitation to this court to "change its mind." The precedent established by the prior panel is not clearly erroneous; it is the law of this case and the law of this circuit.

IV.

Brown contends that the district court misconstrued and misapplied the three-part test. Specifically, Brown argues that the district court's interpretation and application of the test is irreconcilable with the statute, the regulation, and the agency's interpretation of the law, and effectively renders Title IX an "affirmative action statute" that mandates preferential treatment for women by imposing quotas in excess of women's relative interests and abilities in athletics. Brown asserts, in the alternative, that if the district court properly construed the test, then the test itself violates Title IX and the United States Constitution. [**34]

We emphasize two points at the outset. First, notwithstanding Brown's persistent invocation of the inflammatory terms "affirmative action," "preference," and "quota," this is not an affirmative action case. Second, Brown's efforts to evade the controlling authority of Cohen II by recasting its core legal arguments as challenges to the "district court's interpretation" of the law are unavailing; the primary arguments raised here have [*170] already been litigated and decided adversely to Brown in the prior appeal.

A.

Brown's talismanic incantation of "affirmative action" has no legal application to this case and is not helpful to Brown's cause. While "affirmative action" may have different connotations as a matter of politics, as a matter of law, its meaning is more circumscribed. True affirmative action cases have historically involved a voluntary undertaking to remedy discrimination (as in a program implemented by a governmental body, or by a private employer or institution), by means of specific group-based preferences or numerical goals, and a specific timetable for achieving those goals. See Adarand, 132 L. Ed. 2d 158, U.S. , 115 S. Ct. 2097 (1995) (remanding for [**35] review under strict scrutiny a challenge to a federal statute establishing a government-wide goal for awarding to minority businesses not less than 5% of the total value of all prime contracts and subcontracts for each fiscal year); Metro Broadcasting v. FCC, 497 U.S. 547, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990) (upholding a federal program requiring race-based preferences); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (striking down a municipal set-aside program requiring that 30% of the city's construction dollars be paid to racial minority subcontractors on an annual basis); Johnson v. Transportation Agency, 480 U.S. 616, 94 L. Ed. 2d 615, 107 S. Ct. 1442 (1986) (upholding a temporary program authorizing a county agency to consider sex and race as factors in making promotions in order to achieve a statistically measurable improvement in the representation of women and minorities in major job classifications in which they had been historically underrepresented); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986) (striking down a collective-bargaining faculty lay-off provision requiring preferential treatment for certain racial minorities); Fullilove v. Klutznick, 448 U.S. 448, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (upholding a [**36] federal program requiring state and local recipients of federal public works grants to set aside 10% of funds for procuring goods and services from minority business enterprises); United Steelworkers v. Weber, 443 U.S. 193, 61 L. Ed. 2d 480, 99 S. Ct. 2721 (1979) (upholding a collective bargaining agreement that set aside for blacks half the places in a new training program until the percentage of blacks among skilled workers at the plant was commensurate with the percentage of blacks in the local labor force); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (striking down a state medical school's admissions policy that set aside 16 of its places for racial minorities).