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n10 Cases and commentators sometimes treat cases involving involuntarily implemented plans -- e.g., plans adopted pursuant to a consent decree or a contempt order -- as affirmative action cases. See, e.g., United States v. Paradise, 480 U.S. 149, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987) (upholding a "one-black-for-one-white" promotion requirement ordered by a district court as an interim measure in response to proven discrimination by a state employer); Sheet Metal Workers' v. EEOC, 478 U.S. 421, 92 L. Ed. 2d 344, 106 S. Ct. 3019 (1986) (upholding a federal district court's imposition on the union a goal for racial minority membership as a remedy for the union's contempt of the court's earlier orders to cease racially discriminatory admissions practices).

-----End Footnotes----- [**37]

Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI. No aspect of the Title IX regime at issue in this case -- inclusive of the statute, the relevant regulation, and the pertinent agency documents -- mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.

Like other anti-discrimination statutory schemes, the Title IX regime permits affirmative action. n11 In addition, Title IX, like [**171] other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination. Consistent with the school desegregation cases, the question of substantial proportionality under the Policy Interpretation's three-part test is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption, rather than an inflexible requirement. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971). In short, the substantial proportionality test is but one aspect of the inquiry into whether an institution's athletics program [**38] complies with Title IX.

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n11 As previously noted, Title IX itself specifies only that the statute shall not be interpreted to require gender-based preferential or disparate treatment. 20 U.S.C. § 1681(b). However, although Congress could easily have done so, it did not ban affirmative action or gender-conscious remedies under Title IX. See also Weber, 443 U.S. at 201-02 (construing the prohibition against race discrimination contained in §§ 703(a) and (d) of Title VII, and concluding that "an interpretation of the sections that forbade all race-conscious affirmative action would bring about an end completely at variance with the purpose of the statute and must be rejected") (internal quotation marks and citations omitted); id. at 205-06 (construing § 703(j) of Title VII, upon which § 1681(b) of Title IX was based, and concluding that "the natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action").

In addition, remedial action and voluntary affirmative action to overcome the effects of gender discrimination are permitted under the Title IX regulations, 34 C.F.R. § 106.3, and by the Policy Interpretation, 44 Fed. Reg. at 71,416.

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Also consistent with the school desegregation cases, the substantial proportionality test of prong one is applied under the Title IX framework, not mechanically, but case-by-case, in a fact-specific manner. As with other anti-discrimination regimes, Title IX neither mandates a finding of discrimination based solely upon a gender-based statistical disparity, see Cohen II, 991 F.2d at 895, nor prohibits gender-conscious remedial measures. See Missouri v. Jenkins, U.S. , , 115 S. Ct. 2038, 2048, 132 L. Ed. 2d 63 (1995) (acknowledging the constitutional permissibility of court-ordered, race-conscious remedial plans designed to restore victims of discrimination to the positions they would have occupied in the absence of such conduct); Fullilove, 448 U.S. at 483 (recognizing that the authority of a federal court to incorporate racial criteria into a remedial decree also extends to statutory violations and that, where federal anti-discrimination laws have been violated, race-conscious remedies may be appropriate);

Weber, 443 U.S. at 197 (holding that Title VII does not prohibit private employers from voluntarily implementing race-conscious measures to eliminate **[**40]** "manifest racial imbalances in traditionally segregated job categories"); McDaniel v. Barresi, 402 U.S. 39, 41, 28 L. Ed. 2d 582, 91 S. Ct. 1287 (1971) (recognizing that measures required to remedy race discrimination "will almost invariably require" race-conscious classifications, and that "any other approach would freeze the status quo that is the very target of all desegregation processes").

Another important distinction between this case and affirmative action cases is that the district court's remedy requiring Brown to accommodate fully and effectively the athletics interests and abilities of its women students does not raise the concerns underlying the Supreme Court's requirement of a particularized factual predicate to justify voluntary affirmative action plans. In reviewing equal protection challenges to such plans, the Court is concerned that government bodies are reaching out to implement race- or gender-conscious remedial measures that are "ageless in their reach into the past, and timeless in their ability to affect the future," Wygant, 476 U.S. at 276, on the basis of facts insufficient to support a prima facie case of a constitutional or statutory violation, Croson, 488 U.S. at 500, **[**41]** to the benefit of unidentified victims of past discrimination, see id. at 469; Wygant, 476 U.S. at 276. Accordingly, the Court has taken the position that voluntary affirmative action plans cannot be constitutionally justified absent a particularized factual predicate demonstrating the existence of "identified discrimination," see Croson, 488 U.S. at 500-06, because "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," Wygant, 476 U.S. at 276.

From a constitutional standpoint, the case before us is altogether different. Here, gender-conscious relief was ordered by an Article III court, constitutionally compelled to have before it litigants with standing to raise **[*172]** the cause of action alleged; for the purpose of providing relief upon a duly adjudicated determination that specific defendants had discriminated against a certified class of women in violation of a federal anti-discrimination statute; based upon findings of fact that were subject to the Federal Rules of Evidence. The factual problem presented in affirmative action cases is, "Does the evidence support a finding of discrimination such that race- or gender-conscious **[**42]** remedial measures are appropriate?" We find these multiple indicia of reliability and specificity to be sufficient to answer that question in the affirmative.

From the mere fact that a remedy flowing from a judicial determination of discrimination is gender-conscious, it does not follow that the remedy constitutes "affirmative action." Nor does a "reverse discrimination" claim arise every time an anti-discrimination statute is enforced. While some gender-conscious relief may adversely impact one gender -- a fact that has not been demonstrated in this case -- that alone would not make the relief "affirmative action" or the consequence of that relief "reverse discrimination." To the contrary, race- and gender-conscious remedies are both appropriate and constitutionally permissible under a federal anti-discrimination regime, although such remedial measures are still subject to equal protection review. See Miller v. Johnson, U.S. , , 115 S. Ct. 2475, 2491, 132 L. Ed. 2d 762 (1995) ("compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application **[**43]** of those laws") (citing Shaw v. Reno, 509 U.S. 630, 653-54, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993)).

B.

Cohen II squarely rejected Brown's interpretation of the three-part test and carefully delineated its own, which is now the law of this circuit as well as the law of this case. On remand, the district court's liability analysis explicitly and faithfully adhered to Cohen II's mandate, and we are bound to do the same at this stage of the litigation, absent one of the exceptional circumstances discussed supra. Because the precise questions presented regarding the proper interpretation of the Title IX framework were considered and decided by a panel of this court in the prior appeal, and because no exception to the law of the case doctrine is presented, we have no occasion to reopen the issue here. Brown's rehashed statutory challenge is foreclosed by the law of the case doctrine and we are therefore bound by the prior panel's interpretation of the statute, the regulation, and the relevant agency pronouncements.

In its liability analysis, the district court expressly accepted Cohen II's elucidation of the applicable law,

Cohen III, 879 F. Supp. at 194, and applied the law in accordance [**44] with its mandate, *id.* at 210-13. Indeed, every circuit court to have reviewed a Title IX claim of discrimination in athletics since Cohen II was decided is in accord with its explication of the Title IX regime as it applies to athletics. See *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), cert. denied, 130 L. Ed. 2d 883, U.S. , 115 S. Ct. 938 (1995); *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), cert. denied, 510 U.S. 1004, 126 L. Ed. 2d 478, 114 S. Ct. 580 (1993).

Cohen II held that the Policy Interpretation is entitled to substantial deference because it is the enforcing agency's "considered interpretation of the regulation." 991 F.2d at 896-97. Brown argues that the district court erred in concluding that it was obligated to give substantial deference to the Policy Interpretation, on the ground that "the interpretation is not a worthy candidate for deference," Reply Br. at 15, because "the urged interpretation is illogical, conflicts with the Constitution, the Statute, the Regulation, other Agency [**45] materials and practices, existing analogous caselaw and, in addition, is bad policy," *id.* We reject Brown's kitchen-sink characterization of the Policy Interpretation and its challenge to the substantial deference accorded that document by the district court.

[*173] The Policy Interpretation represents the responsible agency's interpretation of the intercollegiate athletics provisions of Title IX and its implementing regulations. 44 Fed. Reg. at 71,413. It is well settled that, where, as here, Congress has expressly delegated to an agency the power to "elucidate a specific provision of a statute by regulation," the resulting regulations should be accorded "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). It is also well established "that an agency's construction of its own regulations is entitled to substantial deference." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) (quoting *Lyng v. Payne*, 476 U.S. 926, 939, 90 L. Ed. 2d 921, 106 S. Ct. 2333 (1986)) (other citation omitted). As the Supreme Court has explained, "because [**46] applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151 (citation omitted).

Applying these principles, Cohen II held that the applicable regulation, 34 C.F.R. § 106.41, deserves controlling weight, 991 F.2d at 895; that the Policy Interpretation warrants substantial deference, *id.* at 896-97; and that, "because the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor," *id.* at 899 (citations omitted). Accord *Horner*, 43 F.3d at 274-75; *Kelley*, 35 F.3d at 270; *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993). On remand, the district court properly applied the legal framework elucidated in Cohen II and explicitly followed this court's mandate in according controlling weight to the regulation and substantial deference to the Policy Interpretation. Cohen III, 879 F. Supp. at 197-99; [**47] accord *Kelley*, 35 F.3d at 272 (holding that "neither the regulation nor the policy interpretation run afoul of the dictates of Title IX"). We hold that the district court did not err in the degree of deference it accorded the regulation and the relevant agency pronouncements.

C.

As previously noted, the district court held that, for purposes of the three-part test, the intercollegiate athletics participation opportunities offered by an institution are properly measured by counting the number of actual participants on intercollegiate teams. Cohen III, 879 F. Supp. at 202. The Policy Interpretation was designed specifically for intercollegiate athletics. n12 44 Fed. Reg. at 71,413. Because the athletics regulation distinguishes between club sports and intercollegiate sports, under the Policy Interpretation, "club teams will not be considered to be intercollegiate teams except in those instances where they regularly participate at the varsity level." *Id.* at n.1. Accordingly, the district court excluded club varsity teams from the definition of "intercollegiate teams" and, therefore, from the calculation of participation opportunities, because [**48] the evidence was inadequate to show that the club teams regularly participated in varsity competition. Cohen III, 879 F. Supp. at 200.

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n12 Application of the Policy Interpretation is not limited to intercollegiate athletics, however. The Policy Interpretation states that "its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by the regulation." 44 Fed. Reg. at 71,413.

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The district court's definition of athletics participation opportunities comports with the agency's own definition. See Clarification Memorandum at 2 ("In determining participation opportunities, OCR counts the number of actual athletes participating in the athletic program."). We find no error in the district court's definition and calculation of the intercollegiate athletics participation opportunities afforded to Brown students, and no error in the court's finding of a 13.01% disparity between the percentage of women participating in intercollegiate varsity athletics **[**49]** **[*174]** at Brown and the percentage of women in Brown's undergraduate student body.

D.

Brown contends that an athletics program equally accommodates both genders and complies with Title IX if it accommodates the relative interests and abilities of its male and female students. This "relative interests" approach posits that an institution satisfies prong three of the three-part test by meeting the interests and abilities of the underrepresented gender only to the extent that it meets the interests and abilities of the overrepresented gender. n13 See Cohen II, 991 F.2d at 899.

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n13 We note that Brown presses its relative interests argument under both prong one and prong three. At trial, Brown argued that, "in order to succeed on prong one, plaintiffs bear the burden of proving that the percentage of women among varsity athletes is not substantially proportionate to the percentage of women among students interested in participating in varsity athletics." Cohen III, 879 F. Supp. at 205. At the preliminary injunction stage, Brown propounded the same relative interests argument under prong three. *Id.* at n.41.

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Brown maintains that the district court's decision imposes upon universities the obligation to engage in preferential treatment by requiring quotas in excess of women's relative interests and abilities. With respect to prong three, Brown asserts that the district court's interpretation of the word "fully" "requires universities to favor women's teams and treat them better than men's [teams]. . . . forces them to eliminate or cap men's teams. . . . [and] forces universities to impose athletic quotas in excess of relative interests and abilities." Appellant's Br. at 55.

The prior panel considered and rejected Brown's approach, observing that "Brown reads the 'full' out of the duty to accommodate 'fully and effectively.'" Cohen II, 991 F.2d at 899. Under Cohen II's controlling interpretation, prong three "demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test." *Id.* at 898.

Brown's interpretation of full and effective accommodation is "simply not the law." **[**51]** Cohen III, 879 F. Supp. at 208. We agree with the prior panel and the district court that Brown's relative interests approach "cannot withstand scrutiny on either legal or policy grounds," Cohen II, 991 F.2d at 900, because it "disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interests," Cohen III, 879 F. Supp. at 209. After Cohen II, it cannot be maintained that the relative interests approach is compatible with Title IX's equal accommodation principle as it has been interpreted by this circuit.

Brown argues that the district court's interpretation of the three-part test requires numerical proportionality, thus imposing a gender-based quota scheme in contravention of the statute. This argument rests, in part, upon Brown's reading of 20 U.S.C. § 1681(b) as a categorical proscription against consideration of gender parity. Section 1681(b) provides:

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on **[**52]** 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

20 U.S.C.A. § 1681(b) (West 1990) (emphasis added).

The prior panel, like Brown, assumed without analysis that § 1681(b) applies unequivocally to intercollegiate athletics programs. We do not question Cohen II's application of § 1681(b). We think it important to bear in mind, however, the congressional concerns that inform the proper interpretation of this provision. Section 1681(b) was patterned after **[*175]** § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), and was specifically designed to prohibit quotas in university admissions and hiring, based upon the percentage of individuals of one gender in a geographical community. See H.R. Rep. No. 554, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.A.N. 2462, 2590-92 (Additional Views); 117 Cong. Rec. 39,261-62 (1971) (remarks of Rep. Quie); 117 Cong. Rec. 30,406, 30,409 (remarks of Sen. **[**53]** Bayh); 117 Cong. Rec. 39,251-52 (remarks of Rep. Mink and Rep. Green). Thus, the legislative history strongly suggests that the underscored language defines what is proscribed (in the contexts of admissions and hiring) in terms of a geographical area, beyond the institution, and does not refer to an imbalance within the university, with respect to the representation of each gender in intercollegiate athletics, as compared to the gender makeup of the student body.

In any event, the three-part test is, on its face, entirely consistent with § 1681(b) because the test does not require preferential or disparate treatment for either gender. Neither the Policy Interpretation's three-part test, nor the district court's interpretation of it, mandates statistical balancing; "rather, the policy interpretation merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance." Kelley, 35 F.3d at 271.

The test is also entirely consistent with § 1681(b) as applied by the prior panel and by the district court. As previously noted, Cohen II expressly held that "a court assessing Title IX **[**54]** compliance may not find a violation solely because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand." 991 F.2d at 895. The panel then carefully delineated the burden of proof, which requires a Title IX plaintiff to show, not only "disparity between the gender composition of the institution's student body and its athletic program, thereby proving that there is an underrepresented gender," *id.* at 901, but also "that a second element -- unmet interest -- is present," *id.*, meaning that the underrepresented gender has not been fully and effectively accommodated by the institution's present athletic program, *id.* at 902 (citing 44 Fed. Reg. at 71,418). Only where the plaintiff meets the burden of proof on these elements and the institution fails to show as an affirmative defense a history and continuing practice of program expansion responsive to the interests and abilities of the underrepresented gender will liability be established. Surely this is a far cry from a one-step imposition of a gender-based quota.

Brown simply ignores the fact that it is **[**55]** required to accommodate fully the interests and abilities of the underrepresented gender, not because the three-part test mandates preferential treatment for women *ab initio*, but because Brown has been found (under prong one) to have allocated its athletics participation opportunities so as to create a significant gender-based disparity with respect to these opportunities, and has failed (under prong two) to show a history and continuing practice of expansion of opportunities for the underrepresented gender. Brown's interpretation conflates prongs one and three and distorts the three-part test by reducing it to an abstract, mechanical determination of strict numerical

proportionality. In short, *Brown* treats the three-part test for compliance as a one-part test for strict liability.

Brown also fails to recognize that Title IX's remedial focus is, quite properly, not on the overrepresented gender, but on the underrepresented gender; in this case, women. Title IX and its implementing regulations protect the class for whose special benefit the statute was enacted. See *Cannon*, 441 U.S. at 694. It is women and not men who have historically and who continue to be underrepresented [**56] in sports, not only at *Brown*, but at universities nationwide. See *Williams v. School Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (1993) (observing that, although Title IX and its regulations apply equally to boys and girls, "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges"), [**176] cert. denied, 510 U.S. 1043, 126 L. Ed. 2d 656, 114 S. Ct. 689 (1994).

The prior panel held that "the fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender." *Cohen II*, 991 F.2d at 899. Instead, the law requires that, absent a demonstration of continuing program expansion for the underrepresented gender under prong two of the three-part test, an institution must either provide opportunities in proportion to the gender composition of the student body so as to satisfy prong one, or fully accommodate the interests and abilities of athletes of the underrepresented gender under prong three. *Id.* In other words, [**57]

If a school, like *Brown*, eschews the first two benchmarks of the accommodation test, electing to stray from substantial proportionality and failing to march uninterruptedly in the direction of equal athletic opportunity, it must comply with the third benchmark. To do so, the school must fully and effectively accommodate the underrepresented gender's interests and abilities, even if that requires it to give the underrepresented gender (in this case, women) what amounts to a larger slice of a shrinking athletic-opportunity pie.

Id. at 906.

We think it clear that neither the Title IX framework nor the district court's interpretation of it mandates a gender-based quota scheme. In our view, it is *Brown*'s relative interests approach to the three-part test, rather than the district court's interpretation, that contravenes the language and purpose of the test and of the statute itself. To adopt the relative interests approach would be, not only to overrule *Cohen II*, but to rewrite the enforcing agency's interpretation of its own regulation so as to incorporate an entirely different standard for Title IX compliance. This relative interests standard would entrench and [**58] fix by law the significant gender-based disparity in athletics opportunities found by the district court to exist at *Brown*, a finding we have held to be not clearly erroneous. According to *Brown*'s relative interests interpretation of the equal accommodation principle, the gender-based disparity in athletics participation opportunities at *Brown* is due to a lack of interest on the part of its female students, rather than to discrimination, and any attempt to remedy the disparity is, by definition, an unlawful quota. This approach is entirely contrary to "Congress's unmistakably clear mandate that educational institutions not use federal monies to perpetuate gender-based discrimination," *id.* at 907, and makes it virtually impossible to effectuate Congress's intent to eliminate sex discrimination in intercollegiate athletics.

E.

Brown also claims error in the district court's failure to apply Title VII standards to its analysis of whether *Brown*'s intercollegiate athletics program complies with Title IX. The district court rejected the analogy to Title VII, noting that, while Title VII "seeks to determine whether gender-neutral job openings have been filled without regard to [**59] gender[,] Title IX . . . was designed to address the reality that sports teams, unlike the vast majority of jobs, do have official gender requirements, and this statute accordingly approaches the concept of discrimination differently from Title VII." *Cohen III*, 879 F. Supp. at 205.

It does not follow from the fact that § 1681(b) was patterned after a Title VII provision that Title VII standards should be applied to a Title IX analysis of whether an intercollegiate athletics program equally accommodates both genders, as Brown contends. While this court has approved the importation of Title VII standards into Title IX analysis, we have explicitly limited the crossover to the employment context. See Cohen II, 991 F.2d at 902 (citing Lipsett v. University of P.R., 864 F.2d 881, 897 (1st Cir. 1988)); but see Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 540 (1st Cir. 1995) (Title VII sexual harassment standards applied to Title IX sexual harassment case in non-employment context), cert. denied, 134 L. Ed. 2d 191, U.S. , 116 S. Ct. 1044 (1996).

As Cohen II recognized, "the scope and purpose of Title IX, which merely conditions [*177] government [**60] grants to educational institutions, are substantially different from those of Title VII, which sets basic employment standards." 991 F.2d at 902 (citation omitted). "Whereas Title VII is largely peremptory," Title IX is "largely aspirational," and thus, a "loosely laced buskin." *Id.*; see also North Haven, 456 U.S. at 521 (directing that Title IX must be accorded "a sweep as broad as its language").

It is imperative to recognize that athletics presents a distinctly different situation from admissions and employment and requires a different analysis in order to determine the existence vel non of discrimination. While the Title IX regime permits institutions to maintain gender-segregated teams, the law does not require that student-athletes attending institutions receiving federal funds must compete on gender-segregated teams; nor does the law require that institutions provide completely gender-integrated athletics programs. n14 To the extent that Title IX allows institutions to maintain single-sex teams and gender-segregated athletics programs, men and women do not compete against each other for places on team rosters. Accordingly, and notwithstanding Brown's protestations [**61] to the contrary, the Title VII concept of the "qualified pool" has no place in a Title IX analysis of equal athletics opportunities for male and female athletes because women are not "qualified" to compete for positions on men's teams, and vice-versa. In addition, the concept of "preference" does not have the same meaning, or raise the same equality concerns, as it does in the employment and admissions contexts.

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n14 See 34 C.F.R. § 106.41(b) (1995) ("[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.") (emphasis added). Nor do the regulations require institutions to field gender-integrated teams:

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.

Id.

Whether or not the institution maintains gender-segregated teams, it must provide "gender-blind equality of opportunity to its student body." Cohen II, 991 F.2d at 896. While this case presents only the example of members of the underrepresented gender seeking the opportunity to participate on single-sex teams, the same analysis would apply where members of the underrepresented gender sought opportunities to play on co-ed teams.

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Brown's approach fails to recognize that, because gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically

material ways. In providing for gender-segregated teams, intercollegiate athletics programs necessarily allocate opportunities separately for male and female students, and, thus, any inquiry into a claim of gender discrimination must compare the athletics participation opportunities provided for men with those provided for women. For this reason, and because recruitment of interested athletes is at the discretion of the institution, there is a risk that the institution will recruit only enough women to fill positions in a program that already underrepresents women, and that the smaller size of the women's program will have the effect of discouraging women's participation.

In this unique context, Title IX operates to ensure that the gender-segregated allocation of athletics opportunities does not disadvantage either gender. Rather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities [**63] between the sexes in a non-discriminatory manner. As the Seventh Circuit observed, "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics." Kelley, 35 F.3d at 270 (citing Sex Discrimination Regulations, Hearings Before the Subcommittee on Post Secondary Education of the Committee on Education and Labor, 94th Cong., 1st Sess. at 46, 54, 125, 129, 152, 177, 299-300 (1975); 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh); 117 Cong. Rec. 30,407 (1971) (same)).

[*178] In contrast to the employment and admissions contexts, in the athletics context, gender is not an irrelevant characteristic. Courts and institutions must have some way of determining whether an institution complies with the mandate of Title IX and its supporting regulations to provide equal athletics opportunities for both genders, despite the fact that the institution maintains single-sex teams, and some way of fashioning a remedy upon a determination that the institution does not equally and effectively accommodate the interests and abilities of both genders. As the Kelley Court pointed out (in the context of [**64] analyzing the deference due the relevant athletics regulation and the Policy Interpretation):

Undoubtedly the agency responsible for enforcement of the statute could have required schools to sponsor a women's program for every men's program offered and vice versa. . . . It was not unreasonable, however, for the agency to reject this course of action. Requiring parallel teams is a rigid approach that denies schools the flexibility to respond to the differing athletic interests of men and women. It was perfectly acceptable, therefore, for the agency to chart a different course and adopt an enforcement scheme that measures compliance by analyzing how a school has allocated its various athletic resources.

Kelley, 35 F.3d at 271 (footnotes omitted).

Each prong of the Policy Interpretation's three-part test determines compliance in this manner.

Measuring compliance through an evaluation of a school's allocation of its athletic resources allows schools flexibility in meeting the athletic interests of their students and increases the chance that the actual interests of those students will be met. And if compliance with Title IX is to be measured through this sort [**65] of analysis, it is only practical that schools be given some clear way to establish that they have satisfied the requirements of the statute. The substantial proportionality contained in Benchmark 1 merely establishes such a safe harbor.

Id. (citations omitted).

We find no error in the district court's refusal to apply Title VII standards in its inquiry into whether Brown's intercollegiate athletics program complies with Title IX. See Cohen II, 991 F.2d at 901 ("There is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and

regulations are clear."). We conclude that the district court's application of the three-part test does not create a gender-based quota and is consistent with Title IX, 34 C.F.R. § 106.41(b) (1995), the Policy Interpretation, and the mandate of Cohen II.

F.

Brown has contended throughout this litigation that the significant disparity in athletics opportunities for men and women at Brown is the result of a gender-based differential in the level of interest in sports and that the district court's application of the three-part test requires universities to provide athletics opportunities for women to an **[**66]** extent that exceeds their relative interests and abilities in sports. Thus, at the heart of this litigation is the question whether Title IX permits Brown to deny its female students equal opportunity to participate in sports, based upon its unproven assertion that the district court's finding of a significant disparity in athletics opportunities for male and female students reflects, not discrimination in Brown's intercollegiate athletics program, but a lack of interest on the part of its female students that is unrelated to a lack of opportunities.

We view Brown's argument that women are less interested than men in participating in intercollegiate athletics, as well as its conclusion that institutions should be required to accommodate the interests and abilities of its female students only to the extent that it accommodates the interests and abilities of its male students, with great suspicion. To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are **[*179]** less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy **[**67]** discrimination that results from stereotyped notions of women's interests and abilities.

Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The Policy Interpretation recognizes that women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports. See 44 Fed. Reg. at 71,419 ("Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men.").

Moreover, the Supreme Court has repeatedly condemned gender-based discrimination based upon "archaic and overbroad generalizations" about women. *Schlesinger v. Ballard*, 419 U.S. 498, 508, 42 L. Ed. 2d 610, 95 S. Ct. 572 (1975). See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982); *Califano v. Webster*, 430 U.S. 313, 317, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977); *Frontiero v. Richardson*, 411 U.S. 677, 684-86, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973). The Court has been especially critical of the use of statistical evidence offered to prove generalized, stereotypical notions about men and women. For example, in holding that Oklahoma's 3.2% beer statute **[**68]** invidiously discriminated against males 18-20 years of age, the Court in *Craig v. Boren*, 429 U.S. 190, 208-209, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976), stressed that "the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities." See also *id.* at 202 ("statistics exhibit a variety of . . . shortcomings that seriously impugn their value to equal protection analysis"); *id.* at 204 ("proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause"); *Cannon*, 441 U.S. at 681 n.2 (observing with respect to the relevance of the University of Chicago's statistical evidence regarding the small number of female applicants to its medical school, in comparison to male applicants, that "the dampening impact of a discriminatory rule may undermine the relevance of figures relating to actual applicants").

Thus, there exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of **[**69]** the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. Prong three requires some kind of evidence of interest in athletics, and the Title IX framework permits the use of statistical evidence in assessing the level of interest in sports. ⁿ¹⁵ Nevertheless, to allow a numbers-based **[*180]** lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX. We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less

interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men. Furthermore, such evidence is completely irrelevant where, as here, viable and successful women's varsity teams have been demoted or eliminated. We emphasize that, on the facts of this case, Brown's lack-of-interest arguments are of no consequence. As the prior panel recognized, while the question of full and effective accommodation of athletics interests and abilities is potentially a complicated issue where plaintiffs seek to create a new team or to [**70] elevate to varsity status a team that has never competed in varsity competition, no such difficulty is presented here, where plaintiffs seek to reinstate what were successful university-funded teams right up until the moment the teams were demoted. n16 Cohen II, 991 F.2d at 904; see also Cohen I, 809 F. Supp. at 992 ("Brown is cutting off varsity opportunities where there is great interest and talent, and where Brown still has an imbalance between men and women varsity athletes in relation to their undergraduate enrollments.").

-----Footnotes-----

n15 Under the Policy Interpretation,

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

- a. The processes take into account the nationally increasing levels of women's interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and
- d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

44 Fed. Reg. at 71,417.

The 1990 version of the Title IX Athletics Investigator's Manual, an internal agency document, instructs investigating officials to consider, inter alia, the following: (i) any institutional surveys or assessments of students' athletics interests and abilities, see Valerie M. Bonnette & Lamar Daniel, Department of Education, Title IX Athletics Investigator's Manual at 22 (1990); (ii) the "expressed interests" of the underrepresented gender, id. at 25; (iii) other programs indicative of interests and abilities, such as club and intramural sports, sports programs at "feeder" schools, community and regional sports programs, and physical education classes, id.

As the district court noted, however, the agency characterizes surveys as a "simple way to identify which additional sports might appropriately be created to achieve compliance. . . . Thus, a survey of interests would follow a determination that an institution does not satisfy prong three; it would not be utilized to make that determination in the first instance." Cohen III, 897 F. Supp. at 210 n.51; see 1990 Investigator's Manual at 27 (explaining that a survey or assessment of interests and abilities is not required by the Title IX regulation or the Policy Interpretation but may be required as part of a remedy when OCR has concluded that an institution's current program does not equally effectively accommodate the interests and abilities of students). (We note that the text of the 1990 Investigator's Manual cited herein at page 25 was apparently at page 27 of the copy of the Manual before the district court.) [**71]

n16 The district court found that the women's gymnastics team had won the Ivy League championship in 1989-90 and was a "thriving university-funded varsity team prior to the 1991 demotion;" that the donor-funded women's fencing team had been successful for many years and that its request to be upgraded to varsity status had been supported by the athletics director at the time; that the donor-funded

women's ski team had been consistently competitive despite a meager budget; and that the club-status women's water polo team had demonstrated the interest and ability to compete at full varsity status. Cohen III, 879 F. Supp. at 190.

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

On these facts, Brown's failure to accommodate fully and effectively the interests and abilities of the underrepresented gender is clearly established. See Clarification Memorandum at 8 ("If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that [**72] interest, ability or available competition no longer exists."); id. at 8-9 n.2 ("While [other] indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia[,] an institution is expected to meet the actual interests and abilities of its students and admitted students."). Under these circumstances, the district court's finding that there are interested women able to compete at the university-funded varsity level, Cohen III, 879 F. Supp. at 212, is clearly correct. Finally, the tremendous growth in women's participation in sports since Title IX was enacted disproves Brown's argument that women are less interested in sports for reasons unrelated to lack of opportunity. See, e.g., Mike Tharp et al., Sports crazy! Ready, set, go. Why we love our games, U.S. News & World Report, July 15, 1996, at 33-34 (attributing to Title IX the explosive growth of women's participation in sports and the debunking of "the traditional myth that women aren't interested in sports").

Brown's relative interests approach is not a reasonable interpretation of the three-part test. This approach contravenes the [**73] purpose of the statute and the regulation because it does not permit an institution or a district court to remedy a gender-based disparity in athletics participation opportunities. Instead, this approach freezes that disparity by law, thereby disadvantaging further the underrepresented gender. Had Congress intended to entrench, rather than change, the status quo -- with its historical emphasis on men's participation opportunities to the detriment of women's opportunities -- it need not [**181] have gone to all the trouble of enacting Title IX.

V.

In the first appeal, this court rejected Brown's Fifth Amendment equal protection challenge to the statutory scheme. Cohen II, 991 F.2d at 900-901. Here, Brown argues that its challenge is to the decision of the district court. As Brown puts it, "the [equal protection] violation arises from the court's holding that Title IX requires the imposition of quotas, preferential treatment, and disparate treatment in the absence of a compelling state interest and a determination that the remedial measure is 'narrowly tailored' to serve that interest." Reply Br. at 18 (citing Adarand, U.S. at , 115 S. Ct. at 2117). [**74]

A.

To the extent that Brown challenges the constitutionality of the statutory scheme itself, the challenge rests upon at least two erroneous assumptions: first, that Adarand is controlling authority on point that compels us, not only to consider Brown's constitutional challenge anew, but also to apply strict scrutiny to the analysis; second, that the district court's application of the law in its liability analysis on remand is inconsistent with the interpretation expounded in the prior appeal. We reject both premises. n17 Brown's implicit reliance on Adarand as contrary intervening controlling authority that warrants a departure from the law of the case doctrine is misplaced because, while Adarand does make new law, the law it makes is wholly irrelevant to the disposition of this appeal, and, even if Adarand did apply, it does not mandate the level of scrutiny to be applied to gender-conscious government action.

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n17 We assume, without deciding, that Brown has not waived its equal protection claim and has standing to raise it. Appellees argue that this claim is waived because Brown did not raise it in the district court. Appellee's Br. at 55 (citing Desjardins v. Van Buren Community Hosp., 969 F.2d 1280,

1282 (1st Cir. 1992)). Appellees also argue that, to the extent that the equal protection claim is viable, Brown lacks standing to raise it. Appellee's Br. at 56 (citing Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 1370-71, 113 L. Ed. 2d 411 (1991)). Given our disposition of this claim, we do not address these arguments.

-----End Footnotes----- [**75]

In rejecting Brown's equal protection claim, the Cohen II panel stated, "It is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination." 991 F.2d at 901. The panel cited as authority Metro Broadcasting, 497 U.S. at 565-66 (for the proposition that "Congress need not make specific findings of discrimination to grant race-conscious relief"), and Califano v. Webster, 430 U.S. at 317 (noting that Webster upheld a social security wage law that benefitted women "in part because its purpose was 'the permissible one of redressing our society's longstanding disparate treatment of women'"). Cohen II, 991 F.2d at 901. The panel also noted that, in spite of the scant legislative history regarding Title IX as it applies to athletics, Congress heard a great deal of testimony regarding discrimination against women in higher education and acted to reverse the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555, 573-74, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984) (holding that Title IX was "program-specific" and thus applied only to those university programs that actually receive federal funds and not to the rest of the university), with athletics prominently [**76] in mind. Cohen II, 991 F.2d at 901.

In Metro Broadcasting, the Court upheld two federally mandated race-based preference policies under intermediate scrutiny. 497 U.S. at 564-65 (holding that benign race-conscious measures mandated by Congress "are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives"). The Metro Broadcasting Court applied intermediate scrutiny, notwithstanding that the previous year, in Croson, 488 U.S. 469, 102 L. Ed. 2d 854, 109 S. Ct. 706, the Court applied strict scrutiny in striking down a municipal minority set-aside program for city construction contracts. The Metro Broadcasting Court distinguished Croson, noting that "in [*182] fact, much of the language and reasoning in Croson reaffirmed the lesson of Fullilove n18 that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." Metro Broadcasting, 497 U.S. at 565.

-----Footnotes-----

n18 In Fullilove, a plurality of the Court applied a standard subsequently acknowledged to be intermediate scrutiny, see Metro Broadcasting, 497 U.S. at 564, in upholding against a Fifth Amendment equal protection challenge a benign race-based affirmative action program that was adopted by an agency at the explicit direction of Congress. The Fullilove plurality inquired "whether the objectives of the legislation are within the power of Congress[]" and "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible means for achieving the congressional objectives." 448 U.S. at 473.

-----End Footnotes----- [**77]

Adarand overruled Metro Broadcasting to the extent that Metro Broadcasting is inconsistent with Adarand's holding that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." Adarand, U.S. at , 115 S. Ct. at 2113. Brown impliedly assumes that Adarand's partial overruling of Metro Broadcasting invalidates the prior panel's disposition of Brown's equal protection challenge by virtue of its passing citation to Metro Broadcasting. This assumption is erroneous because the proposition for which Cohen II cited Metro Broadcasting as authority has not been vitiated by Adarand, is of no consequence to our disposition of the issues raised in this litigation, and is, in any event, unchallenged here. n19

-----Footnotes-----

n19 Cohen II cited Metro Broadcasting for a general principle regarding Congress's broad powers to

remedy discrimination, a proposition that was not reached by Adarand. Moreover, Webster, which Cohen II cited along with Metro Broadcasting, was not overruled or in any way rendered suspect by Adarand.

-----End Footnotes----- [**78]

B.

The prior panel rejected Brown's Fifth Amendment equal protection n20 and "affirmative action" challenges to the statutory scheme. Cohen II, 991 F.2d at 901 (finding no constitutional infirmity, assuming arguendo, that the regulation creates a classification somewhat in favor of women). Thus, to the extent that Brown challenges the statutory scheme itself, that challenge is foreclosed under the law of the case doctrine. Nevertheless, the remedy ordered for a violation of a federal anti-discrimination statute is still subject to equal protection review, assuming that it constitutes gender-conscious government action. See Miller, U.S. at , 115 S. Ct. at 2491. Therefore, we review the constitutionality of the district court's order requiring Brown to comply with Title IX by accommodating fully and effectively the athletics interests and abilities of its women students. Because the challenged classification is gender-based, it must be analyzed under the intermediate scrutiny test. Before proceeding to the analysis, however, we must first address Brown's challenge to the standard of review.

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n20 It is well settled that the reach of the equal protection guarantee of the Fifth Amendment Due Process Clause -- the basis for Brown's equal protection claim -- is coextensive with that of the Fourteenth Amendment Equal Protection Clause. E.g., United States v. Paradise, 480 U.S. at 166 n.16; Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975).

-----End Footnotes----- [**79]

Brown concedes that Adarand "does not, in partially overruling Metro Broadcasting, set forth the proper standard of review for this case." Appellant's Br. at 29. Nevertheless, Brown asserts that "while Adarand is a case involving racial classification, its analysis clearly applies to gender classification as well." *Id.* at 27. Further, inappropriately relying on Frontiero, 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764, and Croson, 488 U.S. 469, 102 L. Ed. 2d 854, 109 S. Ct. 706, Brown concludes that strict scrutiny applies to gender-based classifications. n21 Appellant's Br. [*183] at 29; Reply Br. at 19-20. These conclusory assertions do not comport with the law in this circuit.

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n21 In Frontiero, a plurality of the Court concluded that gender-based classifications, "like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688. In the 23 years that have since elapsed, this position has never commanded a majority of the Court, and has never been adopted by this court. Whatever may be the merits of adopting strict scrutiny as the standard to be applied to gender-based classifications, it is inappropriate to suggest, as Brown does, that Frontiero compels its application here.

Brown's assertion that Adarand obligates this court to apply Croson to its equal protection claim is also incorrect. As noted previously, Croson is an affirmative action case and does not control review of a judicial determination that a federal anti-discrimination statute has been violated. To the extent that Brown assumes that Croson governs the issue of the sufficiency of the factual predicate required to uphold a federally mandated, benign race- or gender-based classification, that assumption is also unfounded. As we have explained, Croson's factual concerns are not raised by a district court's determination -- predicated upon duly adjudicated factual findings bearing multiple indicia of reliability and specificity -- of gender discrimination in violation of a federal statute. We also point out that Adarand did not reach the question of the sufficiency of the factual predicate required to satisfy strict scrutiny review of a congressionally mandated race-based classification.

-----End Footnotes----- [**80]

First, as explained earlier, Adarand and Croson apply to review of legislative affirmative action schemes. This case presents the issue of the legality of a federal district court's determination, based upon adjudicated findings of fact, that a federal anti-discrimination statute has been violated, and of the statutory and constitutional propriety of the judicial remedy ordered to provide redress to plaintiffs with standing who have been injured by the violation.

Second, Adarand does not even discuss gender discrimination, and its holding is limited to explicitly race-based classifications. U.S. at , 115 S. Ct. at 2113. It can hardly be assumed that the Court intended to include gender-based classifications within Adarand's precedential scope or to elevate, sub silentio, the level of scrutiny to be applied by a reviewing court to such classifications.

Third, even if Adarand did apply, it does not dictate the level of scrutiny to be applied in this case, as Brown concedes. For the last twenty years, the Supreme Court has applied intermediate scrutiny to all cases raising equal protection challenges to gender-based classifications, [**81] including the Supreme Court's most recent gender discrimination case, United States v. Virginia, U.S. , 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) ("Virginia"); see id. at 2288 (Rehnquist, C.J., concurring in the judgment) (collecting cases). n22

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n22 We point out that Virginia adds nothing to the analysis of equal protection challenges to gender-based classifications that has not been part of that analysis since 1979, long before Cohen II was decided. While the Virginia Court made liberal use of the phrase "exceedingly persuasive justification," and sparse use of the formulation "substantially related to an important governmental objective," the Court nevertheless struck down the gender-based admissions policy at issue in that case under intermediate scrutiny, U.S. at , 116 S. Ct. at 2271, 2275; id. at 2288 (Rehnquist, C.J., concurring in the judgment), the standard applied to gender-based classifications since 1976, when it was first announced in Craig v. Boren, 429 U.S. at 197, and the test applied in both Metro Broadcasting and Webster.

The phrase "exceedingly persuasive justification" has been employed routinely by the Supreme Court in applying intermediate scrutiny to gender discrimination claims and is, in effect a short-hand expression of the well-established test. See Personnel Adm'r v. Feeney, 442 U.S. 256, 273, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979); Kirchberg v. Feenstra, 450 U.S. 455, 461, 67 L. Ed. 2d 428, 101 S. Ct. 1195 (1981); Hogan, 458 U.S. at 724; J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 136-37, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994).

-----End Footnotes----- [**82]

Fourth, it is important to recognize that controlling authority does not distinguish between invidious and benign discrimination in the context of gender-based classifications, as it has in the context of racial classifications. Neither this court nor the Supreme Court has drawn this distinction in the context of gender discrimination claims or held that a less stringent standard applies in cases involving benign, rather than invidious, gender discrimination. See Hogan, 458 U.S. at 724 & n.9 (reviewing benign gender-conscious admissions policy under intermediate scrutiny and recognizing that the analysis does not change with the objective of the classification); accord Wygant, 476 U.S. at 273. Thus, the analytical result would be same, even if this were an affirmative action case.

Under intermediate scrutiny, the burden of demonstrating an exceedingly persuasive [**184] justification for a government-imposed, gender-conscious classification is met by showing that the classification serves important governmental objectives, and that the means employed are substantially related to the achievement of those objectives. E.g., Hogan, 458 U.S. at 724. Applying that test, it is clear [**83] that the district court's remedial order passes constitutional muster.

We find that the first part of the test is satisfied. The governmental objectives of "avoiding the use of

federal resources to support discriminatory practices," and "providing individual citizens effective protection against those practices," Cannon, 441 U.S. at 704, are clearly important objectives. We also find that judicial enforcement of federal anti-discrimination statutes is at least an important governmental objective.

Applying the second prong of the intermediate scrutiny test, we find that the means employed by the district court in fashioning relief for the statutory violation are clearly substantially related to these important objectives. Intermediate scrutiny does not require that there be no other way to accomplish the objectives, but even if that were the standard, it would be satisfied in the unique context presented by the application of Title IX to athletics.

As explained previously, Title IX as it applies to athletics is distinct from other anti-discrimination regimes in that it is impossible to determine compliance or to devise a remedy without counting and comparing opportunities with gender explicitly in mind. [**84] Even under the individual rights theory of equal protection, reaffirmed in Adarand, U.S. at , 115 S. Ct. at 2112 (the equal protection guarantee "protects persons, not groups"), the only way to determine whether the rights of an individual athlete have been violated and what relief is necessary to remedy the violation is to engage in an explicitly gender-conscious comparison. Accordingly, even assuming that the three-part test creates a gender classification that favors women, allowing consideration of gender in determining the remedy for a Title IX violation serves the important objective of "ensuring that in instances where overall athletic opportunities decrease, the actual opportunities available to the underrepresented gender do not." Kelley, 35 F.3d at 272. In addition, a gender-conscious remedial scheme is constitutionally permissible if it directly protects the interests of the disproportionately burdened gender. See Hogan, 458 U.S. at 728 ("In limited 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.").

Under Brown's [**85] interpretation of the three-part test, there can never be a remedy for a violation of Title IX's equal opportunity mandate. In concluding that the district court's interpretation and application of the three-part test creates a quota, Brown errs, in part, because it fails to recognize that (i) the substantial proportionality test of prong one is only the starting point, and not the conclusion, of the analysis; and (ii) prong three is not implicated unless a gender-based disparity with respect to athletics participation opportunities has been shown to exist. Where such a disparity has been established, the inquiry under prong three is whether the athletics interests and abilities of the underrepresented gender are fully and effectively accommodated, such that the institution may be found to comply with Title IX, notwithstanding the disparity. n23

-----Footnotes-----

n23 Under the three-part test, the institution may also excuse the disparity under prong two, by showing a "history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the [underrepresented gender]," 44 Fed. Reg. at 71,418, in which case the compliance inquiry ends without reaching prong three. It has been determined that Brown cannot avail itself of this defense. See Cohen III, 879 F. Supp. at 211.

-----End Footnotes----- [**86]

Of course, a remedy that requires an institution to cut, add, or elevate the status of athletes or entire teams may impact the genders differently, but this will be so only if there is a gender-based disparity with respect to athletics opportunities to begin with, which is the only circumstance in which prong three comes into play. Here, however, it has not been shown that Brown's men students will be disadvantaged by the full [*185] and effective accommodation of the athletics interests and abilities of its women students.

VI.

Brown assigns error to the district court's exclusion of certain evidence pertaining to the relative athletics interests of men and women. Reviewing the district court's evidentiary rulings for abuse of discretion,

see Sinai v. New England Tel. and Tel. Co., 3 F.3d 471, 475 (1st Cir. 1993), cert. denied, U.S. , 115 S. Ct. 597, 130 L. Ed. 2d 509 (1994), we find none.

Brown first contends that the court erred in barring cross-examination of plaintiffs' expert Dr. Sabor on the issue of why girls drop out of sports before reaching college. Because Dr. Sabor's direct testimony did not address this issue, it was within the district court's discretion **[**87]** to limit cross-examination "to the subject matter of the direct examination." Fed. R. Evid. 611(b); see Ferragamo v. Chubb Life Ins. Co. of Am., 94 F.3d 26, 28 (1st Cir. 1996).

Brown also suggests that the district court's exclusion of statistical and survey data offered in support of its relative interests argument constitutes error. Although the district court excluded as full exhibits two studies, the NCAA Gender Equity Study and the results of an undergraduate poll on student interest in athletics, it nevertheless permitted Brown's experts to rely on the data contained in these two reports as a basis for their expert opinions. n24 Because Brown's experts relied upon the excluded data in providing their opinions on the issue of a gender-based differential in student interest in athletics, the evidence was before the trier of fact and any error was, therefore, harmless. See McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553, 78 L. Ed. 2d 663, 104 S. Ct. 845 (1984) (instructing appellate courts to "ignore errors that do not affect the essential fairness of the trial").

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n24 Brown also contends that the district court erred in excluding the NCAA Annual Report. Appellant's Br. at 56-57. Brown merely asserts, however, that the "study was admissible under Rule 803," id. at 57, and offers no explanation as to how it was prejudiced by the exclusion. Accordingly, we deem the argument waived. Ryan v. Royal Ins. Co. of Am., 916 F.2d 731, 734 (1st Cir. 1990) ("It is settled in this circuit that issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned.") (citations omitted).

-----End Footnotes----- **[**88]**

VII.

It does not follow from our statutory and constitutional analyses that we endorse the district court's remedial order. Although we decline Brown's invitation to find that the district court's remedy was an abuse of discretion, we do find that the district court erred in substituting its own specific relief in place of Brown's statutorily permissible proposal to comply with Title IX by cutting men's teams until substantial proportionality was achieved.

In Cohen II we stated that it is "established beyond peradventure that, where no contrary legislative directive appears, the federal judiciary possesses the power to grant any appropriate relief on a cause of action appropriately brought pursuant to a federal statute." 991 F.2d at 901 (citing Franklin, 503 U.S. at 70-71). We also observed, however, that "we are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations." 991 F.2d at 906 (citing Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 795 (1st Cir. 1992), cert. denied, 507 U.S. 1030, 123 L. Ed. 2d 470, 113 S. Ct. 1845 (1993); Lamphere v. Brown Univ., 875 F.2d 916, 922 (1st Cir. 1989)). Nevertheless, we have recognized **[**89]** that academic freedom does not embrace the freedom to discriminate. Villanueva v. Wellesley College, 930 F.2d 124, 129 (1st Cir. 1991) (citations omitted).

The district court itself pointed out that Brown may achieve compliance with Title IX in a number of ways:

It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies. I leave it entirely to Brown's discretion to decide **[*186]** how it will balance its program to provide equal opportunities for its men and women athletes. I recognize the financial constraints Brown

faces; however, its own priorities will necessarily determine the path to compliance it elects to take.

Cohen III, 879 F. Supp. at 214; see also Cohen II, 991 F.2d at 898 n.15 (noting that a school may achieve compliance with Title IX by "reducing opportunities for the overrepresented gender").

With these precepts in mind, we first examine the compliance plan Brown submitted to the district court in response to its order. We then consider the district court's order rejecting [**90] Brown's plan and the specific relief ordered by the court in its place.

Brown's proposed compliance plan stated its goal as follows:

The plan has one goal: to make the gender ratio among University-funded teams at Brown substantially proportionate to the gender ratio of the undergraduate student body. To do so, the University must disregard the expressed athletic interests of one gender while providing advantages for others. The plan focuses only on University-funded sports, ignoring the long history of successful donor-funded student teams.

Brown's Plan at 1 (emphasis added).

In its introduction, Brown makes clear that it "would prefer to maintain its current program" and that the plan submitted

is inconsistent with Brown's philosophy to the extent that it grants advantages and enforces disadvantages upon student athletes solely because of their gender and curbs the historic role of coaches in determining the number of athletes which can be provided an opportunity to participate. Nevertheless, the University wishes to act in good faith with the order of the Court, notwithstanding issues of fact and law which are currently in dispute.

Id. at 2. [**91]

Brown states that it "seeks to address the issue of proportionality while minimizing additional undue stress on already strained physical and fiscal resources." Id.

The general provisions of the plan may be summarized as follows: (i) Maximum squad sizes for men's teams will be set and enforced. (ii) Head coaches of all teams must field squads that meet minimum size requirements. (iii) No additional discretionary funds will be used for athletics. (iv) Four new women's junior varsity teams -- basketball, lacrosse, soccer, and tennis -- will be university-funded. (v) Brown will make explicit a de facto junior varsity team for women's field hockey. Id. at 3-4.

The plan sets forth nine steps for its implementation, id. at 4-5, and concludes that "if the Court determines that this plan is not sufficient to reach proportionality, phase two will be the elimination of one or more men's teams," id. at 5.

The district court found Brown's plan to be "fatally flawed" for two reasons. First, despite the fact that 76 men and 30 women participated on donor-funded varsity teams, Brown's proposed plan disregarded donor-funded varsity teams. District Court Order at 5-6. Second, [**92] Brown's plan "artificially boosts women's varsity numbers by adding junior varsity positions on four women's teams." Id. at 6. As to the propriety of Brown's proposal to come into compliance by the addition of junior varsity positions, the district court held:

Positions on distinct junior varsity squads do not qualify as "intercollegiate competition" opportunities under the Policy Interpretation and should not be included in defendants' plan. As noted in Cohen, 879 F. Supp. at 200, "intercollegiate" teams are those that "regularly participate in varsity competition." See 44 Fed. Reg. at 71,413 n.1. Junior varsity squads, by definition, do not meet this criterion. Counting new women's junior varsity positions as equivalent to men's full varsity positions flagrantly violates the spirit and letter of Title IX; in no sense is an institution providing equal opportunity if it affords varsity positions to men but junior varsity positions to women.

District Court Order at 6 (footnote omitted).

The district court found that these two flaws in the proposed plan were sufficient to show that Brown had "not made a good faith [*187] effort to comply with this Court's mandate." [**93] Id. at 8.

In criticizing another facet of Brown's plan, the district court pointed out that

an institution does not provide equal opportunity if it caps its men's teams after they are well-stocked with high-caliber recruits while requiring women's teams to boost numbers by accepting walk-ons. A university does not treat its men's and women's teams equally if it allows the coaches of men's teams to set their own maximum capacity limits but overrides the judgment of coaches of women's teams on the same matter.

Id. at 8-9.

After rejecting Brown's proposed plan, but bearing in mind Brown's stated objectives, the district court fashioned its own remedy:

I have concluded that Brown's stated objectives will be best served if I design a remedy to meet the requirements of prong three rather than prong one. In order to bring Brown into compliance with prong one under defendants' Phase II, I would have to order Brown to cut enough men's teams to eradicate approximately 213 men's varsity positions. This extreme action is entirely unnecessary. The easy answer lies in ordering Brown to comply with prong three by upgrading the women's gymnastics, fencing, skiing, [**94] and water polo teams to university-funded varsity status. In this way, Brown could easily achieve prong three's standard of "full and effective accommodation of the underrepresented sex." This remedy would entail upgrading the positions of approximately 40 women. In order to finance the 40 additional women's positions, Brown certainly will not have to eliminate as many as the 213 men's positions that would be cut under Brown's Phase II proposal. Thus, Brown will fully comply with Title IX by meeting the standards of prong three, without approaching satisfaction of the standards of prong one.

It is clearly in the best interest of both the male and the female athletes to have an increase in women's opportunities and a small decrease in men's opportunities, if necessary, rather than, as under Brown's plan, no increase in women's opportunities and a large decrease in men's opportunities. Expanding women's athletic opportunities in areas where there is proven ability and interest is the very purpose of Title IX and the simplest, least disruptive, route to Title IX compliance at Brown.

Id. at 11-12.

The district court ordered Brown to "elevate and maintain women's [**95] gymnastics, women's water polo, women's skiing, and women's fencing to university-funded varsity status." Id. at 12. The court

stayed this part of the order pending appeal and further ordered that, in the interim, the preliminary injunction prohibiting Brown from eliminating or demoting any existing women's varsity team would remain in effect. *Id.*

We agree with the district court that Brown's proposed plan fell short of a good faith effort to meet the requirements of Title IX as explicated by this court in *Cohen II* and as applied by the district court on remand. Indeed, the plan is replete with argumentative statements more appropriate for an appellate brief. It is obvious that Brown's plan was addressed to this court, rather than to offering a workable solution to a difficult problem.

It is clear, nevertheless, that Brown's proposal to cut men's teams is a permissible means of effectuating compliance with the statute. Thus, although we understand the district court's reasons for substituting its own specific relief under the circumstances at the time, and although the district court's remedy is within the statutory margins and constitutional, we think that the district *[**96]* court was wrong to reject out-of-hand Brown's alternative plan to reduce the number of men's varsity teams. After all, the district court itself stated that one of the compliance options available to Brown under Title IX is to "demote or eliminate the requisite number of men's positions." *Cohen III*, 879 F. Supp. at 214. Our respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs counsels that we give universities as much freedom as possible in conducting their operations consonant with *[*188]* constitutional and statutory limits. *Cohen II*, 991 F.2d at 906; *Villanueva*, 930 F.2d at 129.

Brown therefore should be afforded the opportunity to submit another plan for compliance with Title IX. The context of the case has changed in two significant respects since Brown presented its original plan. First, the substantive issues have been decided adversely to Brown. Brown is no longer an appellant seeking a favorable result in the Court of Appeals. Second, the district court is not under time constraints to consider a new plan and fashion a remedy so as to expedite appeal. Accordingly, we remand the case to the district court so that Brown *[**97]* can submit a further plan for its consideration. In all other respects the judgment of the district court is affirmed. The preliminary injunction issued by the district court in *Cohen I*, 809 F. Supp. at 1001, will remain in effect pending a final remedial order.

VIII.

There can be no doubt that Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports. See, e.g., Frank DeFord, *The Women of Atlanta*, *Newsweek*, June 10, 1996, at 62-71; Tharp, *supra*, at 33; Robert Kuttner, *Vicious Circle of Exclusion*, *Washington Post*, September 4, 1996, at A15. In addition, there is ample evidence that increased athletics participation opportunities for women and young girls, available as a result of Title IX enforcement, have had salutary effects in other areas of societal concern. See DeFord, *supra*, at 66.

One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports. These Olympians represent *[**98]* the first full generation of women to grow up under the aegis of Title IX. The unprecedented success of these athletes is due, in no small measure, to Title IX's beneficent effects on women's sports, as the athletes themselves have acknowledged time and again. What stimulated this remarkable change in the quality of women's athletic competition was not a sudden, anomalous upsurge in women's interest in sports, but the enforcement of Title IX's mandate of gender equity in sports. Kuttner, *supra*, at A15.

Affirmed in part, reversed in part, and remanded for further proceedings. No costs on appeal to either party.

DISSENTBY: TORRUELLA

DISSENT: TORRUELLA, Chief Judge (Dissenting). Because I am not persuaded that the majority's view represents the state of the law today, I respectfully dissent.

I. THE LAW OF THE CASE

Under the doctrine of the "law of the case," a decision on an issue of law made by the court at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation except in unusual circumstances. See Abbadessa v. Moore Business Forms, Inc., 987 F.2d 18, 22 (1st Cir. 1993); EEOC v. Trabucco, 791 F.2d 1, 2 (1st Cir. 1986). It is well established, however, that a decision of the Supreme Court, that is rendered between two appeals and is irreconcilable with the decision on the first appeal, must be followed on the second appeal. See Linkletter v. Walker, 381 U.S. 618, 627, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965); Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth., 945 F.2d 10, 12 (1st Cir. 1991), rev'd on other grounds, 506 U.S. 139, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993); Young v. Herring, 917 F.2d 858 (5th Cir. 1990); Fogel v. Chestnutt, 668 F.2d 100, 109 (2d Cir. 1981), cert. denied, 459 U.S. 828, 103 S. Ct. 65, 74 L. Ed. 2d 66 (1982). I believe that we face such a situation in the instant case.

A. Adarand and Metro Broadcasting

At the time of Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993) (Cohen II), the standard intermediate scrutiny test for discriminatory classifications based on sex required that "a statutory classification must be substantially related to an important government objective." Clark v. Jeter, 486 U.S. 456, 461, 100 L. Ed. 2d 465, 108 S. Ct. 1910 (1988); see also Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24, 73 L. Ed. 2d 1090, 102 S. Ct. 3331, and n.9 (1982); Mills v. Habluetzel, 456 U.S. 91, 99, 71 L. Ed. 2d 770, 102 S. Ct. 1549 (1982); Craig v. Boren, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976); Mathews v. Lucas, 427 U.S. 495, 505-06, 49 L. Ed. 2d 651, 96 S. Ct. 2755 (1976). As was also the case under strict scrutiny review prior to Adarand Construction Inc. v. Peña, U.S. , 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995), however, courts applying intermediate scrutiny sometimes allowed "benign" gender classifications on the grounds that they were a "reasonable means of compensating women as a class for past . . . discrimination." Ronald D. Rotunda & John E. Novack, 3 Treatise on Constitutional Law § 18.23, at 277; see Califano v. Webster, 430 U.S. 313, 317, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977) (allowing women to compute certain social security benefits with a more favorable formula than could be used by men); Lewis v. Cowen, 435 U.S. 948, 55 L. Ed. 2d 797, 98 S. Ct. 1572 (1978) (summary affirmance of a district court decision upholding a provision of the Railroad Retirement Act that allowed women to retire at age 60 while men could not retire until age 65).

In Cohen II, we applied precisely this type of benign-classification analysis to what we viewed to be benign gender discrimination by the federal government. Although Cohen II, in its brief discussion of the equal protection issue, does not specify the precise standard it used, the court stated that "even if we were to assume . . . that the regulation creates a gender classification slanted somewhat in favor of women, we would find no constitutional infirmity." Cohen II, 991 F.2d at 901. Note that the focus is on the government's ability to favor women in this context, rather than on an "important government objective," suggesting that the court considered the issue to be one of benign discrimination. Indeed, no governmental interest is even identified in Cohen II. Furthermore, both of the cases cited by the court in Cohen II are cases in which a suspect classification was allowed because it was judged benign, see id. at 901 (citing Metro Broadcasting Inc. v. FCC, 497 U.S. 547, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990) (race); Califano v. Webster, 430 U.S. 313, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977) (sex)).

Cohen II's assumption that a regulation slanted in favor of women would be permissible, Cohen II 991 F.2d at 901, and by implication that the same regulation would be impermissible if it favored men, was based on Metro Broadcasting, which held that benign race-based action by the federal government was subject to a lower standard than non-remedial race-based action. See Metro Broadcasting, 497 U.S. at 564. Specifically, the Supreme Court announced that

benign race-conscious measures mandated by Congress are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Id. at 565 (emphasis added). Although Metro Broadcasting explicitly discussed race-conscious rather than gender-conscious classifications, we applied its standard in Cohen II. See Cohen II, 991 F.2d at 901.

Since Cohen II, however, Metro Broadcasting has been overruled, at least in part. See Adarand Constr. Inc. v. Pena, U.S. , , 115 S. Ct. 2097, 2111-12, 132 L. Ed. 2d 158 (1995). In Adarand, the Supreme Court held that "all racial classifications . . . must be analyzed under strict scrutiny." Adarand, 115 S. Ct. at 2113. The Court in Adarand singled out Metro Broadcasting as a "significant departure" from much of the Equal Protection jurisprudence that had come before it, in part because it suggested that "benign" government race-conscious classifications should be treated less skeptically [***103**] than others. See Adarand, 115 S. Ct. at 2112.

In Adarand, the Supreme Court reasoned that "'it may not always be clear that a so-called preference is in fact benign.'" Id. (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (opinion of Powell, J.)). Additionally, the Supreme Court endorsed the view that

[***190**] absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.

115 S. Ct. at 2112; see also Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989).

It is not necessary to equate race and gender to see that the logic of Adarand -- counseling that we focus on the categories and justifications proffered rather than the labels attached -applies in the context of gender. While cognizant of differences between race-focused and gender-focused Equal Protection precedent, I nevertheless think that Adarand compels us to view so-called "benign" gender-conscious governmental actions under the same lens as any [***104**] other gender-conscious governmental actions. See Adarand, 115 S. Ct. at 2112; see also United States v. Virginia, 135 L. Ed. 2d 735, 116 S. Ct. 2264, 2274, 2277 (1996) (viewing Virginia's benign justification for a gender classification skeptically); Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535, 1557 (D. Ala. 1995) (stating that courts "must look behind the recitation of a benign purpose to ensure that sex-based classifications redress past discrimination"). Rather than conduct an inquiry into whether Title IX and its resulting interpretations are "benign" or "remedial," and conscious of the fact that labels can be used to hide illegitimate notions of inferiority or simple politics just as easily in the context of gender as in the context of race, we should now follow Adarand's lead and subject all gender-conscious government action to the same inquiry. n25

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n25 Our discussion in Cohen II also cited Califano v. Webster, 430 U.S. 313, 51 L. Ed. 2d 360, 97 S. Ct. 1192 (1977), which has not been explicitly overruled. That case concerned Congress' provision, under the Social Security Act, for a lower retirement age for women than for men, with the result that, as between similarly situated male and female wage-earners, the female wage-earner would be awarded higher monthly social security payments, id. at 314-16. In that case, Congress specifically found that more frequent and lower age limits were being applied to women than to men in the labor market. Id. at 319. This led the Supreme Court to characterize the provision at issue as remedial rather than benign, noting that the provision had been repealed in 1972, roughly contemporaneously with "congressional [anti-discrimination] reforms [that] . . . have lessened the economic justification for the more favorable benefit computation" for women. Id. at 320. The instant case should be distinguished from Califano for two reasons. First, Califano did not necessarily rule on benign classifications, as Metro Broadcasting and Adarand clearly did. Second, Califano, unlike the instant case, contained an "exceedingly persuasive justification" for its gender-conscious state action.

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B. United States v. Virginia

A second Supreme Court case has also made it necessary to review our decision in Cohen II. In United States v. Virginia, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996), the Court faced an Equal Protection challenge to Virginia's practice of maintaining the Virginia Military Institute as an all male institution. Rather than simply apply the traditional test requiring that gender classifications be "substantially related to an important government objective," Clark v. Jeter 486 U.S. 456, 461, 100 L. Ed. 2d 465, 108 S. Ct. 1910 (1988), the Supreme Court applied a more searching "skeptical scrutiny of official action denying rights or opportunities based on sex," 116 S. Ct. at 2274, which requires that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action," *id.* In its discussion, the Court stated that, in order to prevail in a gender case, "the State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 2275 (internal quotations omitted) [**106] (emphasis added). Being "substantially related to an important government objective," therefore, is considered a necessary but not sufficient condition. The Court also requires a focus on "whether the proffered justification is 'exceedingly persuasive.'" *Id.*

[*191] Virginia "drastically revised our established standards for reviewing sex-based classifications." *Id.* at 2291 (Scalia, J. dissenting). "Although the Court in two places . . . asks whether the State has demonstrated that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives . . . the Court never answers the question presented in anything resembling that form." *Id.* at 2294 (citations omitted). "The Court proceeds to interpret 'exceedingly persuasive justification' in a fashion that contradicts the reasoning of Hogan and our other precedents." *Id.*

What is important for our purposes is that the Supreme Court appears to have elevated the test applicable to sex discrimination cases to require an "exceedingly persuasive justification." This is evident from the language of both the majority opinion [**107] and the dissent in Virginia.

This is not just a matter of semantics. Metro Broadcasting, and our application of its intermediate scrutiny standard in Cohen II, omitted the additional "skeptical scrutiny" requirement of an "exceedingly persuasive justification" for gender-based government action. Compare Virginia, 116 S. Ct. at 2274 (citing J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 136-37, 128 L. Ed. 2d 89, 114 S. Ct. 1419, and *n.6* (1994)), and Mississippi Univ. for Women v. Holden, 458 U.S. 718, 724, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982), with Metro Broadcasting, 497 U.S. at 564-65.

I conclude, therefore, that Adarand and Virginia are irreconcilable with the analysis in Cohen II and, accordingly, we must follow the guidance of the Supreme Court in this appeal. Under the new standards established in those cases, Cohen II is flawed both because it applies a lenient version of intermediate scrutiny that is impermissible following Adarand and because it did not apply the "exceedingly persuasive justification" test of Virginia. We must, as Brown urges, reexamine the Equal Protection challenge to the three-prong test as interpreted by the district court.

C. Preliminary Injunction [**108]

In addition to the above reasons for considering the merits of this appeal, it is important to note that Cohen II was an appeal from a preliminary injunction. "When an appeal comes to us in that posture, the appellate court's conclusions as to the merits of the issues presented on preliminary injunction are to be understood as statements of probable outcomes, rather than as comprising the ultimate law of the case." A.M. Capen's Co. v. American Trading and Prod. Co., 74 F.3d 317, 322 (1st Cir. 1996) (internal quotations omitted); see also Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 6 (1st Cir. 1991).

The binding authority of Cohen II, therefore, is lessened by the fact that it was an appeal from a preliminary injunction. First, we now have a full record before us and a set of well-defined legal questions presented by the appellant. Trial on the merits has served to focus these questions and to

provide background that allows us to consider these questions in the proper context and in detail. In its decision in *Cohen II*, this court recognized and, indeed, emphasized the fact that its holding was only preliminary. *Cohen II*, 991 F.2d at 902 ("a [**109] party losing the battle on likelihood of success may nonetheless win the war at a succeeding trial"). Rather than turning that ruling into a permanent one, we should review the question in light of the full set of facts now available.

Second, the standard of review has changed. The *Cohen II* court stated that it was adopting a deferential standard of review, and that "if . . . the district court made no clear error of law or fact, we will overturn its calibration . . . only for manifest abuse of discretion." *Id.* at 902. The test applied by the court was based on "(1) the movant's probability of victory on the merits; (2) the potential for irreparable harm if the injunction is refused; (3) the balance of interests as between the parties . . . and (4) the public interest." *Id.* The case is now before us on appeal from the merits and we must review it accordingly. For the purposes of this appeal, [*192] we must review findings of fact under a clearly erroneous standard, *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1069 (1st Cir. 1995) and findings of law de novo, *Portsmouth v. Schlesinger*, 57 F.3d 12, 14 (1st Cir. 1995). Because the standard has changed, [**110] it is conceivable that the result of the analysis will change, making review appropriate.

II. BROWN'S EQUAL PROTECTION CHALLENGE

Appellees have argued that the three-prong test does not create a gender classification because the classification applies to both women and men. Although I agree that by its words, the test would apply to men at institutions where they are proportionately underrepresented in intercollegiate athletics, I cannot accept the argument that, via this provision, the Government does not classify its citizens by gender. See *United States v. Virginia*, U.S. , 116 S. Ct. 2264, 2274-76, 135 L. Ed. 2d 735 (1996) (applying Equal Protection review to "gender-based government action" where Commonwealth of Virginia attempted to maintain two purportedly equal single-sex institutions). Cf. *Loving v. Virginia*, 388 U.S. 1, 8-9, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967) (stating that even though the statute at issue applied equally to members of different racial classifications, it still implicated race-related Equal Protection concerns, since the statute itself contained race-conscious classifications). The fact of gender-conscious classification, even with equal enforcement with respect to both genders, [**111] requires the application of a higher level of scrutiny than rational basis review. We cannot pretend that an interpretation of a statute that contains explicit categorization according to gender and that has intentional gender-conscious effect does not represent gender-based government action. Equal Protection is implicated where the claim is made that a classification made by the government intentionally subjects an individual to treatment different from similarly situated individuals based on an impermissible characteristic, such as race, national origin, or gender. Ronald D. Rotunda & John E. Nowak, 3 *Treatise on Constitutional Law* § 18.2, at 7-8 (2d ed. 1992).

A. The District Court's Construction of the Three-Prong Test

1. Prong One

A central issue in this case is the manner in which athletic "participation opportunities" are counted. During the 1990-91 academic year, Brown fielded 16 men's and 15 women's varsity teams on which 566 men and 328 women participated. By the 1993-94 year, there were 12 university-funded men's teams and 13 university funded women's teams. These teams included 479 men and 312 women. Based on an analysis of membership in varsity teams, [**112] the district court concluded that there existed a disparity between female participation in intercollegiate athletics and female student enrollment.

Even assuming that membership numbers in varsity sports is a reasonable proxy for participation opportunities -- a view with which I do not concur -- contact sports should be eliminated from the calculus. The regulation at 34 C.F.R. § 106.41 (1995)(b) provides that an academic institution may operate 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." 34 C.F.R. § 106.41(b). When a team is sponsored only for one sex, however, and where "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," *id.* (emphasis added). The regulation, therefore, allows

schools to operate single-sex teams in contact sports. In counting participation opportunities, therefore, it does not make sense to include in the calculus athletes participating in contact sports that include only men's teams. For example, if a university chooses to sponsor a football team, it is permitted to sponsor only a men's team. [**113] Not all sports are the same and the university should be given the flexibility to determine which activities are most beneficial to its student body. By including in its accounting a contact sport that requires very large numbers of participants, e.g., football, the district court skews the number of athletic participants -- [**193] making it impossible for the university to provide both men's and women's teams in other sports.

If the athletes competing in sports for which the university is permitted to field single-sex teams are excluded from the calculation of participation rates, the proportion of women participants would increase dramatically and prong one might be satisfied. If so, the inquiry ends and Brown should be judged to be in compliance.

2. Prong Two

The district court concluded, and the majority appears to agree, that Brown failed to satisfy prong two because "merely reducing program offerings to the overrepresented [**114] gender does not constitute program expansion for the underrepresented gender." Majority Opinion at 18. This is a curious result because the entire three-prong test is based on relative participation rates. Prong one, for example, requires that participation opportunities be provided proportionately to enrollment, but does not mandate any absolute number of such opportunities. The district court's conclusion with respect to prong two, however, implies that a school must not only demonstrate that the proportion of women in their program is growing over time, it must also show that the absolute number of women participating is increasing.

n26

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n26 This requirement presents a dilemma for a school in which women are less interested in athletics, as Brown contends is the case. Under such conditions, a school may be unable to succeed under the second prong because there may not be enough interested female students to achieve a continuing increase in the number of female participants.

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Under the district court's [**115] interpretation, a school facing budgetary constraints must, in order to comply with prong two, increase the opportunities available to the underrepresented gender, even if it cannot afford to do so. Rather than respecting the school's right to determine the role athletics will play in the future -- including reducing the opportunities available to the formerly overrepresented gender to ensure proportionate opportunities -- the district court and the majority demand that the absolute number of opportunities provided to the underrepresented gender be increased. I see no possible justification for this interpretation -- the regulation is intended to protect against discrimination, not to promote athletics on college campuses. A school is not required to sponsor an athletic program of any particular size. It is not for the courts, or the legislature, for that matter, to mandate programs of a given size. The most that can be demanded is that athletics be provided in a non-discriminatory manner.

Furthermore, the claim that a reduction in the opportunities given to the overrepresented gender is an unacceptable method of coming into compliance with the three prong test is contrary [**116] to both Cohen II and comments of the majority opinion. The majority quotes approvingly from Cohen v. Brown Univ., 879 F. Supp. 185 (D.R.I. 1995) (Cohen III), to demonstrate the many ways in which a university might achieve compliance:

It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies.

Majority Opinion at 70 (quoting Cohen II). This conclusion is consistent with Cohen II, which states that a school may achieve compliance by reducing opportunities for the overrepresented gender. See Cohen II, 991 F.2d at 898 n.15. I fail to see how these statements can be reconciled with the claim that Brown cannot satisfy prong two by reducing the number of participation opportunities for men.

3. Prong Three

Prong three of the three-prong test states that, where an institution does not comply with prongs one or two, compliance will be assessed on the basis of

whether it can be demonstrated that the interests and abilities of the members of the [proportionately [**117] underrepresented] sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 71,413, 71,418 (December 11, 1979).

[*194] According to the district court, Brown's athletics program violates prong three because members of the proportionately underrepresented sex have demonstrated interest sufficient for a university-funded varsity team that is not in fact being funded. The district court asserts that this is not a quota. Brown, on the other hand, argues that prong three is satisfied when (1) the interests and abilities of members of the proportionately underrepresented gender (2) are accommodated to the same degree as the proportionately overrepresented gender.

The district court's narrow, literal interpretation should be rejected because prong three cannot be read in isolation. First, as Brown points out, the Regulation that includes prong three provides that, in assessing compliance under the regulation, "the governing principle in this area is that the athletic interests and abilities of male and female students be equally effectively accommodated." Policy Interpretation, 44 Fed. Reg. 71,413, 71,414. Thus, Brown contends, to meet "fully" -- in [**118] an absolute sense -- the interests and abilities of an underrepresented gender, while unmet interest among the overrepresented gender continues, would contravene the governing principle of "equally effective accommodation" of the interests and abilities of students of both genders.

It is also worthwhile to note that to "fully" accommodate the interests and abilities of the underrepresented sex is an extraordinarily high -- perhaps impossibly so -- requirement. How could an academic institution with a large and diverse student body ever "fully" accommodate the athletic interests of its students? Under even the largest athletic program, it would be surprising to find that there is not a single student who would prefer to participate in athletics but does not do so because the school does not offer a program in the particular sport that interests the student. To read fully in an absolute sense would make the third prong virtually impossible to satisfy and, therefore, an irrelevant addition to the test.

This difficulty was recognized in Cohen II, which stated that "the mere fact that there are some female students interested in a sport does not ipso facto require the school to [**119] provide a varsity team in order to comply with the third benchmark." Cohen II 991 F.2d at 898. The balance that Cohen II advocates would require the institution to ensure "participatory opportunities . . . when, and to the extent that, there is sufficient interest and ability among the members of the excluded sex to sustain a viable team." *Id.* (internal citations omitted). This standard may be practical for certain sports that require large teams, but what of individual sports? A "viable" tennis team may require only a single player. The same could be said of any individual sport, including golf, track and field, cycling, fencing, archery, and so on. Therefore, we still have the problem that to "fully accommodate" the interests of the underrepresented sex may be impossible under the district court's interpretation.

In light of the above, Brown argues that prong three is in fact ambiguous with respect to whether "fully" means (1) an institution must meet 100% of the underrepresented gender's unmet reasonable interest and

ability, or (2) an institution must meet the underrepresented gender's unmet reasonable interest and ability as fully as it meets those of the overrepresented [**120] gender. I agree with Brown that, in the context of OCR's Policy Interpretation, prong three is susceptible to at least these two plausible interpretations.

Additionally, section 1681(a), a provision enacted by Congress as part of Title IX itself, casts doubt on the district court's reading of prong three. 20 U.S.C. § 1681(a) (1988). As Brown points out, Title IX, of which the Policy Interpretation is an administrative interpretation, contains language that prohibits the ordering of preferential treatment on the basis of gender due to a failure of a program to substantially mirror the gender ratio of an institution. Specifically, with respect to Title IX's guarantee that no person shall be excluded on the basis of sex from "participation in, denied the benefits of or subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681(a),

nothing contained [therein] shall be interpreted to require any educational institution to grant preferential or disparate [**195] 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 the sex participating [**121] 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.

Id. § 1681(b). Section 1681(b) provides yet another reason why the district court's reading of prong three is troublesome and why Brown's reading is a reasonable alternative.

Since the applicable regulation, 34 C.F.R. § 106.41, and policy interpretation, 44 Fed. Reg. 71,418, are not manifestly contrary to the objectives of Title IX, and Congress has specifically delegated to an agency the responsibility to articulate standards governing a particular area, we must accord the ensuing regulation considerable deference. *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). That notwithstanding, where -- as here -- the resulting regulation is susceptible to more than one reasonable interpretation, we owe no such deference to the interpretation chosen where the choice is made not by the agency but by the district court. Therefore, like other cases of statutory interpretation, we should review the district court's reading de novo.

B. The District Court's Interpretation [122] and the Resulting Equal Protection Problem**

The district court's interpretation of prongs one and three creates an Equal Protection problem, which I analyze in two steps. First, the district court's interpretation creates a quota scheme. Second, even assuming such a quota scheme is otherwise constitutional, appellees have not pointed to an "exceedingly persuasive justification," see *Virginia*, 116 S. Ct. at 2274, for this particular quota scheme.

1. The Quota

I believe that the three prong test, as the district court interprets it, is a quota. I am in square disagreement with the majority, who believe that "no aspect of the Title IX regime at issue in this case . . . mandates gender-based preferences or quotas." Majority Opinion at 29. Put another way, I agree that "Title IX is not an affirmative action statute," *id.*, but I believe that is exactly what the district court has made of it. As interpreted by the district court, the test constitutes an affirmative action, quota-based scheme.

I am less interested in the actual term "quota" than the legally cognizable characteristics that render a quota scheme impermissible. And those characteristics are present here in [**123] spades. I am not persuaded by the majority's argument that the three-part test does not constitute a quota because it does not permit an agency or court to find a violation solely on the basis of prong one of the test; instead, an institution must also fail prongs two and three. As Brown rightly argues, the district court's application

of the three-prong test requires Brown to allocate its athletic resources to meet the as-yet-unmet interest of a member of the underrepresented sex, women in this case, while simultaneously neglecting any unmet interest among individuals of the overrepresented sex. To the extent that the rate of interest in athletics diverges between men and women at any institution, the district court's interpretation would require that such an institution treat an individual male student's athletic interest and an individual female student's athletic interest completely differently: one student's reasonable interest would have to be met, by law, while meeting the other student's interest would only aggravate the lack of proportionality giving rise to the legal duty. "The injury in cases of this kind is that a 'discriminatory classification prevents . . . competition [**124] on an equal footing.'" Adarand, 115 S. Ct. at 2104 (quoting Northeast Fla. Chapter, Assoc'd Gen'l Contractors of America v. Jacksonville, 508 U.S. 656, 666, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993)). As a result, individual male and female students would be precluded from competing against each other for scarce resources; they would instead compete only against members of their own gender. Cf. Hopwood v. Texas, 78 F.3d 932, 943-46 (5th [*196] Cir.) (concluding that not only would government action precluding competition between individuals of different races for law school admissions be unconstitutional, but in fact even partial consideration of race among other factors would be unconstitutional), cert. denied, 135 L. Ed. 2d 1095, 116 S. Ct. 2581 (1996). n27

-----Footnotes-----

n27 In response, appellees cite Kelley v. Board of Trustees, 35 F.3d 265 271 (1994), for the proposition that the three-prong test does not constitute a quota, because it does not "require any educational institution to grant preferential or disparate treatment" to the gender underrepresented in that institution's athletic program. *Id.* However, in Kelley, the Seventh Circuit, unlike the district court, did not use the three-prong test as a definitive test for liability. Rather, the Seventh Circuit endorsed the test as one for compliance, in dismissing the plaintiff's claims. The Seventh Circuit did not consider the question of whether, had the defendant University of Illinois not been in compliance, lack of compliance with the three-prong test alone would trigger automatic liability, nor did the Seventh Circuit spell out what steps would have been required of defendant. At any rate, Kelley pre-dates the Supreme Court's opinions in Adarand and Virginia, meaning that it suffers from the same defects as Cohen II.

-----End Footnotes----- [**125]

The majority claims that "neither the Policy Interpretation nor the district court's interpretation of it, mandates statistical balancing." Majority Opinion at 41. The logic of this position escapes me. A school can satisfy the test in three ways. The first prong is met if the school provides participation opportunities for male and female students in numbers substantially proportionate to their enrollments. This prong surely requires statistical balancing. The second prong is satisfied if an institution that cannot meet prong one can show a "continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of the underrepresented sex." 44 Fed. Reg. at 71,418. It can hardly be denied that this prong requires statistical balancing as it is essentially a test that requires the school to show that it is moving in the direction of satisfying the first prong. Establishing that a school is moving inexorably closer to satisfying a requirement that demands statistical balancing can only be done by demonstrating an improvement in the statistical balance. In other words, the second prong also requires balancing. Finally, the [**126] third prong, interpreted as the majority advocates, dispenses with statistical balancing only because it choose to accord zero weight to one side of the balance. Even a single person with a reasonable unmet interest defeats compliance. This standard, in fact, goes farther than the straightforward quota test of prong one. According to the district court, the unmet interests of the underrepresented sex must be completely accommodated before any of the interest of the overrepresented gender can be accommodated. n28

-----Footnotes-----

n28 The problem with the majority's argument can be illustrated with a hypothetical college admissions policy that would require proportionality between the gender ratio of the local student aged population and that of admitted students. This policy is comparable to prong one of the three prong test and is, without a doubt, a quota. It is no less a quota if an exception exists for schools whose gender ratio differs

from that of the local population but which admit every applicant of the underrepresented gender. It remains a quota because the school is forced to admit every female applicant until it reaches the requisite proportion. Similarly, the district court's interpretation requires the school to accommodate the interests of every female student until proportionality is reached.

-----End Footnotes----- [**127]

A pragmatic overview of the effect of the three-prong test leads me to reject the majority's claim that the three-prong test does not amount to a quota because it involves multiple prongs. In my view it is the result of the test, and not the number of steps involved, that should determine if a quota system exists. Regardless of how many steps are involved, the fact remains that the test requires proportionate participation opportunities for both sexes (prong one) unless one sex is simply not interested in participating (prong three). It seems to me that a quota with an exception for situations in which there are insufficient interested students to allow the school to meet it remains a quota. All of the negative effects of a quota remain, n29 and the school can escape the quota [**197] under prong three only by offering preferential treatment to the group that has demonstrated less interest in athletics.

-----Footnotes-----

n29 Nor does the second prong of the test change the analysis. That prong merely recognizes that a school may not be able to meet the quotas of the first or third prong immediately, and therefore deems it sufficient to show program expansion that is responsive to the interests of the underrepresented sex.

-----End Footnotes----- [**128]

2. "Extremely Persuasive Justification" Test

In view of the quota scheme adopted by the district court, and Congress' specific disavowal of any intent to require quotas as part of Title IX, appellees have not met their burden of showing an "exceedingly persuasive justification" for this gender-conscious exercise of government authority. As recently set forth in Virginia, "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." Virginia, 116 S. Ct. at 2274. While the Supreme Court in Virginia acknowledged that "physical differences between men and women . . . are enduring," *id.* at 2276, it went on to state that such "'inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for . . . artificial constraints on an individual's opportunity." *Id.*

Neither appellees nor the district court have demonstrated an "exceedingly persuasive justification" for the government action that the district court has directed in this case. In fact, appellees have failed to point to any congressional statement or indication of intent regarding [**129] a proportional representation scheme as applied by the district court. While they point to Congress' decision to delegate authority to the relevant agencies, this does not amount to a genuine -- that is, not hypothesized or invented in view of litigation, *id.* at 2275 -exceedingly persuasive justification in light of section 1681(b)'s "no quota" provision. We are left with the explanations discussed in Cohen II to the effect that Congress conducted hearings on the subject of discrimination against women in education. There is little more than that, because Congress adopted Title IX as a floor amendment without committee hearings or reports. See *Cohen II*, 991 F.2d at 893.

I believe that the district court's interpretation of the Policy Interpretation's three-prong test poses serious constitutional difficulties. "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, [we] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988); see *NLRB v. Catholic Bishop [**130] of Chicago*, 440 U.S. 490, 507, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979). To the extent that Congress expressed a specific intent germane to the district court's interpretation, Congress, if anything, expressed an aversion to quotas as a method to enforce Title IX. As a result, I opt for Brown's construction of prong three, which, as we have discussed, *infra*, is also a reasonable reading.

Accordingly, I would reverse and remand for further proceedings.

III. Evidentiary Issues

In disputes over the representation of women in athletic programs, it is inevitable that statistical evidence will be relevant. There is simply no other way to assess participation rates, interest levels, and abilities. The majority opinion, however, offers inconsistent guidance with respect to the role of statistics in Title IX claims. Early in the opinion, the majority approvingly cites to the statistical evaluations conducted in Cohen I, Cohen II, and Cohen III. Majority Opinion at 8-10. The figures in question demonstrate that women's participation in athletics is less than proportional to their enrollment. Later in the opinion, however, when the level of interest among women at Brown is at issue, the court adopts [****131**] a much more critical attitude towards statistical evidence: "There exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity." Majority Opinion at 53. In other words, evidence of differential levels of interest is not to be credited because it may [****198**] simply reflect the result of past discrimination.

The refusal to accept surveys of interest levels as evidence of interest raises the question of what indicators might be used. The majority offers no guidance to a school seeking to assess the levels of interest of its students. Although the three-prong test, even as interpreted by the district court, appears to allow the school the opportunity to show a lack of interest, the majority rejects the best -- and perhaps the only -- mechanism for making such a showing.

Brown claims that the district court erred in excluding evidence pertaining to the relative athletic interests of men and women at the university. Brown sought to introduce the NCAA Gender Equity Study and the results [****132**] of an undergraduate poll on student interest in athletics, but was not permitted to do so. The majority is unsympathetic to Brown's claim that the disparity between athletic opportunities for men and women reflect a gender-based difference in interest levels. Indeed, despite Brown's attempt to present evidence in support of its claim, the majority characterizes Brown's argument as an "unproven assertion." Majority Opinion at 51. n30

-----Footnotes-----

n30 Among the evidence submitted by Brown are: (i) admissions data showing greater athletic interest among male applicants than female applicants; (ii) college board data showing greater athletic interest and prior participation rates by prospective male applicants than female applicants; (iii) data from the Cooperative Institutional Research Program at UCLA indicating greater athletic interest among men than women; (iv) an independent telephone survey of 500 randomly selected Brown undergraduates that reveals that Brown offers women participation opportunities in excess of their representation in the pool of interested, qualified students; (v) intramural and club participation rates that demonstrate higher participation rates among men than women; (vi) walk-on and try-out numbers that reflect a greater interest among men than women; (vii) high school participation rates that show a much lower rate of participation among females than among males; (viii) the NCAA Gender Equity Committee data showing that women across the country participate in athletics at a lower rate than men.

-----End Footnotes----- [****133**]

Furthermore, the majority recognizes that institutions are entitled to use any nondiscriminatory method of their choosing to determine athletic interests. Majority Opinion at 53 n.15. If statistical evidence of interest levels is not to be considered by courts, however, there is no way for schools to determine whether they are in compliance. Any studies or surveys they might conduct in order to assess their own compliance would, in the event of litigation, be deemed irrelevant. Regardless of the efforts made by the academic institution, the specter of a lawsuit would be ever-present.

In addition, the majority has put the power to control athletics and the provision of athletic resources in the hands of the underrepresented gender. Virtually every other aspect of college life is entrusted to the

institution, but athletics has now been carved out as an exception and the university is no longer in full control of its program. Unless the two genders participate equally in athletics, members of the underrepresented sex would have the ability to demand a varsity level team at any time if they can show sufficient interest. Apparently no weight is given to the sustainability of the interest, [**134] the cost of the sport, the university's view on the desirability of the sport, and so on.

IV. FIRST AMENDMENT ISSUE

Finally, it is important to remember that Brown University is a private institution with a constitutionally protected First Amendment right to choose its curriculum. Athletics are part of that curriculum. Although the protections of the First Amendment cannot be used to justify discrimination, this court should not forget that it has a duty to protect a private institution's right to mould its own educational environment.

The majority pays lip service to these concerns in the final pages of its long opinion, stating that "we are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations." Majority Opinion at 69 (quoting Cohen II, 991 F.2d at 906), and "our respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs counsels that we give universities as much freedom as possible." Majority Opinion at 75. Despite these statements, [*199] however, the majority in its opinion today, and the district court before it, have failed to give Brown University freedom to [**135] craft its own athletic program and to choose the priorities of that program. Instead, they have established a legal rule that straightjackets college athletics programs by curtailing their freedom to choose the sports they offer.



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The Providence Journal-Bulletin

April 22, 1997, Tuesday, ALL EDITIONS

SECTION: NEWS, Pg. 1A

LENGTH: 2058 words

HEADLINE: Women win equal time Brown appeal on sports rejected;
The U.S. Supreme **Court**, in refusing to consider the **Title IX case**, forces the University to move toward "gender parity" in athletics.

BYLINE: Story by Tracy Breton, Elizabeth Rau and Mike Szostak

BODY:

In a closely watched dispute over sexual equality with wide-ranging ramifications, the U.S. Supreme **Court** yesterday let stand lower **court** rulings that found **Brown University** illegally discriminates against its women athletes and must now move to correct the imbalance.

The Supreme **Court's** decision not to hear the **Title IX case** will have significant implications for colleges with athletic programs and could also lead some colleges to cut or continue to cut men's sports programs to boost the ratio of female athletes in the student body.

Brown says it won't eliminate any men's sports but will increase the number of opportunities for women to compete and will cap the number of men who can participate in some sports.

The legal significance of yesterday's **court** action is that for now, the Brown **case** is the standard by which **Title IX cases** will be judged nationwide whenever students raise sex-discrimination claims regarding athletics.

The Supreme **Court's** refusal to consider the **case** may, for some colleges, also be the death knell for minor sports such as baseball, wrestling and tennis. Athletic scholarships for men may also be reduced or eliminated.

Opportunities for women, however, will continue to expand. Colleges will either add high-participation teams such as soccer and crew, expand regular programs or increase roster sizes, as Brown has done. Scholarship money for women also should increase at some schools.

The Brown **case**, which began five years ago, could end up costing the university over \$ 2 million in fees, according to Lynette Labinger, lead trial lawyer for the Brown women athletes who filed the lawsuit. The plaintiffs alone have billed more than \$ 1 million, which they are asking the **court** to order Brown to pay.

The **case** has generated tremendous interest throughout the sports and legal community nationwide. Brown, with the backing of 60 colleges and universities, 49 members of Congress, the American Council on Education, former Secretary of Health, Education and Welfare Caspar E. Weinberger, and numerous athletic organizations, argued that the First Circuit **Court** of Appeals and the U.S. Department of Education had misinterpreted **Title IX**.

Title IX is a 1972 law that bans discrimination in colleges and universities based on sex if the institutions receive federal money.

Since the law was passed, women's sports programs have grown from small, poorly funded, club-level activities to competitive varsity programs. According to a 1996 federal General Accounting Office report, 100,000 American women are now participating in intercollegiate athletics, a four-fold increase since 1972.

But the same report also pointed out that the ratio of female athletes to total undergraduate enrollment is still out of whack - which is a major part of the Brown female athletes' gripes.

The Supreme **Court's** decision not to disturb rulings against Brown drew mixed reactions.

"I'm excited that the next generation of daughters will not have to go to **court** to exercise their rights to play sports," said Donna Lopiano, executive director of the Women's Sports Foundation.

"This is a huge victory for everyone who believes in equality across the country," said Arthur H. Bryant, a Washington lawyer for the Brown women athletes who sued. "This is the 25th anniversary of **Title IX**, and the decision signals that it's time for a celebration."

But Walter B. Connolly Jr., of Detroit, the lawyer who tried the **case** for Brown, complained that the First Circuit's ruling sets up a "quota system" for sexes in college athletics that is present nowhere else in academia.

He said the decision punished Brown because not enough female students there are interested in athletics.

Brown and others who filed briefs siding with the university argued that the First Circuit's ruling could actually hurt female athletes "in virtually every university throughout the nation" because some schools will simply cut men's programs without increasing women's.

"I will never be convinced that the First Circuit's decision results in equal opportunity," said lawyer Maureen E. Mahoney, who wrote Brown's brief to the Supreme **Court**. "It is quite clear that it instructs universities to neglect the interests of men."

Yesterday was the third time that the nation's highest **court** has refused to consider a **case** involving the obligation of colleges to provide equal opportunities for athletes under **Title IX** of the Education Amendments of 1972. Other **cases** involved women's softball at Colorado State University and men's swimming at the University of Illinois.

The First Circuit **case** arose out of Brown's decision in May 1991 to stop funding for its women's volleyball and gymnastics teams and two men's teams, water polo and golf.

Brown said the teams would only be allowed to continue if they could raise all of their money from private sources. The women's teams would have to raise more than \$ 62,000 a year to survive; the men's teams had to raise less than \$ 16,000.

The men raised the money but the women didn't.

In 1992, some of the Brown women athletes sought help from the Washington-based Trial Lawyers for Public Justice, a national public-interest law firm that specializes in precedent-setting litigation, which told Brown to restore funds for the women's teams or it would file suit.

Brown did not restore the money, so in April 1992, nine members of the university's gymnastics team, led by co-captain **Amy Cohen**, filed suit in U.S. District **Court** in Providence. Almost immediately afterward, the suit was amended to include three members of the volleyball team and a member of the women's rugby club.

The suit was certified as a class-action for "all present and future **Brown University** women students

and potential students who participate, seek to participate and/or are deterred from participating in intercollegiate athletics funded by Brown."

The plaintiffs asked the **court** to order Brown to ensure women equality of opportunity and treatment in Brown's intercollegiate athletic program.

While the **case** was in the preliminary stage, Senior U.S. District Judge Raymond J. Pettine issued an injunction in 1992, forcing Brown to restore money to the women's volleyball and gymnastics teams and prohibiting Brown from eliminating funds for any other teams while the suit was pending.

Brown appealed that preliminary injunction and lost.

Pettine used a three-pronged test devised by the federal Office of Civil Rights to determine **Title IX** compliance.

The standards involve the ratios of male and female athletes to male and female students; program expansion and the accommodation of athletic interests and abilities.

After a lengthy trial in 1994, Pettine found that Brown failed to satisfy all three parts of the test.

He said Brown failed the first part of the test because women are provided with only 38 percent of the opportunities to participate while their undergraduate enrollment is 51 percent.

He said Brown failed the second part of the test because Brown's history of program expansion for women athletes essentially began and ended in the 1970s. With the exception of 1982, when it added an indoor track season for women that was already provided for men, the **court** said, Brown ignored, rejected or interfered with the developing and established interests and abilities of women who participate in intercollegiate sports - all to save money.

Pettine also said Brown failed the third part of the test because women with the highest caliber of interest and ability in gymnastics, fencing, skiing and water polo were not being fully and effectively accommodated in Brown's existing program.

He rebuffed Brown's argument that its broader offering to male athletes is justified because men are more interested in participating in intercollegiate athletics than women.

In July 1995, Brown submitted a proposed compliance order that would cap the size of men's teams, increase the size of women's teams and create several junior varsity teams for women. But Pettine rejected Brown's proposal as "fatally flawed" and neither comprehensive nor a good-faith effort.

Instead, Pettine ordered Brown to pay for women's gymnastics, fencing, water polo and skiing, which would increase the number of female varsity athletes by 40 and the percentage of women among Brown's athletes to 39.1 percent. Pettine stayed his order, pending an appeal.

Brown appealed to the First Circuit in Boston which, in a 2-to-1 decision, upheld Pettine's judgment but reversed his compliance order. The **case** went back to the District **Court** to give Brown an opportunity to present another plan.

Brown then asked the U.S. Supreme **Court** to review the **case**, which yesterday it refused to do.

Brown officials reacted with disappointment and stood by their longstanding claim that the university offers one of the best sports programs for women in the country.

"**Brown University** was an early leader in developing athletic programs for women and continues its national leadership today," said Laura Freid, executive vice president for external affairs. "What is at issue is not our commitment to women's sports or to excellence in women's sports, but the technical question of whether **Title IX** compliance requires statistical targets."

Mark Nickel, a spokesman for Brown, said the university pressed on with the **case** because it felt strongly that it had complied with the **Title IX** law.

He said Brown offers 35 varsity sports - 17 for men and 16 for women. (Two teams are coed.)

"That is an array of opportunities to compete that is characteristic of only a very few colleges and universities in the country," he said. "This is a matter of principle. And the principle involved from the beginning was whether or not a college or a university has the autonomy to design programs as it wishes to design them."

While the **case** was in the U.S. District **Court**, Brown was forced to restore some cuts that it planned to make in its women's athletic program.

In order to further comply with the rulings issued by Pettine and the First Circuit **Court** of Appeals, Brown yesterday submitted a plan for more remedies.

The plan would create a lightweight varsity women's crew team and reclassify the women's water polo team from a club sport to a donor-financed varsity sport. The plan also would enforce minimum roster sizes for all women's sports and cap the current roster sizes for men's team sports.

"We expect our compliance plan to bring the gender ratio among athletes to within one percent of the overall undergraduate ratio," said Fried. "It is the best the university can do without eliminating a men's varsity team."

THE EFFECTS

On Brown

Brown has exhausted its last appeal and must accept legally that it violates **Title IX**. Brown must now comply by increasing the number of opportunities for women to participate in intercollegiate sports or decreasing the number of opportunities for men so that the percentage of female and male athletes is proportional to the percentage of female and male undergraduates. Brown also will have to pay the legal costs of the **case**, which could reach \$ 2 million.

On colleges

Colleges must be aware that the Brown **case** is now without question the standard by which **Title IX cases** will be judged. The decisions in Cohen v. Brown have been and will continue to be used by other federal **courts**. It could lead some colleges to cut or continue to cut men's sports programs to boost the ratio of female athletes in the student body.

On men's sports

Colleges, Brown among them, will continue to reduce the size of men's teams and, in some **cases**, eliminate men's programs. So-called minor sports such as baseball, wrestling and tennis may be in jeopardy. The number of men participating in NCAA sports programs declined by .29 percent from 1994 to 1995. Athletic scholarships for men may also be reduced or eliminated.

On women's sports

Opportunities to participate will expand. The number of women participating in NCAA varsity athletics increased by 4.7 percent from 1994 to 1995. Colleges will either add high-participation teams such as soccer and crew, schedule regular program expansion or increase roster sizes, as Brown has done. Scholarship money also should increase at schools that award them.

* * *

NOTES:

Related stories on pages A-01 and A-08.

GRAPHIC: Photo: PUSHING FOR EXCELLENCE: Kristen Marshall, a sophomore pitcher on the softball team, lifts weights on her day off from practice yesterday to strengthen her legs.
Journal-Bulletin, MARY MURPHY

LOAD-DATE: April 23, 1997



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SECTION: Vol. 28 ; No. 4 ; Pg. 46; ISSN: 0009-1383

LENGTH: 5524 words

HEADLINE: Missed opportunities: lessons from the **Title IX** case at Brown.suit by women athletes against **Brown University**

BYLINE: Lazerson, Marvin ; Wagener, Ursula

BODY:

In April 1992, nine women student athletes sued **Brown University** for noncompliance with **Title IX**, igniting the most bitterly contested battle in the war over gender equity in intercollegiate athletics. Emotions and legal fees have run high. To many college and university administrations, the still unresolved **case** represents the worst excesses of federal regulation of higher education. However, we contend that instead of viewing **Title IX** as a threat, higher education might more productively focus on the opportunities it represents.

Our focus is how the battle over **Title IX** at Brown evolved and why higher education has become so engaged by it. The Brown administration and the plaintiffs made a series of choices, each of which served to solidify and anger the other side. Arguments against compliance with **Title IX** were blown into specters of federal intrusion and affirmative action quotas. Media headlines heightened tensions. National organizations--the American Council on Education, the Association of American Universities, the National Association of Independent Colleges and Universities, and the National Association of State Universities and Land-Grant Colleges--and national associations of intercollegiate coaches rallied to Brown's support.

THREAT OR OPPORTUNITY?

Title IX hangs like a storm cloud, occasionally touching down in the form of complaints and lawsuits, challenging universities to improve athletic opportunities and the conditions of women's sports. First passed by Congress as part of the Education Amendments of 1972 to prohibit gender discrimination in education, **Title IX** has been most prominently applied to intercollegiate sports. Not only does it coincide with rapid increases in female participation in athletics from grade school through college--from under 10 percent of student athletes in 1972 to more than 35 percent today--but its very existence has reinforced this growth.

On many campuses--including Temple, Oklahoma, William and Mary, Bridgeport, UCLA, Massachusetts (Amherst), Pennsylvania, Texas (Austin), New Hampshire, and the University of California system--formal complaints have led to settlements favorable to women. At Colorado State, Louisiana State, Washington State, Indiana University of Pennsylvania, and Brown, the **courts** have had to resolve **Title IX** lawsuits.

The ostensible battle is over women and sports, but the war is broader and deeper. Most of higher education has viewed **Title IX** as a series of threats: a menace to higher education's autonomy in an era of substantial federal and legal regulation and public demand for accountability; a threat to financial stability by requiring that athletic departments escalate their budgets in a time of cutbacks and economizing; an intrusion into the privileged culture of male athletics, which has such power and status.

Yet **Title IX** offers opportunity: a chance to advance women student athletes and to debate the meaning of equal opportunity; the potential for presidents and boards to provide greater oversight for athletic budgets; the opportunity for higher education to recast athletics as part of its educational responsibilities. These opportunities have been absent from much of the controversy over **Title IX**.

THE IRONY OF LIBERALISM

That an Ivy League university is at the center of **Title IX** is ironic. The eight universities--Brown, Columbia, Cornell, Dartmouth, Harvard, Pennsylvania, Princeton, and Yale--emphasize academics, give no athletic scholarships, and provide the broadest array of intercollegiate women's and men's sports of any athletic conference in the nation.

Charging Brown with gender discrimination in sports is even more unlikely. Widely acknowledged as the Ivy League's most liberal institution--The Economist recently referred to Brown's "politically correct credentials"--Brown has benefited from a collaborative culture and a history of student involvement in all aspects of college life. Minority groups constitute almost one-third of the student body. The university ranks among the nation's leaders in introducing greater flexibility in its curriculum and in emphasizing good teaching and student creativity. In athletics, it does not spend lots of money on winning football and men's basketball teams. For much of the 1980s, Brown was at the bottom of the Ivy League in those sports.

The irony is magnified in Brown's president, Vartan Gregorian. An individual of impeccable liberal and academic credentials, Gregorian came to Brown in 1988 with a distinguished record as provost of the University of Pennsylvania and as president of the New York City Public Library. His effusive Eastern European personality, wit and intellect, liberalism, and lust for living gave him stature and respect. A unique personality, he was expected to substantially improve Brown's academic and fiscal standing.

Brown also provided lots of opportunities for students to engage in intercollegiate athletics. Only Harvard offered more intercollegiate sports than Brown, which in the early 1990s fielded 13 varsity sports for women and 12 for men, in addition to having three women's and four men's "club" teams supported by external donors. As early as 1978, Brown sponsored twice the number of women's teams as the national average in the mid-1990s. Over 12 percent of the women students at Brown were then playing varsity sports--nearly triple the national average. With women accounting for more than 40 percent of its varsity athletes, compared to 35 percent among Division I universities, Brown ranks in the top 1 percent of all intercollegiate programs in terms of women's participation. No wonder Brown's athletic director David Roach claimed in a New York Times interview last September that the university was "indisputably among the nation's half-dozen best universities for women's sports."

It is almost unbelievable that this liberal institution, not only led by a responsive and principled president, but having a history of female and male student athletic opportunities, should find itself in such a heated and controversial battle over gender equity in athletics. What happened?

DOWNSIZING ATHLETICS

Brown, like most colleges and universities in the early 1990s, suffered fiscal pressures and faced a \$ 1.6 million budgetary shortfall. Efforts to build its academic reputation had been costly; deferred maintenance on buildings and the costs of new construction weighed heavily. To balance his budget, President Gregorian ordered a moratorium on hiring and a 5 percent reduction in operating costs in 1991, exempting only student financial aid and library acquisitions from the cuts.

Roach, formerly a women's swimming coach and new to the athletic director's job, reluctantly accepted his task, deciding to eliminate \$ 78,000 from his \$ 5 million budget by ending university funding of two men's sports (golf and water polo) and two women's sports (volleyball and gymnastics). The teams could continue to play as club teams, but they would need to generate their own funds from external sources. Cutting the men's teams saved almost \$ 16,000 annually, the women's teams \$ 62,000 annually.

The seeming even-handedness of the cuts--two men's and two women's teams--did not sit well with the women athletes and their supporters. Arlene Gorton, who had headed women's sports before Pembroke College merged with Brown in 1972, complained that women's sports were already underfunded compared to men's: "You have two people. One of them is obese and the other is anorexic. If you order both of them to lose 20 pounds, is that fair?"

Looking for redress, the student athletes turned to Kathryn Reith. A 1978 Brown graduate, former crew team member, and assistant executive director of the Women's Sports Foundation, a high-profile gender equity organization. Reith referred the students to Arthur Bryant, executive director of Trial Lawyers for Public Justice. Bryant subsequently wrote Gregorian that he had been retained by several Brown athletes to sue the university "for discrimination against its female intercollegiate athletes and potential athletes."

Bryant's letter can be read in two ways: as a typical lawyer's threat to sue as prelude to negotiations or as an inflammatory act against the institution. Rejecting any intimation that Brown discriminated against its women athletes--a position Brown has adhered to throughout the controversy--Gregorian took the latter interpretation and was furious that anyone would tell him how to run the university.

Two adversarial camps had been created, perhaps unnecessarily. Eleven months after Brown announced the downgrading of the four teams, Bryant and co-counsel Lynette Labinger filed a class-action suit on behalf of 13 female athletes, charging the university with discrimination and asking that the two women's teams be reinstated. On the university side, Robert Reichley, the executive vice president would later declare, "This is a **case** we won't settle."

DAYS IN COURT

Amy Cohen, captain of the gymnastics team, loved Brown. She served as a campus guide for prospective students and believed that her university was progressive. The decision to downgrade her sport was a shock. Lisa Stern was a sufficiently outstanding gymnast to turn down scholarship offers to other universities. When she heard of the downgrading, it was too late to get other scholarship offers. As a high school senior in 1991, volleyball player Megan Hull had committed to coming to Brown and was told that the change to club status only involved funding sources, that the varsity volleyball team would continue to compete as it always had. Only after she arrived on campus did Hull discover that volleyball had been reduced to second-class status.

The women's decision to join the suit against Brown did not come easily. Brown was their college, they valued athletics highly, and they had believed **Title IX** issues could be worked out. But increasingly the women recognized that resources between men and women would not be equalized, regardless of Brown's liberalism. By the fall of 1991, they concluded that Brown did not treat women athletes equally.

The university had a different view. Fiscal exigencies required cutbacks. The only substantial savings within the athletic department would come through reduced funding for teams. Even with the cuts, however, Brown was still a national leader in sponsoring women athletes. "There may be reasons why women's sports are not a more prominent part of the nation's intercollegiate scene," Brown's Reichley argued, "but lack of opportunity at Brown is definitely not one of them."

With neither side willing to budge, the suit went to U.S. District **Court** Judge Raymond J. Pettine in fall 1992. On December 24, Pettine gave Brown an unwelcome Christmas present: sufficient evidence existed to indicate that Brown may have violated **Title IX**. He ordered the university to restore to full varsity status the women's gymnastic and volleyball teams and not to eliminate or reduce in status or funding any existing women's intercollegiate varsity team until the **case** was resolved.

Brown immediately appealed to the First Circuit **Court** of Appeals--and lost. On April 16, 1993, the appeals **court** upheld Pettine's injunction, ordering the **case** back to the district **court** for a full trial. The stage had been set for open warfare.

The hearings began in Judge Pettine's **court** on September 26, 1994. As one member of the Brown administration recalled, the legal contest was a horrible experience, having little to do with athletics or students. Both sides were brittle and angry. Walter B. Connolly Jr., Brown's major outside counsel, was so anxious to fight **Title IX** that he agreed to represent Brown at half his usual fee. He clashed openly with the judge, aggressively cross-examined women students, and at one point had to be cautioned by Brown vice president and legal counsel Beverly Ledbetter. The plaintiffs' lawyer, Lynette Labinger, would later accuse Brown of engaging in a "Stalingrad defense," a scorched-earth approach that refused to give an inch. The university officials, in turn, believed that Pettine, who had previously found against the university in a different gender discrimination **case**, was biased against Brown and was being manipulated by Labinger, his former law clerk.

On the eve of the hearings, both sides pulled a surprise by agreeing to a partial out-of-**court** settlement. Brown assured the equitable provision for the next three years of locker rooms, athletic equipment, practice facilities, scheduling of games, use of the university's weight room, and opportunities to take training trips. The agreement set aside what on many campuses are the most disagreeable issues in **Title IX**, the obvious in-equalities in the treatment of female and male athletes.

For Brown this was a major victory, for the university had always claimed that it treated men and women athletes equitably. The students' lawyers agreed to the partial settlement because Brown had, in fact, improved its treatment of women athletes since the filing of the suit, for example, renovating the boathouse and the women's locker room. The agreement also relieved the plaintiffs from the burden of detailing in-equitable treatment, an expensive and time-consuming process that required such things as comparing practice times and schedules, measuring locker rooms, counting ice hockey sticks, and evaluating facilities and space use.

Ironically, the out-of-**court** settlement could have ended the Brown **case** with little national attention paid to it. It would have been like countless others, a quick tempest of local interest followed by compromise. With equitable treatment agreed upon--a revolutionary act at most universities--both sides could probably have found a plan to increase opportunities for women to play sports. Animosities had become so great, however, that one side's compromise was the other's Waterloo. The **case** turned to the single most controversial issue in **Title IX**: opportunities and participation rates for women athletes.

The plaintiffs argued that there were significant statistical differences between the proportion of women athletes at Brown and the proportion of women in the undergraduate student body. Since 51 percent of the enrolled students were women, they argued, 51 percent of the athletes should be women. Brown rejected this interpretation of **Title IX**, distinguishing between "participation opportunities" and "participation rates." Women at Brown participated in intercollegiate sports less than men did. They did so, Brown claimed, not for lack of opportunity, but out of choice, since women were less interested in athletic competition than men. The legal **case** had thus boiled down to a single issue: Were the opportunities provided by Brown for women to engage in intercollegiate athletics sufficient to meet **Title IX's** requirements? On March 29, 1995, Judge Pettine answered with a resounding no.

THREE PRONGS AND YOU'RE OUT

Between Pettine's initial finding for the women athletes late in 1992 and his decision in March 1995, the First, Third, Sixth, Seventh, and Tenth Circuit **Courts** of Appeal had all ruled in favor of women in **Title IX cases**. Pettine was emboldened by their support. On every item, he rejected Brown's claims, sometimes seeming to mock their legitimacy.

Pettine concluded that the issue before the **court** was the "effective accommodation" section of the Office of Civil Rights' (OCR's) 1979 regulations on **Title IX**: "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." To answer that, Pettine turned to OCR's "three-pronged test" for compliance with **Title IX**. Adhering to any one of the prongs certified compliance.

The first prong required substantial proportionality between the number of female and male undergraduate students and the number of intercollegiate sports opportunities provided to male and

female students. Or, as the appeals **court** had noted, "A university which does not wish to engage in extensive compliance analysis may stay on the sunny side of **Title IX** simply by maintaining gender parity between its student body and its athletic lineup."

For the 1993-94 academic year, Brown's undergraduate enrollment was 51 percent women and 49 percent men; its athletic opportunities 38 percent women, 62 percent men. As Pettine noted: "The gender balance of Brown's intercollegiate athletic program is far from substantially proportionate to its student enrollment. Thus, because Brown maintains a 13.01 percent disparity between female participation in intercollegiate athletics and female student enrollment, it cannot gain the protection of prong one."

(**Title IX** does not clearly define "opportunities." Brown's position was that opportunities to participate--that is, roster positions available--should be counted in the **Title IX** comparisons. The plaintiff's argument was that only those players actively on teams should be included in the participation ratios. Pettine accepted the plaintiff's argument.)

The second prong required "a history and continuing practice of program expansion" of women's athletics. Brown's women's programs dated from the 1970s when the university incorporated Pembroke College, the women's coordinate college, under its aegis. Since 1977 only two women's sports--indoor track in 1982 and skiing in 1994--had been added. Brown provided lots of opportunities for women, Pettine concluded, but it could not show a "continuing practice of program expansion."

The university had a last chance. Prong three required that "the interests and abilities of the members of that underrepresented sex have been fully and effectively accommodated by the present program." Pettine found that Brown had refused to elevate to university-sponsored varsity status at least four existing women's donor or club teams--gymnastics, fencing, skiing, and water polo. These were women interested in, and capable of competing. Keeping them in what Pettine called "second-class varsity status" was clear evidence of Brown's failure to meet prong three's requirements.

No one doubted who had won in Judge Pettine's **court**. Disclaiming any desire to "micro-manage" Brown's athletic program, leaving it "entirely to Brown's discretion to decide how it will balance its program to provide equal opportunities for its men and women athletes," Pettine nonetheless suggested ways the university might achieve compliance. But he rejected the notion that the only way to achieve equity was cutting men's teams. He concluded by ordering Brown to submit within 120 days, "a comprehensive plan for complying with **Title IX**."

UPPING THE ANTE

Both before and after Judge Pettine's decision, Brown engaged in the most sweeping attack yet on **Title IX**, dramatically escalating the issues from gender equity in athletics to the intrusiveness of federal regulations and affirmative action quotas. Brown accused the judge of penalizing it for increasing opportunities in the 1970s: had it waited until the mid-1980s to expand women's programs, it could have shown recent expansion.

The university also contended that Pettine miscounted, that by the spring of 1995 the discrepancy between women's enrollment and athletic participation was 7 percent, surely an acceptable number. Men, according to Athletic Director Roach, are more interested in playing intercollegiate sports than women: almost all of Brown's women's teams had room for additional athletes, while men's teams turned away athletes. And the fiscal realities precluded simply adding more to the athletic budget.

President Gregorian seemed to be everywhere, defending Brown and raising the hot-button issues: **Title IX** had introduced confusing and intrusive federal regulations into the fiscal and academic decision-making integrity of universities. "I am a frustrated university administrator," he declared, "who does not like bureaucracy and who does not like to be intimidated by lawyers and who would like a clear policy," a theme that resonated among frustrated higher education administrators.

Title IX, he contended, gave athletics higher significance than academics. How, Gregorian asked, "can the university be free to cut libraries and academic departments, but not athletics?" This was an

argument attractive to those disenchanted with the prominence of athletics within higher education. **Title IX** would inevitably reduce athletic opportunities for men, Gregorian claimed, deepening fears among alumni everywhere.

Gregorian told a congressional sub-committee that **Title IX** threatened to establish "an arbitrary numerical reference system." In the context of the nation's politics, with the Regents of the University of California moving to abolish affirmative action, the **courts** shifting ground on quotas and set-asides, and Congress considering reducing federal regulations, **Title IX** had political correctness written all over it.

(It is worth noting that Brown's peer institutions within the Ivy League have kept their distance. All seven of them took different routes to **Title IX** compliance. Cornell and Pennsylvania settled complaints out of **court**. Yale, Harvard, Columbia, and Dartmouth announced plans to improve the quality of women's sports. Princeton has been expanding facilities and opportunities for women at dramatic rates. The Ivy presidents refused Gregorian's appeal to file a separate Ivy League brief in support of Brown, electing to be more anonymous in the briefs of the national higher education organizations.)

During the summer of 1995, Brown made one last effort to accommodate Judge Pettine, presenting a plan to achieve 49 percent proportionality by eliminating positions on men's teams, creating junior varsity women's teams, and requiring minimum roster sizes for women's teams. Pettine rejected the plan and proposed that Brown make four women's teams university-sponsored varsity teams. Enjoining the university from dropping any women's teams, he agreed to postpone implementation of his order while Brown appealed to the First Circuit. Gregorian called it "an abuse of judicial discretion," a "quota standard," and vowed not to devote any additional funds to athletics. For Lisa Stern, it was disheartening: "We've been through so much...Brown is wasting its money."

HIGHER EDUCATION'S STAKE

As 1995 ended, the **case** of *Cohen v. Brown University* went to the First Circuit **Court** of Appeals in Boston. The various **court** briefs reiterated the same themes; there was little new to be said. The central issue--whether women's interest in athletic participation was sufficiently high to warrant proportionality as a legitimate test of compliance with **Title IX**--remained highly controversial. At a hearing on April 1, 1996, the three-judge appeals panel asked whether contact sports like football and wrestling should be excluded from **Title IX** consideration, wondered whether participation opportunities were the same as participation rates, and questioned whether Judge Pettine had gone too far in requiring a particular remedy for Brown. With a decision expected before the end of 1996, both sides claim they will appeal to the Supreme **Court**.

The Department of Education tried to clarify its position by issuing examples to guide institutions, rhetorically bending a little toward Brown, but essentially making little change. In a letter to OCR's chief, Gregorian once again sharply criticized the government's approach. Unsurprisingly, the Justice Department filed an amicus brief in support of the women athletes. In January 1996, a federal **court** judge found Louisiana State University in violation of **Title IX** and criticized it for continuing to assume that athletics was a male domain. However, the judge simultaneously rejected as unproven that women at LSU had proportionally the same interests and abilities in athletic participation as men.

For Brown, **Title IX** has been depleting. Its legal expenses have been high. If it loses the **case**, the judge could order it to pay the plaintiffs' fees, sending the total costs into the millions. Although no longer the "hot" issue it once was, **Title IX** still heats emotions and causes tensions. As the executive editor of the *Brown Daily Herald* put it: "The **case** has dragged on for so long that it no longer affects everyone on a daily basis. But it's becoming a fight between men's and women's athletics." Male athletes fear that their teams will be cut because of **Title IX**. Worst of all, a great university's energies have been expended on what it considers a minor matter--intercollegiate athletics.

Most of higher education has adopted Brown's view of **Title IX** as anti-discrimination legislation gone berserk. The tendency, as noted before, is to view **Title IX** as a series of threats to institutional autonomy, athletic budgets, and male athletics. **Title IX** battles are thus quickly framed in terms of these threats; the issue of equal conditions and opportunities for women athletes is diminished or lost.

Higher education has especially focused on the threat to its autonomy. Colleges and universities today face greater outside scrutiny than they did just a few decades ago: increased governmental and judicial regulations, the politicization of affirmative action, political correctness, athletic scandals, and shrinking federal and state budgetary allotments. Pressed by a public quizzical about accountability and costs, attacked by critics, even satirized in a best-selling novel (Jane Smiley's *Moo*), universities and colleges find it increasingly difficult to find relatively safe harbors. Given this critical, sometimes hostile, environment, many in higher education have had enough. They may want more government money, but they do not want "outsiders" telling them what to do.

A second threat is the need to increase athletic expenditures at a time of cutbacks and increased scrutiny. **Title IX's** emergence as a national issue comes at a troubling time for intercollegiate athletics and higher education. Under the auspices of the Knight Commission and the NCAA, university presidents have haltingly begun to assert oversight of their athletic departments, which on many campuses exist as autonomous domains.

In addition, at the same time that budgetary constraints have reduced academic programs, **Title IX** increases pressures to spend more on women's sports. Higher education is thus caught in a complex dilemma. It would like to spend less on athletics, but greater equity and the expansion of women's sports are likely to require increases in athletic expenditures. The choices seem to require cutting men's sports while seeking more funds from external sources such as television and corporate sponsorships, thereby giving athletic departments even more power within the university.

Title IX also threatens the privileged male culture of athletics by challenging assumptions that activities, money, and fame belong to men. Through **Title IX**, many women have concluded that they have the right to expect equal treatment in athletics. Assumptions of equality--when they challenge a privileged world--inevitably create angst and anger. Universities where discrimination against women athletes is substantially greater than at Brown find it exceedingly difficult to state that women athletes are as important as men. Threats to football, men's basketball, ice hockey, and wrestling can elicit support for higher education from the same public and political leaders who are simultaneously critical of it. To the big athletic schools, **Title IX** can seem like a challenge to bowl games, March Madness, and alumni enthusiasm.

TITLE IX AS OPPORTUNITY

Viewing **Title IX** as a series of threats has taken attention from the simple nature of the mandate: do not discriminate by gender in an athletic program; provide women athletes with the same things as men. Instead of threats, higher education might view **Title IX** as presenting opportunities: the chance to advance women; the potential for presidents and boards to have greater oversight of athletic budgets; the opportunity for higher education to embrace athletics as part of its educational responsibilities.

Title IX, as Megan Hull put it, is "a law with great intentions," but not much muscle. Because universities and colleges have been so resistant to equalizing conditions and opportunities for women athletes, women have had to file complaints and increase pressure, going beyond what most would have preferred. Their goal is simple: treat us equally. They are not hostile to men's sports; they are, after all, athletes. They are frequently surprised and frustrated when their goals are phrased as opposition to men's sports. As Hull noted: "Cutting men's teams was never our goal." Lisa Stern echoed this point: "I don't begrudge the men their opportunities; women should have the same ones."

It may be instructive to consider **Title IX** in light of how higher education has been equalizing opportunities in the classroom, enabling institutions to learn about and to teach their students what opportunity means. Obviously, there is disagreement over how many women want to play intercollegiate athletics. One view is "if you build it, they will play," a Field of Dreams notion that if you provide opportunities, women athletes will appear. The opposite view is that more men than women want to play sports; for the foreseeable future offering men and women the same number of sports opportunities will still lead to disproportionate rates of participation. But as in other areas of opportunity, the test of interest and ability will come only when institutions undertake gender-comparable athletic recruiting and

scholarship aid, provide for all athletes similar academic tutorial programs and equally strong coaching, and build their women's programs over a number of years. Just announcing that places are available on women's teams is probably not enough. In any event, by reducing the focus on the threatening aspects of **Title IX**, equal opportunity can be debated, allowing students to discuss and learn--activities presumably at the heart of higher education.

Given that college athletic teams represent the university but are not controlled by the university administration, **Title IX** also offers a golden opportunity to address the chronic corruption of college sports. Some of this is already happening on campuses through greater attention to athletic department budgets. One outcome of the events at Brown is that the administration and the athletic department have a considerably better understanding of how they spend their sports money. **Title IX's** enforcement is an incentive to undertake such a review, including a hard look at the private slush funds set up by alumni groups to support their coaches and teams.

Similarly, the debate over **Title IX** provides some insight into the growing commercialization of college sports. The trend toward selling advertisements and showing corporate logos whenever possible predates the serious enforcement of **Title IX**, but to the extent that gender equity will require greater expenditures, it is also likely to further commercialize college sports. The tendency is to justify the process because of **Title IX's** requirements, making these requirements both villain and hero, depending on how one views the search for television and corporate revenues. Although it is unfair to make **Title IX** so central to commercialization, the reality suggests that **Title IX** can be used to open discussion about how far to privatize college sports.

Perhaps the greatest opportunity **Title IX** provides is for the discussion of the relationship between athletics and education. This is the unspoken issue of **Title IX**: the isolation of athletic programs from the educational responsibilities of colleges and universities. **Title IX** battles have unfortunately been about everything but education. Rather than focusing on whether **Title IX** will force football teams to be smaller in order to equalize participation rates, conversations about **Title IX** need to be joined to discussions about student athletes' academic preparation, graduation rates, and improved learning on campus. There is some evidence that women who play sports are more likely to graduate high school. There are also hints that the discipline athletes bring to the playing fields can be converted into more disciplined approaches to learning. These insights need to be tapped.

Reducing **Title IX** to a fight between men and women or between federal bureaucrats and higher education over-looks the legitimate desires of women athletes to be treated equally. It also undermines higher education's capacity to look at athletic programs as part of its educational responsibilities. In its defensive support of Brown, higher education is overestimating the threats and missing the opportunities. That may be the lesson higher education is neglecting in its attack on **Title IX**.

GRAPHIC: Other

IAC-NUMBER: IAC 18603196

IAC-CLASS: Magazine

LANGUAGE: ENGLISH

LOAD-DATE: September 24, 1996

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912 F.Supp. 892

106 Ed. Law Rep. 1060

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Beth PEDERSON, et al.

v.

LOUISIANA STATE UNIVERSITY, et al.

No. CV94-247-A-M1.

United States District Court, M.D. Louisiana.

Jan. 12, 1996.

Female students brought Title IX class action against state university seeking to force university to field intercollegiate women's fast pitch softball and soccer teams. The District Court, Doherty, J., held that: (1) students lacked standing to bring unequal treatment claims; (2) students lacked standing to bring unequal accommodation claim regarding soccer; (3) students had standing to bring unequal accommodation claim regarding fast pitch softball; (4) university violated Title IX by not providing fast pitch softball team for women; and (5) students could recover attorney fees for certain discovery violations.

Ordered accordingly.

[1] FEDERAL COURTS k12.1

170Bk12.1

Federal judicial power may be asserted only to resolve cases and controversies. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[2] FEDERAL CIVIL PROCEDURE k103.2

170Ak103.2

To establish standing under federal courts' power to adjudicate cases or controversies, plaintiff must demonstrate: (1) that she personally has suffered some actual or threatened injury as result of putatively illegal conduct of defendant; (2) that injury fairly can be traced to challenged action; and (3) that injury is likely to be redressed by favorable decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[2] FEDERAL CIVIL PROCEDURE k103.3

170Ak103.3

To establish standing under federal courts' power to

adjudicate cases or controversies, plaintiff must demonstrate: (1) that she personally has suffered some actual or threatened injury as result of putatively illegal conduct of defendant; (2) that injury fairly can be traced to challenged action; and (3) that injury is likely to be redressed by favorable decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[3] FEDERAL COURTS k12.1

170Bk12.1

In determining whether jurisdiction may be asserted under federal courts' power to adjudicate cases and controversies, court should consider three prudential concerns: (1) whether plaintiff's complaint falls within zone of interests protected by statute or constitutional provision at issue; (2) whether complaint raises abstract questions amounting to generalized grievances which are more appropriately resolved by legislative branches; and (3) whether plaintiff is asserting his or her own legal rights and interests rather than legal rights and interests of third parties. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[4] FEDERAL CIVIL PROCEDURE k103.2

170Ak103.2

Irreducible constitutional minimum of standing contains three elements: (1) plaintiff must have suffered injury in fact, i.e., invasion of legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) there must be causal connection between injury and conduct complained of; and (3) it must be likely, as opposed to merely speculative, that injury will be redressed by favorable decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[4] FEDERAL CIVIL PROCEDURE k103.3

170Ak103.3

Irreducible constitutional minimum of standing contains three elements: (1) plaintiff must have suffered injury in fact, i.e., invasion of legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) there must be causal connection between injury and conduct complained of; and (3) it must be likely, as opposed to merely speculative, that

injury will be redressed by favorable decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[5] FEDERAL CIVIL PROCEDURE k103.4
170Ak103.4

Individual injury requirement for establishing standing under Article III is not met by alleging that injury has been suffered by other, unidentified members of class to which plaintiff belongs and which she purports to represent; named plaintiff in class action who cannot establish requisite case or controversy between herself and defendants cannot seek relief for herself or any other member of class. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[5] FEDERAL CIVIL PROCEDURE k164
170Ak164

Individual injury requirement for establishing standing under Article III is not met by alleging that injury has been suffered by other, unidentified members of class to which plaintiff belongs and which she purports to represent; named plaintiff in class action who cannot establish requisite case or controversy between herself and defendants cannot seek relief for herself or any other member of class. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[6] FEDERAL CIVIL PROCEDURE k103.2
170Ak103.2

To establish standing under Article III, complaining party must show that she is within that class of persons who will be concretely affected; plaintiff who has been subject to injurious conduct of one kind does not possess, by virtue of that injury, necessary stake in litigating conduct of another kind, although similar, to which she has not been subject. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[7] FEDERAL CIVIL PROCEDURE k103.2
170Ak103.2

Standing must exist as matter of fact, not merely upon allegation and even where standing is determined to exist upon allegations, courts must ensure at trial that those allegations have sufficient merit to justify continued jurisdiction over case. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[8] CIVIL RIGHTS k201
78k201

Allegations of generalized grievance as to manner in which "women at LSU were treated" did not grant female student's requisite connexity and personal injury required for standing under Article III, in Title

IX action against university. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[9] CIVIL RIGHTS k201
78k201

Female students lacked standing to bring Title IX claim of unequal treatment against university due to university's treatment of its female varsity athletes; plaintiffs personally suffered no injury or threatened injury, plaintiffs' alleged inability to participate in intercollegiate varsity level in their chosen sport was result of ineffective accommodation of females, rather than unequal treatment vis-a-vis male athletes, and plaintiffs neither were nor would be intercollegiate varsity athletes. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[10] CIVIL RIGHTS k128
78k128

Title IX did not require state university to provide any athletic opportunity for any of its students, however, once university chose to provide athletic opportunities for certain of its students, it was then required to provide equal athletic opportunity for both sexes and not exclude either group from participation on account of sex. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[11] CIVIL RIGHTS k128
78k128

To support Title IX claim of failure to provide equal accommodation in athletics, plaintiff must show existence of interest to participate in athletics and existence of ability to participate in athletics; opportunity guaranteed by Title IX is possibility of participation rather than guarantee of participation. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[12] ACTION k1
13k1

Right to bring cause of action is distinct from right to obtain specific remedy.

[13] CIVIL RIGHTS k201
78k201

Even if female plaintiffs would not make cut to participate in fast pitch softball, plaintiffs had standing to bring Title IX action against university for failure to provide equal opportunities to participate in athletics; plaintiffs established that sufficient interest and ability existed among female students at university to field fast pitch softball team and university provided opportunity for men to participate

in varsity baseball but provided no similar opportunity for women. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[14] CIVIL RIGHTS k128

78k128

Even if university generally provided greater athletic opportunities for males than female students, female students who wanted to play intercollegiate varsity soccer failed to establish that they were denied opportunities available to men, and thus could not bring Title IX action for unequal accommodation of female athletes, where university did not provide intercollegiate varsity soccer team for men. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[15] CIVIL RIGHTS k128

78k128

University cannot prove its compliance with Title IX merely by showing that males and females are represented in athletics in same proportion as found in general student population and are given numerically proportionate opportunity to participate in advanced competition. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[16] STATUTES k219(1)

361k219(1)

Court must grant great deference to administrative agency especially where agency is specifically required by Congress to promulgate interpretative regulations.

[17] CIVIL RIGHTS k128

78k128

Title IX does not mandate equal numbers of participants in college sports, rather it prohibits exclusion based on sex and requires equal opportunity to participate for both sexes. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[18] CIVIL RIGHTS k128

78k128

In determining whether state university violated Title IX by subjecting female students to discrimination based on sex, court would look to whether its policies were discriminatory in language or effect, and whether substantial and unjustified disparities existed within program, either as a whole or within individual segments, between opportunities afforded male and female students such as to deny equal athletic opportunity. Education Amendments of 1972, § 901

et seq., 20 U.S.C.A. § 1681 et seq.

[19] CIVIL RIGHTS k128

78k128

University can determine interests and abilities of its female students, for purposes of complying with Title IX, in variety of ways, including, but not limited to: (1) requests by students that sports be added; (2) requests that existing club sport be elevated; (3) participation levels in club or intramural sports; (4) interviews with students, admitted students, coaches, administrators or others regarding interest in particular sport; (5) results of questionnaires of students and admitted students regarding interest in particular sports; and (6) participation levels in interscholastic sports by admitted students. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[20] CIVIL RIGHTS k128

78k128

Despite state university's contention that it had recently added two additional intercollegiate varsity women's sports, university did not demonstrate history and continuing practice of expanding athletic opportunities for its female student athletes nor adequate plan to redress its violations, as would avoid finding of noncompliance with Title IX; university had not yet added one of those sports and the other was operating under considerable handicaps demonstrating inadequate commitment to team. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[21] CIVIL RIGHTS k128

78k128

Educational institution which is proved not to be effectively accommodating interests and abilities of underrepresented sex but is able to demonstrate history and continuing practice of program expansion demonstrably responsive to developing interests and abilities of underrepresented sex may be found in compliance with Title IX. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[22] ACTION k3

13k3

When Congress enacts legislation pursuant to its Spending Power, placing compliance requirements on states and entities receiving federal funds, court will presume that Congress does not thereby intend to create private right of action entitling citizens to recover monetary damages for noncompliance with

statutory requirements, absent showing that noncompliance is intentional; this presumption may be overcome by clear declaration by Congress to contrary. U.S.C.A. Const. Art. I, § 8, cl. 1.

[23] CIVIL RIGHTS k271
78k271

Monetary damages are not recoverable under Title IX, absent finding of intentional discrimination. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[24] CIVIL RIGHTS k293
78k293

Notwithstanding that university was in violation of Title IX, female students could not recover attorney fees in Title IX action, where violations were not intentional but rather result of arrogant ignorance, confusion regarding practical requirements of law and outdated view of women and athletics which created resistance to change. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[25] CIVIL RIGHTS k128
78k128

State university did not have in place adequate plan for remedying Title IX violations within reasonable period of time, as would avoid finding that they were not in compliance; university had only verbal commitments, supported by vague intentions, resulting in erratic, random action, and no cohesive structured plan designed to encompass complexity of problem or to institute method to identify interests and abilities within male and female student populations existed. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

[26] FEDERAL CIVIL PROCEDURE k172
170Ak172

Movants have the burden of demonstrating propriety of class certification. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[27] FEDERAL CIVIL PROCEDURE k162
170Ak162

District court has wide discretion in deciding whether to certify proposed class. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[28] FEDERAL CIVIL PROCEDURE k161
170Ak161

Efficiency and economy of litigation is principal purpose underlying Rule 23 certification of class.

Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[29] CIVIL RIGHTS k296
78k296

To obtain attorney fees as prevailing party in § 1988 civil rights litigation, plaintiff must obtain enforceable judgment against defendant from whom fees are sought or comparable relief through consent decree or settlement; whatever relief plaintiff secures must directly benefit him at time of judgment or settlement and, of itself, moral satisfaction that results from any favorable statement of law cannot bestow prevailing party status. 42 U.S.C.A. § 1988.

[30] CIVIL RIGHTS k296
78k296

Female students who sued university for violating Title IX were "prevailing parties" entitled to recover attorney fees, where students would be granted opportunity to try out for newly-created intercollegiate varsity fast pitch softball teams. 42 U.S.C.A. § 1988.

[31] CIVIL RIGHTS k296
78k296

Degree of change does not control award of attorney fees to successful civil rights litigant, rather it impacts amount of attorney fees awarded. 42 U.S.C.A. § 1988.

[32] CIVIL RIGHTS k302
78k302

Inquiry for awarding attorney fees to successful civil rights litigant does not end with determination that plaintiffs are prevailing parties; having determined that litigation materially altered legal relationship between parties, determination must be made as to degree of plaintiff's overall success which is most critical factor in determining reasonableness of fee award. 42 U.S.C.A. § 1988.

[33] CIVIL RIGHTS k302
78k302

Where recovery of private damages is purpose of civil rights litigation, district court, in fixing fees, is obligated to give primary consideration to amount of damages awarded as compared to amount sought, since such comparison promotes court's central responsibility to make assessment of what is reasonable fee under circumstances. 42 U.S.C.A. § 1988.

[34] CIVIL RIGHTS k271

78k271

Any damages awarded to successful civil rights litigant must always be designed to compensate injuries caused by constitutional deprivation; fee awards were not intended to produce windfalls to attorneys. 42 U.S.C.A. § 1988.

[34] CIVIL RIGHTS k292.1

78k292.1

Any damages awarded to successful civil rights litigant must always be designed to compensate injuries caused by constitutional deprivation; fee awards were not intended to produce windfalls to attorneys. 42 U.S.C.A. § 1988.

[35] CIVIL RIGHTS k302

78k302

In determining amount of attorney fees award to successful civil rights litigant, court should reduce hours claimed by plaintiffs' counsel to account for time expended on unsuccessful claims. 42 U.S.C.A. § 1988.

[36] CIVIL RIGHTS k302

78k302

In determining amount of attorney fees award to prevailing party in civil rights litigation, court should identify specific hours that should be eliminated or reduce award to account for limited success of plaintiffs. 42 U.S.C.A. § 1988.

[36] CIVIL RIGHTS k305

78k305

In determining amount of attorney fees award to prevailing party in civil rights litigation, court should identify specific hours that should be eliminated or reduce award to account for limited success of plaintiffs. 42 U.S.C.A. § 1988.

[37] FEDERAL CIVIL PROCEDURE k1278

170Ak1278

Awards against opposing party's counsel, for discovery violations, are penal in nature. 28 U.S.C.A. § 1927.

[38] FEDERAL CIVIL PROCEDURE k1278

170Ak1278

Statute awarding attorney fees for opposing counsel's discovery violations must be strictly construed so that legitimate zeal of attorney in representing her client is not dampened. 28 U.S.C.A. § 1927.

[39] FEDERAL CIVIL PROCEDURE k1278

170Ak1278

Awards for opposing counsel's discovery violations are authorized only against attorneys, not against parties, and district court must identify and demonstrate actual fees and costs which proscribed conduct has caused. 28 U.S.C.A. § 1927.

[40] FEDERAL CIVIL PROCEDURE k2757

170Ak2757

Federal courts' inherent powers, including their ability to fashion appropriate sanction for conduct which abuses judicial process, must be exercised with restraint and discretion.

[41] FEDERAL CIVIL PROCEDURE k2757

170Ak2757

Federal court's inherent power to fashion appropriate sanction for conduct which abuses judicial power is both broader and narrower than various statutes and rules which provide for sanctions; court's inherent power extends to full range of litigation abuses but may only be used in cases of bad faith conduct or willful disobedience.

[42] FEDERAL CIVIL PROCEDURE k2757

170Ak2757

District court's findings regarding award of sanctions pursuant to its inherent power to fashion appropriate remedy for conduct which abuses judicial process should reflect the following factors: (1) conduct being punished or sought to be deterred by sanction; (2) expenses or costs caused by violation; (3) whether costs and expenses were reasonable, as opposed to self-imposed, mitigatable, or result of delay in seeking court intervention; and (4) whether award is least severe sanction adequate to achieve purpose of rule violated.

[42] FEDERAL CIVIL PROCEDURE k2810

170Ak2810

District court's findings regarding award of sanctions pursuant to its inherent power to fashion appropriate remedy for conduct which abuses judicial process should reflect the following factors: (1) conduct being punished or sought to be deterred by sanction; (2) expenses or costs caused by violation; (3) whether costs and expenses were reasonable, as opposed to self-imposed, mitigatable, or result of delay in seeking court intervention; and (4) whether award is least severe sanction adequate to achieve purpose of rule violated.

[43] FEDERAL CIVIL PROCEDURE k1272.1

170AK1272.1

Standard for discovery is not admissibility rather whether or not material could reasonably be anticipated to lead to discoverable material.

[44] FEDERAL CIVIL PROCEDURE k1636.1

170Ak1636.1

Sanctions were not warranted, by statute or under court's inherent power to fashion appropriate remedy for conduct which abuses judicial process, against university, for failure to provide documents responsive to discovery request in Title IX action, where plaintiffs were not prejudiced by university's failure.

[45] FEDERAL CIVIL PROCEDURE k1636.1

170Ak1636.1

Although university's failure to turn over letter, in response to plaintiff's discovery request in Title IX action, was technical violation of its discovery obligation, no prejudice to plaintiffs resulted and thus no sanction was warranted, either by statute or under court's inherent power to fashion appropriate remedy for conduct which abuses judicial process, where letter was written and delivered by plaintiff herself.

[46] FEDERAL CIVIL PROCEDURE k1636.1

170Ak1636.1

Even if defendant failed to provide certain documents to plaintiffs within time for responding to plaintiff's first request for production of documents, no prejudice resulted and thus no sanction was warranted either by statute or under court's inherent power to fashion appropriate remedy for conduct which abuses judicial process where documents were delivered prior to plaintiff's second request for production of documents.

[47] FEDERAL CIVIL PROCEDURE k1636.1

170Ak1636.1

Defendant's counsel's failure to deliver documents pursuant to discovery request did not warrant levying sanctions either by statute or under court's inherent authority to fashion appropriate remedy for conduct which abuses judicial process, absent deliberate conduct. 28 U.S.C.A. § 1927; Fed.Rules Civ.Proc.Rule 26(g)(2), 28 U.S.C.A.

[48] FEDERAL CIVIL PROCEDURE k1636.1

170Ak1636.1

Sanctions against defendants for failure to deliver documents pursuant to discovery request would be unjust, and therefore would not be awarded either by

statute or under court's inherent authority to fashion appropriate remedy for conduct which abuses judicial process, where defendants were unaware that documents existed, and evidence of documents was not allowed into evidence upon plaintiffs' objection.

[49] FEDERAL CIVIL PROCEDURE k1637

170Ak1637

Although plaintiff eventually obtained documents, defendant's initial refusal to provide documents in response to discovery request warranted award of attorney fees in light of potential prejudice sustained by plaintiffs by having new and relevant information surface after plaintiffs had planned trial strategy. Fed.Rules Civ.Proc.Rules 16(f), 26(e), 28 U.S.C.A.

[50] FEDERAL CIVIL PROCEDURE k1278

170Ak1278

Attorneys and parties should not be allowed to fall back on excuse of inadvertence, poor judgment or mistake as to law to escape their obligations under discovery.

***897** Keith B. Nordyke, Nordyke & Denlinger, Baton Rouge, LA, Thomas L. Krebs, Ritchie & Rediker, P.C., Birmingham, AL, R. Lawrence Ashe, Jr., Nancy E. Ryan, Lynne H. Rambo, Paul, Hastings, Janofsky & Walker, Atlanta, GA, for plaintiff.

Gerald Michael Pharis, William Shelby McKenzie, David Mark Bienvenu, Jr., Taylor, Porter, Brooks & Phillips, Baton Rouge, LA, for defendant.

OPINION

DOHERTY, District Judge.

PROCEDURAL HISTORY

Plaintiffs' initial complaint entitled "Complaint-Class Action" was filed in the Middle District of Louisiana on March 31, 1994, by Beth Pederson, Lisa Ollar and Samantha Clark, hereinafter referred to as ("Pederson" or "Pederson plaintiffs"), each individually and "on behalf of all others similarly situated," seeking "declaratory, injunctive and monetary relief" against Louisiana State University, William E. Davis, individually and in his official capacity as Chancellor of Louisiana State University, Joe Dean, individually and in his official capacity as Athletic Director of Louisiana State University, Elaine D. Abell, Clarence L. Barney, Milton C. Chapman, Elenora A. Cawthon, David Conroy, Charles V. Cusimano, Gordon E. Dore, Janice M.

Foster, Jimmy A. Lalonde, Jr., Joseph Lesage, Jr., Rolfe McCollister, Jr., Roger H. Ogden, Nicholas Smith, Jr., Joseph L. Waitz, Charles S. Weems, III, John R. Williams, Milton J. Womack, each in their official capacity as members of the Board of Supervisors ("LSU"). The equitable relief requested in the complaint included an affirmative injunction by this Court ordering LSU to field an intercollegiate varsity women's fast pitch softball team in 1995 and a intercollegiate varsity women's soccer team in 1994. As the basis for their claim, plaintiffs specifically alleged interest and skill in soccer; however, none of the three asserted interest or ability in fast pitch softball or any other sport. Defendants answered on May 16, 1994, denying plaintiffs' allegations and contesting plaintiffs' standing to assert an action or class action requesting remedy as to women's fast pitch softball.

On May 16, 1994, plaintiffs filed a Motion for Preliminary Injunction, a Motion for Class Certification, and requested expedited hearing. The Motion for Preliminary Injunction sought to compel LSU to institute intercollegiate varsity soccer in the Fall of 1994 and intercollegiate varsity fast pitch softball in the Fall of 1995. Judge Parker, then presiding, denied plaintiffs' request for expedited hearing on May 20, 1994 and both motions were scheduled for hearing on June 17, 1994 in the Middle District of Louisiana. Thereafter, Judges Parker and Polozola, the two sitting judges of the Middle District, recused and the case was referred to Judge Politz, the Chief Judge of the Fifth Circuit, for reassignment. On June 28, 1994, the suit was reassigned to Judge Rebecca F. Doherty of the Western District; however, the case remains filed within the Middle District of Louisiana. This Court responded to plaintiffs' request for "expeditious" hearing on the Preliminary Injunction and class certification by holding a telephone status conference with all counsel on June 29, 1994. As a result of those discussions, the hearing for Preliminary Injunction was set for July 28 and 29, 1994 and a scheduling order was issued. During the telephone conference, both parties agreed to a bifurcated trial; damages to be tried separately from the case on the merits. [FN1]

FN1. Counsel for plaintiffs and defendants made additional filings which prompted a telephone status conference on July 1, 1994, wherein it was determined plaintiffs' claim was much broader than previously disclosed

and, accordingly, the hearing for Preliminary Injunction was reset tentatively for August 15, 1994 with a backup date as a preferential fixing for October 17, 1994. The request for class certification was fixed for hearing on November 15, 1994.

On September 19, 1994, defendants filed a Motion for Summary Judgment, urging the dismissal of plaintiffs' Motion for Preliminary Injunction alleging plaintiffs lacked standing to seek the requested mandatory Preliminary *898 Injunction affecting fast pitch softball. [FN2] Defendants argued none of the named plaintiffs had desire to participate in fast pitch softball, and therefore, LSU's actions concerning fast pitch softball had no impact on those plaintiffs and accordingly plaintiffs lacked standing to ask this Court to force LSU to change its decisions concerning fast pitch softball.

FN2. All counsel agreed to stipulate that plaintiffs' request for Preliminary Injunction as to instatement of women's soccer in the Fall of 1994 was moot; consequently, this Court dismissed same as moot. Further, the Court subsequently held a pre-trial conference on September 28, 1994 in anticipation of the hearing on the remaining issue as to the preliminary injunction and extensively discussed with counsel defendant's Motion for Summary Judgment based on standing and issued a new Scheduling Order for the Preliminary Injunction hearing and ordered the parties to comply with this Court's Pre-Trial Procedures Outline. The Court informed the parties that additional Scheduling Orders and dates would be given for the hearing on Class Certification scheduled for November 15, 1994 and for trial on the merits, once date was set.

After receipt of numerous memoranda both in support of and in opposition to defendants' Motion for Summary Judgment, on October 11, 1994 [FN3] via telephone conference, this Court issued a preliminary ruling as to defendants' motion indicating its intent to grant defendants' motion on different grounds and to deny plaintiffs' request for Preliminary Injunction ordering LSU to act upon fast pitch softball. [FN4] Formal written reasons were issued on October 28, 1994 dismissing plaintiffs' Motion for Preliminary Injunction. [FN5]

FN3. Document # 79--Record of Telephone Status Conference.

FN4. Document # 88--Memorandum Ruling, October 28, 1994. However, the Court did not base its grant of defendants' Motion for Summary Judgment on the issue of standing, as argued by defendants, rather denial of plaintiffs' Motion for Preliminary Injunction was granted on the basis the relief requested by the plaintiffs, i.e. the institution of intercollegiate varsity softball in the Fall of 1995 rather than the Fall of 1996, was not relief that the Court would grant by way of Title IX.

FN5. Plaintiffs filed a Notice of Appeal with regard to the denial of Preliminary Injunction, which is presently pending before the Fifth Circuit Court of Appeals.

After denial of the Pederson preliminary injunction, Cindy and Karla Pineda sought to introduce their claims into the Pederson suit via an "intervention of right." This Court denied the request to intervene as procedurally improper as it contained new, distinct and expanded claims from those made by Pederson and invited plaintiffs' counsel to properly join the Pinedas and their new claims as party plaintiffs in the Pederson suit. [FN6] Plaintiffs did not do so.

FN6. Document # 94--Memorandum Ruling, November 15, 1994.

At a December 1, 1994 status conference, [FN7] the Pederson plaintiffs informed the Court that their Motion for Class Certification was couched under only Federal Rules of Civil Procedure 23(b)(2), seeking certification of an injunctive class. Monetary damages were sought only by the named plaintiffs individually; plaintiffs did not seek certification of a class pursuant to Federal Rule of Civil Procedure 23(b)(3) or monetary damages for the class. [FN8]

FN7. Document # 107--Transcript of Status Conference held December 1, 1994.

The pre-trial conference for the hearing on class certification on December 1, 1994 was converted to a status conference, wherein the parties requested they submit the issue of class certification on briefs with supporting evidence, thus foregoing the evidentiary hearing.

FN8. Plaintiffs indicated they may wish later to seek such relief; however, the Court has not been advised of any such change in position.

At the December 1, 1994 conference the Court bifurcated the trial into Stage One on the equitable relief sought by plaintiffs and Stage Two on the issue of monetary damages. Stage One was set for October 10 through 27, 1995 involving those issues within the request for declaratory and/or injunctive relief as to the named plaintiffs and any class that might be certified by the Court. [FN9] Stage Two would be heard after Stage One and would address the damage claims made *899 by the Pederson plaintiffs. [FN10]

FN9. Document # 112--On December 16, 1994 the Court issued a Scheduling Order for trial on Stage One beginning on October 10, 1995.

FN10. The Court also ruled, for reasons contained within the record, to limit plaintiffs' claims, as follows:

(1) The Court GRANTED defendants' Motion to Dismiss all individuals named as defendants to plaintiffs' Title IX claim, based on jurisprudence which limited a Title IX action to suit solely against the academic institution and did not allow suit against an individual. (This ruling was subsequently modified by this Court's ruling of September 14, 1995). See note 17.

(2) The Court further DISMISSED the 42 U.S.C. §1983 claims for damages against the defendants named in their official capacities based on the Eleventh Amendment of the United States Constitution. (This ruling was subsequently modified by this Court's ruling of September 14, 1995). See note 17.

(3) The Court DENIED defendants' Motion to Dismiss plaintiffs' claims for damages on the basis that plaintiffs, as soccer players, lacked the requisite standing to pursue any claims related to the implementation decisions of LSU regarding women's fast-pitch softball; and

(4) The Court DEFERRED defendants' Motion to Dismiss the 42 U.S.C. § 1983 claims for damages made against William E. Davis and Joe Dean in their individual capacities on the basis of qualified immunity. (This ruling was subsequently

modified by this Court's ruling of September 14, 1995). See note 17.
Document # 107/108--Transcript/Minute Entry December 1, 1994 Status Conference.

On January 3, 1995 Cindy and Karla Pineda filed suit in the Eastern District of Louisiana, requesting declaratory and injunctive relief against LSU and, in particular, a preliminary injunction as to fast pitch softball. Defendants moved to transfer the case to the Middle District and to consolidate the Pineda suit with the pending Pederson suit. Plaintiffs opposed the transfer of the case to the Middle District and initially opposed the proposed consolidation with the Pederson suit. [FN11] Transfer was granted on February 22, 1995 and a Motion to Consolidate was presented to and signed by Judge Polozola on March 30, 1995. [FN12]

FN11. Document # 116--Minute Entry, January 17, 1995, concerning filing of Pineda. This Court issued a Minute Entry on January 17, 1995 indicating it would stay its ruling on class certification in Pederson pending disposition by the Eastern District of the Motion to Transfer in Pineda. Defendants requested a status conference; the Court indicated it would set a status conference in Pederson once the Pineda motion to transfer had been decided by the Eastern District.

FN12. Consequently, this Court ordered the parties to craft a modified scheduling order to address how the consolidation would effect the Pederson Scheduling Order. The parties submitted a complimentary copy of the proposed Joint Response to Consolidation and Addendum to the Scheduling Order directly to the Court in chambers, however the original was not provided to the Court for signing until May 25, 1995.

Paragraph 4 of the Addendum Scheduling Order states:

"The parties stipulate that the plaintiffs' Motion for Class Certification remains pending in the Pederson Action, and now applies to Cindy and Karla Pineda as well as the Pederson Action Plaintiffs. Plaintiffs will supplement the Motion for Class Certification, and the brief in support thereof, to the extent that the addition of the

Pinedas as proposed class representatives has an effect thereon, within ten (10) days of approval and entry of this Joint Response to Consolidation and Addendum to Scheduling Order."

Paragraph 5 states:

"Defendants will respond to the supplemental class certification filing by Plaintiffs, and include therein their outstanding response to Plaintiffs' arguments that a class is needed, within two weeks after service of Plaintiffs' supplemental brief, or by May 12, 1995, whichever is later."

This Court received defendants' supplemental response on June 21, 1995.

The Court ruled on July 5, 1995 [FN13] denying the Pinedas' request for a preliminary injunction requesting: (a) institution of intercollegiate varsity fast pitch softball in the Fall of 1995, (b) requesting LSU present a plan for compliance with Title IX, and (c) freezing current expenditures and administrative support for male varsity sports at Louisiana State University. Full written reasons for the denial are contained within this Court's October 28, 1994 ruling.

FN13. Document # 145--Memorandum Ruling Denying Pinedas' Motion for Preliminary Injunction regarding fast-pitch softball.

On September 14, 1995, this Court issued several rulings, one Memorandum Ruling delineating the claims which remained before the Court at that juncture. [FN14]

FN14. This Court ruled on September 14, 1995, via Memorandum Ruling and Amended Order of September 18, 1995, as follows:

(1) This Court granted plaintiffs' Motion to Reconsider its December 7, 1994 ruling dismissing Joe Dean and William Davis individually pursuant to Title IX and reinstated suit individually against Joe Dean and William Davis pursuant to Title IX.

(2) This Court overruled its June 23, 1995 judgment denying defendants' Motion for Summary Judgment seeking to dismiss plaintiffs' claims pursuant to 42 U.S.C. § 1983 for monetary damages against Joe Dean and Williams Davis in their individual capacities. This Court converted defendants'

Motion for Reconsideration of June 23, 1995 Denial of Summary Judgment to a Motion for Reconsideration of Qualified Immunity and granted same, dismissing plaintiffs' claims pursuant to Title IX against Dean and Davis individually for damages.

(3) The Court granted defendants' Motion to Dismiss plaintiffs' claims brought pursuant to 42 U.S.C. § 1983 claims, finding they have been subsumed into plaintiffs' Title IX claim.

(4) The Court granted defendants' Motion for Partial Summary Judgment, dismissing the following.

(a) All claims of all plaintiffs for declaratory or injunctive relief with respect to the existing women's varsity sports of basketball, volleyball, track, tennis, golf, gymnastics and swimming; (b) All other claims of all plaintiffs for declaratory and injunctive relief, except:

(i) Claims of Beth Pederson, Samantha Clark and Lisa Oller for declaratory judgment that defendants have violated Title IX by failing to accommodate plaintiffs' interests and abilities in varsity intercollegiate soccer, and, if such violation is found, the claims of Beth Pederson for injunctive relief to remedy such violation; and

(ii) The claims of Karla Pineda and Cindy Pineda for declaratory judgment that defendants have violated Title IX by failing to accommodate plaintiffs' interests and abilities in varsity inter-collegiate fast pitch softball, and, if such violation is found, the claims of Karla Pineda and Cindy Pineda for injunctive relief to remedy such violation.

***900** In a separate Memorandum Ruling, this Court provisionally certified the following class.

Those female students enrolled at LSU since 1993 and any time thereafter who have sought or seek to participate in varsity intercollegiate athletics at LSU but who are or were not allowed such participation due to LSU's failure to field teams in said female varsity athletics. [FN15]

FN15. Document # 197--Memorandum Ruling on class certification.

This Court provisionally certified the class, giving plaintiffs an opportunity to bolster their argument and evidence that sufficient numerosity existed. The Court further granted counsel for plaintiffs thirty days

from the close of testimony in Stage One to submit the additional support of their claim as to the numerosity requirement. [FN16]

FN16. Document # 207--Memorandum of Pre-Trial Conference, September 14, 1995. Prior to decision on the merits, this Court denied plaintiffs' request for class certification. Full reasons are found in this Court's Memorandum Ruling dated January 11, 1996.

Stage One was tried before this Court beginning October 10, 1995, with closing arguments held on November 8, 1995. At trial, plaintiffs' remaining claims included individual plaintiffs and class claims for declaratory and/or injunctive relief against Joe Dean and William Davis individually and in their official capacities and the Louisiana State Board of Supervisors [FN17] based on the only remaining ***901** issue: LSU's alleged failure to effectively accommodate its female students in violation of Title IX. [FN18] Plaintiffs asked for a variety of specific injunctive relief, the particulars of which continued to change up to and through the trial on the merits, and for a declaration that LSU was in violation of Title IX.

FN17. Document # 182--Transcript of December 1, 1994 conference.

Document # 175--Motion to Reconsider December 7, 1994 Ruling That Individuals Cannot be Sued Under Title IX.

Document # 199--Memorandum Ruling, September 14, 1995.

Document # 201--Memorandum Ruling, September 14, 1995.

Document # 206--Amended Order, September 18, 1995.

Plaintiffs initially sued Louisiana State University, William E. Davis, Chancellor of Louisiana State University, both individually and in his official capacity, Joe Dean, Athletic Director of Louisiana State University, both officially and in his individual capacity, and listed the then members of the Board of Supervisors of LSU and named them in their official capacity as members of the Louisiana State Board of Supervisors.

After an aggressive motion practice, this Court ultimately vacated and amended previous rulings as follows: (See note 10)

1. The Court dismissed plaintiffs' 42 U.S.C. § 1983 claims, based on Fourteenth Amendment Equal Protection for declaratory, injunctive and monetary relief, against all parties in both their individual and official capacities, holding that said claims were more properly brought pursuant to Title IX. This Court had previously dismissed plaintiffs' § 1983 claims for damages against defendants named in their official capacities based on the Eleventh Amendment of the United States Constitution. The Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 abrogated the state's Eleventh Amendment immunity under Title IX.

2. The Court granted plaintiffs' Motion to Reconsider its previous ruling that individuals could not be sued under Title IX (See note 10) and held that individuals exercising control could be sued individually pursuant to Title IX for damages effectively reinstating plaintiffs' Title IX claims against Joe Dean and William Davis, as requested by plaintiffs. The Court, however, subsequently dismissed plaintiffs' Title IX claims against Joe Dean and William Davis individually for damages holding that they were entitled to qualified immunity. Dean and Davis, however, remained in the suit individually and in their official capacities as to declaratory and injunctive relief under Title IX.

3. The order vacating this Court's December 7, 1994 ruling to allow suit against individuals pursuant to Title IX, also impacted the named Board of Supervisors, who had been dismissed in their official capacities under the order vacated. Accordingly, as this Court has not been petitioned to alter their status, they remain as named defendants under Title IX; however, the Louisiana State Board of Supervisors, itself, rather than the individuals who make up the Board is the proper party defendant with authority to respond to any declaratory or injunctive relief granted.

Consequently, defendants in Stage One of trial pursuant to plaintiffs' Title IX claims for declaratory and injunctive relief included Joe Dean and William Davis, both individually and in their official capacities and the LSU Board of Supervisors. Plaintiffs' Title IX claims against the Louisiana Board of

Supervisors for monetary damages were to be heard, if necessary, in Stage Two of trial.

FN18. This Court ruled previously that plaintiffs had standing only to assert a claim for ineffective accommodation. This ruling was based on reasoning that plaintiffs who are not varsity athletes at Louisiana State University had no standing to raise what has been termed as the "treatment" issues, contained within 45 C.F.R. § 86.41(2-10). See Standing, *infra*.

FACTS

LSU has provided opportunity for its male students to participate in intercollegiate varsity athletics since the inception of football and men's baseball in 1893, and men's basketball in 1908. [FN19] Intercollegiate varsity athletic opportunity for its women athletes was provided in 1977 with the initiation of a women's sports program. [FN20] In 1979, women's fast pitch softball was added, but was dropped following the 1982-83 season with no credible reason given. No additional sports were added for either males or females until 1993 when the decision was made to add two intercollegiate varsity women's sports in the 1995 season, fast pitch softball and soccer. [FN21] Implementation of that decision was delayed in accordance with an agreement of the Southeastern Conference schools and requests by the Senior Women's Administrators of the Southeastern Conference. The agreement called for commencing competitive conference play in soccer in the Fall of 1995 and to begin implementation of softball in the Fall of 1996 with competitive conference play in the Spring of 1997.

FN19. Plaintiffs' Exhibit # 454--Football Media Guide; Plaintiffs' Exhibit # 480--Baseball Media Guide; and Plaintiffs' Exhibit # 467--Basketball Media Guide.

FN20. Plaintiffs' Exhibit # 558, Affidavit of Joe Dean dated June 30, 1994.

Men's Volleyball	1977
Women's Gymnastics	1977
Women's Basketball	1977
Women's Tennis	1977
Women's Swimming & Diving	1977
Women's Golf	1979
Women's Track & Field	1981
Women's Softball	1979

FN21. Men's wrestling and men's gymnastics were eliminated in the Spring and Summer of 1985. Plaintiffs' Exhibit 558--Affidavit of Joe Dean--June 30, 1994.

LSU hired a soccer coach, Miriam Hickey, in August of 1994 and began the process of obtaining facilities and athletes for play to begin in the Fall of 1995. Play at the intercollegiate varsity level began in 1995.

LSU hired a softball coach, Cathy Compton, effective June 1, 1995 and began the process of recruiting athletes and obtaining a facility to initiate play in the Fall off-season of 1996 and intercollegiate competition in the spring of 1997. Play has not yet begun. Neither facilities nor recruiting for either the softball or soccer teams is complete.

A full complement of scholarships for both soccer and softball, i.e., eleven each, have been allocated. However, presently only two *902 partial softball scholarships have been awarded to two potential team players. Also, less than the full complement of soccer scholarships has been awarded. How many scholarships to award, when to award them, and to whom the scholarships are awarded is within the discretion of the respective coaches.

Testimony by Assistant Athletic Director, Greg LaFleur, established that, as of 1993, LSU recognized there was sufficient interest and ability among women students on its campus for LSU to consider additional action by the Athletic Department. [FN22] Additional factual findings are made throughout this opinion and will not be repeated here.

FN22. Although there was some testimony that this recognition occurred as early as 1991, for present purposes it is sufficient for this Court to note it occurred no later than 1993.

STANDING

[1] Before this Court can address the merits of plaintiffs' claims, the Court must first visit plaintiffs' standing to bring their claims in view of the jurisdictional limitations imposed by Article III, Section 2 of the United States Constitution. Federal judicial power may be asserted only to resolve "cases and controversies." *Allen v. Wright*, 468 U.S. 737, 750-51, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). *Allen* and subsequent rulings by the Supreme Court hold that "the core component of standing is an essential and unchanging part of the case or controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Without standing, plaintiffs' claims cannot go forward. [FN23]

FN23. As noted above, plaintiffs have asserted claims individually as well as on behalf of a class. Standing must be established as to the individual claims of putative class representatives. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974).

I. Law

[2][3] In order to establish standing under Article III of the United States Constitution, a plaintiff must demonstrate:

[1] that [s]he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant ...

[2] that the injury "fairly can be traced to the challenged action" and

[3] [that the injury] "is likely to be redressed by a favorable decision."

Cramer v. Skinner, 931 F.2d 1020, 1024 (5th Cir.), cert. denied, 502 U.S. 907, 112 S.Ct. 298, 116

L.Ed.2d 242 (1991) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982)). In making a determination under this framework, "a court should consider three prudential concerns:

- 1) whether the plaintiff's complaint falls within the zone of interests protected by the statute or constitutional provision at issue;
- 2) whether the complaint raises abstract questions amounting to generalized grievances which are more appropriately resolved by the legislative branches; and
- 3) whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties."

Cramer, 931 F.2d at 1024-25 (citations omitted).

Standing was directly addressed in the recent United States Supreme Court decision of *United States v. Hays*, 515 U.S. 737, ---, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995). The Court in that Voting Rights Act case dismissed the claims of the appellees, finding they lacked standing to raise the issue. The Court reiterated that "the federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" [FN24]

FN24. *Hays*, 515 U.S. at ---, 115 S.Ct. at 2435.

[4] It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized, *903 and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of.... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by favorable decision." ... In light of these principles, we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power.... "[I]t is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' ... 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" [FN25]

FN25. *Id.* (citations omitted).

Hays was a Voting Rights Act case wherein the appellees did not live in the district that was the primary focus of the alleged racial gerrymandering. They did not otherwise demonstrate they personally had been subject to a racial classification. As such, the Court noted they lacked standing to raise their claim and rejected appellees' position that "anybody in the state has a claim." [FN26]

FN26. *Id.* at ---, 115 S.Ct. at 2436.

The Court required a demonstration of "individualized harm" before standing could be found and noted that unless evidence of such "individualized harm" were present the plaintiffs "would be asserting only a generalized grievance against governmental conduct of which he or she does not approve." [FN27] The *Hays* court noted that the appellees had pointed to no evidence tending to show that they had suffered injury. Although the appellees insisted they were challenging the underlying state act in its entirety and not the specific impact on the individual district in isolation, the Court found that to be "irrelevant."

FN27. *Id.*

The fact that Act 1 affects all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean--even if Act 1 inflicts race-based injury on some Louisiana voters--that every Louisiana voter has standing to challenge Act 1 as a racial classification. Only those citizens able to allege injury "as a direct result of having personally been denied equal treatment," may bring such a challenge, and citizens who do so carry the burden of proving their standing, as well as their case on the merits. [FN28]

FN28. *Id.* at ---, 115 S.Ct. at 2437.

The Court clearly required personal injury on the part of the claimants.

Although the Court addressed standing in the context of a Voting Rights Act and Equal Protection challenge, the standing analysis enunciated by the Court is independent of the context and applies equally to the matter before this Court. Merely because LSU's decisions concerning athletics and its female population affects some LSU women students, does not mean all LSU women students have standing

to bring a challenge to LSU's actions. Only those women able to allege injury "as a direct result of having personally been denied equal treatment, may bring such a challenge."

[5] In order to establish standing under Article III, a plaintiff must allege and show that she personally suffered injury. *Cramer, supra*. If she cannot show personal injury, no Article III case or controversy exists and a Federal Court is powerless to hear that grievance. The individual injury requirement is not met by alleging "that injury has been suffered by other, unidentified members of the class to which [the plaintiff] belong[s] and which she purports to represent." *Warth v. Seldin*, 422 U.S. 490, 502, 95 S.Ct. 2197, 2207, 45 L.Ed.2d 343 (1975). Accordingly, a named plaintiff in a class action who cannot establish the requisite case or controversy between herself and the defendants cannot seek relief for anyone ... not for herself, and not for any other member of the class. *O'Shea*, 414 U.S. at 494, 94 S.Ct. at 675.

[6] In addition to the need for personalized injury, the standing doctrine limits the scope of claims which may be asserted. Although some plaintiffs have established a case or controversy between themselves and the defendant on the basis of denial of effective *904 accommodation, as this Court finds below, this does not grant plaintiffs a carte blanche to assert all other claims they might wish and for which they have suffered no "palpable injury." The Supreme Court, when discussing the relationship between standing and a class action, stated it is not enough that the conduct of which the plaintiff complains will injure someone. [FN29] The complaining party must also show that she is within that class of persons who will be concretely affected. "Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which [s]he has not been subject." [FN30]

FN29. *O'Shea*, 414 U.S. at 494-495, 94 S.Ct. at 675-76 (citations omitted).

FN30. *Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 2783, 73 L.Ed.2d 534 (1982) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67, 92 S.Ct. 1965, 1968-69, 32 L.Ed.2d 627 (1972)) (emphasis added).

[7] Finally, the standing doctrine requires a finding

that standing exists as a matter of fact, not merely upon allegation. Even where standing is determined to exist upon allegations, courts are required to ensure at trial that those allegations have sufficient merit to justify continued jurisdiction over the case. "And when a case is proceeded to final judgment after a trial, as this case has, 'those facts (if controverted) must be "supported adequately by the evidence adduced at trial" to avoid dismissal on standing grounds.'" [FN31]

FN31. *Hays*, 515 U.S. at ----, 115 S.Ct. at 2435 (citations omitted).

II. Analysis

As is discussed in detail *infra*, Title IX and its jurisprudence clearly distinguish between, on the one hand, claims for unequal treatment of athletes based on sex ["treatment claims"] and, on the other hand, claims for ineffective accommodation of demands of female and male athletes, i.e., equality of opportunity to participate in athletics.

[8] This Court has had great difficulty identifying and, it seems, plaintiffs articulating the injury which forms the basis for plaintiffs' cause of action. Rather, allegations of a generalized grievance as to the manner in which "women at LSU were treated" have tended to predominate both the filings and the arguments made by plaintiffs. Such generalized allegations do not grant the requisite connexity and personal injury required for standing. This Court must examine the relationship of each plaintiff to LSU's actions, as well as the allegations and factual basis for the allegations made by each plaintiff, to determine if the requisite personal injury and connexity exists. Within this analysis, two separate and legally distinct factual scenarios exist.

A. Treatment

[9] All five plaintiffs asserted a claim for unequal treatment of female varsity athletes, including unequal pay to coaches, lesser quality facilities, and other related grievances. An unequal treatment claim presupposes that the claimant was a varsity athlete who was treated unequally based upon her sex. The complaint fails to allege, however, that any plaintiff ever participated in any varsity sport at LSU. As plaintiffs have never participated in varsity athletics at LSU, they can never have suffered injury from any alleged discriminatory action by LSU in its treatment

of female varsity athletes vis-a-vis male varsity athletes. Plaintiffs have not alleged any experience of the effect, impact or alleged injury resulting from any of the alleged discriminatory practices within LSU's existing women's varsity athletics.

Plaintiffs have personally suffered no injury or threatened injury due to LSU's alleged illegal treatment of its female varsity athletes and, as such, fail the initial prong of the standing inquiry as to their claims for illegal treatment of female varsity athletes. [FN32]

FN32. Although plaintiffs, from the inception of this suit, have sought relief, both declaratory and injunctive for what has been termed "factors 2-10," the treatment portions of Title IX, for LSU's alleged disparate treatment of its male and female varsity athletes, plaintiffs have never sought relief for any disparate treatment by LSU of its female and male athletes at a lower organizational level.

However, this Court notes evidence presented at trial pursuant to plaintiffs' effective accommodation claims established that LSU's female soccer club is and was treated in the same manner as LSU's male and coed soccer clubs. Three of the plaintiffs participated in LSU's club soccer program. None of the plaintiffs participated in any other club sport at LSU.

***905** The injury plaintiffs allege, i.e., their inability to participate at the intercollegiate varsity level in their chosen sport at LSU, is arguably the result of LSU's alleged ineffective accommodation of its female student population, not of LSU's treatment of its female varsity athletes vis-a-vis its male varsity athletes. Thus, plaintiffs' claims as to illegal treatment of LSU varsity female athletes fail the second prong of the standing analysis.

As noted above, a plaintiff who might have been subjected to injurious conduct of one kind does not possess the necessary stake in litigating conduct of another kind, although similar, to which she has not been subject. [FN33] Further, a favorable decision by this Court that LSU treats its female varsity athletes in an unequal manner as to its male varsity athletes would not address plaintiffs' alleged injury, i.e., their inability to participate in intercollegiate varsity athletics at LSU. For this Court to order LSU to treat its intercollegiate varsity female athletes differently would not impact plaintiffs, as they are not varsity

athletes nor have plaintiffs convinced this Court plaintiffs will, in fact, be intercollegiate varsity athletes at LSU. Thus, plaintiffs' claim on the treatment issues fails the third prong of the standing analysis.

FN33. Blum, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) and cases cited therein.

The Supreme Court in *Warth v. Seldin*, supra, instructed that even when a plaintiff has suffered his own injury, he must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties. By previous ruling, this Court dismissed plaintiffs' claims of unequal treatment in violation of Title IX, thus limiting plaintiffs' claims for declaratory and injunctive relief to those claims that LSU had failed to effectively accommodate plaintiffs' interests and ability to participate. This ruling remains undisturbed.

B. Accommodation

[10][11] One must keep in mind that LSU is not required by Title IX to provide any athletic opportunity for any of its students. However, should LSU choose to provide athletic opportunities for certain of its students, it then must provide equal athletic opportunity for both sexes and not exclude either group from participation because of their sex. LSU has chosen to provide athletic opportunity for its male students. Consequently, LSU must provide equal athletic opportunity for the interests and abilities of its female students and cannot exclude its female students from participation because of their sex. One must never lose sight that the key concepts involved in this challenge are exclusion from participation and equal athletic opportunity. Exclusion, in this instance, requires the existence of an interest to participate and the existence of an ability to participate. Opportunity is the possibility of participation, not the guarantee of participation.

Plaintiffs have alleged LSU failed to accommodate its female athletes by providing greater athletic opportunity to its male students than female students at a time when sufficient interest and ability existed within its female population to justify increasing women's sports opportunity. Trial on the merits of this claim was had in October, 1995.

As noted above, this Court previously declined to