

grant the injunctive relief sought by the original named plaintiffs as to softball. The Pederson plaintiffs did not allege that they had interest and ability to participate in fast pitch softball. After consolidation of the Pederson and Pineda suits, this Court declined to dismiss the Pinedas' claim as to softball on the argued grounds of a lack of standing.

[12] However, defendants continue to raise the question of standing. While defendants challenge plaintiffs' standing to seek particular remedies, this Court declines to address standing only in terms of the remedy requested. Standing will be determined as a question of whether plaintiffs have the requisite interest to bring a cause of action. The *906 right to bring a cause of action is distinct from the right to obtain a specific remedy. Plaintiffs argue LSU is in violation of Title IX and urge this Court to so declare.

Plaintiffs also request specific injunctive relief including the accelerated institution of intercollegiate varsity fast pitch softball and soccer. Whether the plaintiffs have standing to bring their suit is not to be confused with the question of whether plaintiffs are entitled to the equitable relief they seek.

In accordance with this Court's continuing duty to monitor its jurisdictional basis, the question of whether the Pineda and Pederson plaintiffs have proven the merits of their standing claims is herein addressed.

i. Pinedas

At trial, Karla and Cindy Pineda were students at LSU and each had eligibility to participate in intercollegiate varsity athletics. They continue to seek to play intercollegiate varsity fast pitch softball and they meet the NCAA eligibility criteria. LSU does not presently field a intercollegiate varsity fast pitch softball team; although LSU has begun implementation of an intercollegiate fast pitch softball program by hiring Cathy Compton as its head softball coach effective July 1, 1995, the process is not complete. LSU asserts that Karla and Cindy Pineda will be given the opportunity to try out for the fast pitch softball team prior to its commencement of intercollegiate competition in the Fall of 1996 should such competition truly begin in the Fall of 1996.

The existence of one or two students with interest and ability to participate in sports likely would not constitute a basis for a claim of ineffective accommodation and thus, violation of Title IX.

However, the Pinedas also established at trial the existence of sufficient interests and abilities on campus to field a intercollegiate varsity women's fast pitch softball team.

The Pinedas established that sufficient interest and ability existed on the LSU campus to field a successful Division I women's fast pitch softball team in 1979 and that interest and ability to participate in fast pitch softball has increased since 1979 nationally, regionally, locally and in the Louisiana high schools--the primary feeder schools for LSU. Therefore, this Court finds interest and ability to participate in fast pitch softball has not declined since 1979 when there was sufficient interest and ability to field a successful Division I team. Yet, LSU provided and provides no opportunity of any kind for its female students to participate in fast pitch softball on any level.

[13] The Pinedas have established they individually have the interest and ability to participate in athletics on some level at LSU; they have established sufficient interest and ability exists at LSU to field a Division I fast pitch softball team. The Pinedas have proved the University is providing greater opportunity to participate in sports for males than females and, in particular, LSU is providing opportunity to participate in varsity baseball for males with interest and ability similar to the Pinedas. Finally, plaintiffs have presented evidence that such action has caused them personal injury.

In short, the Pinedas have presented evidence sufficient to establish individualized injury and standing to bring a private right of action against LSU pursuant to Title IX.

Defendants argue that the Pinedas cannot make the cut to participate in fast pitch softball at the Division I level and therefore, they lack standing. This argument has no merit, for it presupposes that only those athletes who can prove they would get a position on a team have standing to claim they were discriminated against on the basis of their sex in being denied the opportunity to compete. Such an argument misconstrues the nature of both Standing and Title IX and grants control over standing to the subjective decisions of the university. Moreover, the question cannot be proven until the time team positions are actually offered: if determined to field a team in 1996, LSU should accept the best athletes available to it at that time. Whether the Pinedas are in that group depends, in part, upon the level of

competition among the athletes who desire to get on the team and the subjective evaluations made by the university. Title IX's guarantee of equal opportunity is not granted only to the best athletes in the country; it is granted to all athletes who have an interest in participating *907 in athletics as well as an ability to do so. The Pinedas have proven they have both. Whether LSU decides to eventually offer them positions on a team is not determinative of the issue.

LSU provided no organized athletic participation opportunity for those with the interest and skill of the Pinedas at any level, at a time when LSU provided greater athletic opportunity to its male than female students and at a time when male students with similar interest and skill were provided the opportunity to participate in baseball at the intercollegiate varsity Division I level.

ii. Pederson Plaintiffs

As noted above, the Pederson plaintiffs, asserted claims that LSU was in violation of Title IX by ineffectively accommodating their interest in playing intercollegiate varsity soccer and requested particularized injunctive relief keyed to their particular sport of choice.

Samantha Clark and Lisa Ollar were ineligible to compete in intercollegiate athletics after May, 1995 under the regulations of the National Collegiate Athletic Association. As they became ineligible to compete during the course of the litigation, the particularized equitable relief requested vis-a-vis soccer no longer granted any remedy for Clark and Ollar. However, with respect to monetary damages, Ollar and Clark also argue LSU was in violation of Title IX during their period of athletic eligibility and that LSU's alleged violation produced individual personalized injury to them.

Ms. Pederson retains NCAA eligibility and was offered the opportunity to try out for the varsity soccer team in 1994, but was unable to do so because of knee surgery. She tried out in 1995, practiced with the team, was issued a uniform, and was included in the team picture. She never played with the team, rather, she quit due to financial problems and contemporaneously was cut as lacking the requisite skill. [FN34]

FN34. After hearing evidence at trial, this Court finds that Ms. Pederson was both cut from the

team as she was unable to perform at the necessary threshold skill level at that time and contemporaneously chose to quit due to financial constraints. However, notwithstanding her parallel decision to quit, ultimately, as of 1995 she could not perform at the necessary skill level to play varsity soccer at LSU.

[14] The evidence at trial established LSU has no male varsity Division I soccer team. Further, LSU provides the same opportunity for soccer participation for its male and female students--albeit limited support and opportunity--at the club level. Evidence established LSU has in no way excluded members of either sex from the opportunity to participate in soccer at the club level. Further, this Court finds the Pederson plaintiffs did not establish the existence of the requisite ability to play soccer above the club level. Consequently, the Pederson plaintiffs did not establish they had been excluded from athletic participation at LSU because of their sex; rather the evidence proved they were included in the soccer participation offered at LSU in the same manner as male students. Further, the evidence established the Pederson plaintiffs had not been, as alleged by plaintiffs, excluded from intercollegiate varsity play as none had the requisite skill to play soccer at the intercollegiate varsity level.

Although LSU provided greater athletic opportunity for its male than female students during this time, none of the Pederson plaintiffs alleged any interest or ability to participate in any sport other than soccer. All three participated in soccer at the club level--none had the requisite ability to participate above that level. Therefore, LSU's alleged violation of Title IX by not providing additional athletic opportunity to its female students in no way personally impacted these three plaintiffs. LSU's failure to provide greater opportunity could not have impacted the Pederson plaintiffs as they could not, and did not desire to, participate in other sports at LSU and could not have participated above the club level in soccer. Therefore, each lacks the requisite personal injury caused by the alleged violation of Title IX by LSU. Moreover, the particularized remedy sought as to soccer would not inure to Ollar's or Clark's benefit as neither is eligible under NCAA criteria to participate.

*908 As LSU's alleged violation of Title IX has not had the required personal impact on the Pederson plaintiffs, the Pederson plaintiffs do not have standing to bring claims for equitable or declaratory relief in

this forum for violation of Title IX and as such their claims are DISMISSED WITH PREJUDICE.

TITLE IX

I. Law

In 1972 Congress enacted the prohibition against discrimination on the basis of sex by universities securing federal funds. Section 901(a) of Title IX of the Education Amendments of 1972 provides:

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

20 U.S.C.A. § 1681(a) (1990).

After establishing that sex discrimination is prohibited, Title IX then proceeds to clarify that efforts to remedy historical sex discrimination shall not include preferential or disparate treatment of one sex over another, with one specific caveat: statistical evidence of disparate treatment may be considered in evaluating compliance with Title IX. Section 1681(a) shall not be

interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which makes this with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

20 U.S.C.A. § 1681(b). [FN35]

FN35. For a detailed description of Title IX's history, statutory and regulatory framework, see *Cohen v. Brown University*, 991 F.2d 888 (1st Cir.1993).

Section 844 of the Education Amendments of 1974, further provides that:

The secretary of [HEW] shall prepare and publish ... proposed regulations implementing the provisions of Title IX of the Education

Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports. [FN36]

FN36. 44 Fed.Reg. 71,413 (1979).

In 1975, the secretary of the Department of Health, Education and Welfare ("HEW") promulgated regulations to implement Title IX, which specifically encompassed college athletics (hereinafter referred to as "Regulations"). The Title IX Regulations were signed by President Ford on May 27, 1975 and submitted to Congress for review pursuant to § 431(d)(1) of the General Education Provisions Act ("GEPA"). After hearings, Congress did not disapprove the Regulations within the 45 days allowed under GEPA. The Regulations became effective on July 21, 1975, and were codified at 45 C.F.R. § 86, et seq. [FN37] The Regulations provided for a three-year transition period which expired on July 21, 1978.

FN37. Initially promulgated by HEW, the regulations found in Title 45 of the Code of Federal Regulations are now designated as Department of Health & Human Services ("HHS") regulations. In addition, three other agencies have promulgated substantially identical regulations concerning the prohibition of sex discrimination in athletic programs, specifically: the Department of Agriculture, 7 C.F.R. § 15a, et seq.; the Department of Energy, 10 C.F.R. § 1040, et seq.; and the Department of Education, 34 C.F.R. § 106, et seq.

Section 86.41 of the regulations which specifically addresses athletic programs in educational institutions receiving money from the federal government, defines the prohibition more completely than the statute.*909 describes the circumstances under which separate teams will be allowed, grants educational institutions an adjustment period within which to come into compliance and, most important for purposes of this discussion, specifies that the prohibition against sex discrimination means federal aid recipients are required to provide equal athletic opportunity to members of both sexes. [FN38]

FN38. 45 C.F.R. § 86.41 reads as follows:

(a) General. No person shall, on the basis of sex,

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

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, 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. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

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

- 1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- 2) The provision of equipment and supplies;
- 3) Scheduling of games and practice time;
- 4) Travel and per-diem allowance;
- 5) Opportunity to receive coaching and academic tutoring;
- 6) Assignment and compensation of coaches and tutors;
- 7) Provision of locker rooms, practice and competitive facilities;
- 8) Provision of medical and training facilities and services;
- 9) Provision of housing and dining facilities and services;
- 10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider

the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) Adjustment period. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

45 C.F.R. § 86.41 (1995).

Determination of whether this latter requirement is being met shall be made, according to the regulation, by considering ten specific factors, as well as "other" factors. These factors include nine measures comparing how men's teams and women's teams are treated by the university--the so-called "treatment" issues. [FN39] The tenth factor identified in § 86.41 focuses the analysis on substantive equality of opportunity, i.e., "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 45 C.F.R. § 86.41(c)(1).

FN39. Treatment issues are not implicated herein as no plaintiff has standing to assert same. See Standing discussion, *supra*.

In 1979, HEW's Office of Civil Rights (hereinafter "OCR") added another layer to the administrative amalgamation. After notice and extensive comment, a "Policy Interpretation" became effective on December 11, 1979. The Policy Interpretation contains a more detailed measure of what OCR determined is required for equal athletic opportunity under Title IX.

According to the Policy Interpretation, Title IX can be violated in three ways:

- (a) where the policies of an institution are discriminatory in language or effect; or
- (b) where disparities of a substantial and unjustified nature exist in the benefits, treatments, services or opportunities afforded *910 male and female athletes in the institution's program as a whole; or
- (c) where disparities exist in individual segments of

the program with respect to benefits, treatments, services or opportunities which are substantial enough in and of themselves to deny equality of athletic opportunity. [FN40]

FN40. 44 Fed.Reg. at 74,417-18.

Additionally, the Policy Interpretation recognizes three areas in which compliance can be assessed: [FN41]

FN41. *Id.* at 71,413.

(a) Athletic Financial Assistance (Scholarships) [FN42];

FN42. *Id.* at 71,415.

(b) Equivalence in Other Athletic Benefits and opportunities (so-called "treatment" issues) [FN43]; and

FN43. *Id.* at 71,415-17. This section analyzes factors two--ten as set forth in 45 C.F.R. § 86.41(c)(2)-(10).

(c) Effective Accommodation of Students' Interests and Abilities. [FN44]

FN44. *Id.* at 71,417-18. This section deals with factor one as set forth in 45 C.F.R. § 86.41(c)(1).

The Policy Interpretation was effective on its face December 11, 1979. However, it was never approved by the President. The Policy Interpretation does not have the binding effect of those rules, regulations or orders authorized by 20 U.S.C. § 1682. [FN45]

FN45. Title IX, §1682 authorizes the effectuation of the provisions of Title IX by "issuing rules, regulations or orders of general applicability which shall be consistent with the achievements of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." Interestingly, § 1682 of Title IX also provides "no such rule, regulation or order shall become effective unless and until approved by the President." The Policy Interpretation effective December 11, 1979 was never submitted to the President for approval. Section 1682 of Title IX provides for administrative enforcement of the act by "each Federal Department and agency which is empowered to

extend capital federal financial assistance to any education program or activity."

Title IX, as previously interpreted, was dealt a significant blow when, in 1984, the Supreme Court in *Grove City College v. Bell*, 465 U.S. 555, 574, 104 S.Ct. 1211, 1221, 79 L.Ed.2d 516 (1984) held Title IX was "program specific," so that it applied only to those programs that were actually receiving federal funds. The Court reasoned that Title IX did not reach the entire university and, thus, did not reach an athletic program which did not, itself, receive federal assistance. Few athletic departments were impacted by Title IX, as interpreted by *Grove City College*, as few were the direct recipients of federal funds. [FN46]

FN46. The LSU Athletic Department has never received federal financial assistance.

Congress responded to the *Grove City College* decision by passing the Civil Rights Restoration Act of 1987, codified at 20 U.S.C. § 1987 (1988) ("Restoration Act"), wherein the institution-wide application of Title IX was clarified. The Restoration Act provided that if an educational institution received federal funds, the institution as a whole must comply with Title IX's provisions. There is little doubt that one of the primary reasons Congress passed the Restoration Act was to make it applicable to athletic departments. [FN47]

FN47. Continuing debate and controversy suggest that either Congress or OCR, or both, may revisit Title IX and its regulations. See Hearing on Title 9 of the Education Amendments of 1972, Before the Subcomm. On Postsecondary Education, Training, and Life-Long Learning of the House Comm. on Economic and Educational Opportunities, 104th Cong., 1st Sess. (May 9, 1995); Letter from 136 Members of Congress, House of Representatives, to Norma Cantu, Assistant Secretary for Civil Rights (June 30, 1995) (on file with the Committee on Economic and Educational Opportunities); Letter and attached Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test from Norma Cantu, Assistant Secretary for Civil Rights to Members of Congress, House of Representatives (Sept. 20, 1995) (on file with the Committee on Economic and Educational Opportunities); Letter from Buck McKeon and Steve Gunderson to Norma

Cantu, Assistant Secretary for Civil Rights (October 30, 1995) (on file with the Committee on Economic and Educational Opportunities).

The judicial branch, by contrast with the executive, has had relatively little involvement with interpreting Title IX's statutory and regulatory provisions. At this point, neither ***911** Court to whom this Court looks for binding guidance has yet addressed the issues under Title IX arising herein. The only case in which the Supreme Court has addressed Title IX since 1984 held that the statute does imply a private right of action. [FN48] The Fifth Circuit has addressed Title IX only in the context of determining that it does not create an avenue separate from Title VII for asserting employment discrimination claims. [FN49]

FN48. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992).

FN49. See *Chance v. Rice University*, 984 F.2d 151, 153 (5th Cir.1993), reh'g denied with opinion, 989 F.2d 179 (5th Cir.1993); *Lakoski v. James*, 66 F.3d 751 (5th Cir.1995). In *Lakoski* the Fifth Circuit held that Title VII is the proper vehicle to bring an employment discrimination claim and that individuals seeking monetary damages for employment discrimination on the basis of sex in federally funded educational institutions may not assert Title IX either directly or derivatively through § 1983.

Within the broader scope of federal jurisprudence throughout the country, only a handful of cases have interpreted Title IX, and each of them is factually distinguishable from the case at hand. [FN50]

FN50. *Horner v. Kentucky High School Athletic Ass'n.*, 43 F.3d 265 (6th Cir.1994) (12 female student athletes who participated in interscholastic girls' high school slow pitch softball sued for failure to field fast pitch softball and failure to support equal athletic opportunity for females); *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir.1994), cert. denied, 513 U.S. 1128, 115 S.Ct. 938, 130 L.Ed.2d 883 (1995) (members of the men's swimming team alleged violation of Title IX when the university terminated the swimming program); *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3rd Cir.1993) (members of the women's gymnastics and field hockey teams alleged

violation of Title IX when the university terminated both programs); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, cert. denied, 510 U.S. 1004, 114 S.Ct. 580, 126 L.Ed.2d 478 (1993) (students and members of the women's fast pitch softball team alleged violation of Title IX when the university terminated the program); *Williams v. School District of Bethlehem*, 998 F.2d 168 (3d Cir.), cert. denied, 510 U.S. 1043, 114 S.Ct. 689, 126 L.Ed.2d 656 (1994) (parents of a minor boy alleged violation of Title IX when he was excluded from a girls' field hockey team); *Cohen v. Brown University*, 991 F.2d 888 (1st Cir.1993) (members of the gymnastics and volleyball teams alleged violation of Title IX when teams were demoted from full varsity status to club varsity status); and *Cohen v. Brown University*, 879 F.Supp. 185 (D.R.I., 1995) (same).

This Court has found precious little guidance within the available jurisprudence to aid in understanding the analytical framework within which to address the claims in this case. As noted above, this case involves female students at Louisiana State University who have never participated in varsity athletics and who want LSU to create varsity athletic opportunity for them.

In review, the present state of the law of Title IX includes a statute containing very broad language and few specifics, regulations issued by several different agencies, a Policy Interpretation adopted by OCR but never approved by the President or Congress, and very little jurisprudence, none of which clarifies the proper analysis of claims brought thereunder.

II. Analysis

In the absence of binding jurisprudence or a standard of review provided within the statute, this Court must derive the proper analytical framework from the available sources. The statute itself contains a general prohibition against sex discrimination, which language does not further the analysis greatly. The regulations promulgated pursuant to 20 U.S.C. § 1681, et seq. do provide more guidance, with pertinent language mandating equal athletic opportunity for members of both sexes. More particularly, the regulations identify effective accommodation of interests and abilities of both sexes as the primary factor to be considered in evaluating whether an institution is granting equal opportunities

to participate in athletics. The statute and the regulations, however, do not provide any additional aid in deriving an analytical framework under Title IX.

As noted above, OCR has also issued a Policy Interpretation. This interpretation is helpful in identifying issues which arise under Title IX and establishing an analytical framework for assessing claims arising under the Title. The Policy Interpretation has not been approved by either the President or Congress, however, and is also susceptible, in part, to an interpretation distinctly at odds *912 with the statutory language. Despite these drawbacks, the Policy Interpretation definitely has a role to play in ascertaining the proper analysis of compliance with Title IX. [FN51]

FN51. In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944), the court addressed the issue of whether time spent by company employees in the fire hall waiting for fire alarms was "working time" for purposes of the Fair Labor Standards Act. In determining what weight to give to the interpretation articulated by the Administrator of the Wage and Hour Division, the Court set forth the following standard:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The *Skidmore* Court rejected the Administrator's interpretation as being erroneous.

The Policy Interpretation inquiry into effective accommodation keys to whether the (a) selection of sports [FN52] and (b) the level of competition including the opportunity for team competition effectively accommodate the (c) interests and abilities [FN53] of members of both sexes. [FN54] The selection of sports and determination of interests and abilities factors do not present difficulties in the analysis. It is the question of how to evaluate

equality of opportunity in levels of competition which provides a significant sticking point in the Policy Interpretation's framework.

FN52. Both plaintiffs and defendants assert they have no objection to the two women's sports now selected for addition by LSU. Consequently, the selection of women's fast-pitch softball and soccer over some other sport is not contested. One should note, under the analysis set out herein, that within the selection of sports, an institution is not required to provide exactly the same choice for males and females; however, where an institution sponsors a team for one sex, the institution may be required to allow the other sex to try out for the team or provide a team for the excluded sex.

FN53. In analyzing the determination of the athletic interests and abilities, the Policy Interpretation notes an institution may determine the interests and abilities by any non-discriminatory method of their choosing provided:

- (a) The processes take into account nationally increasing levels of women's interests and abilities;
- (b) The methods don't disadvantage the underrepresented sex;
- (c) The methods take into account team performance records; and
- (d) The methods are responsive to the expressed interests of students capable of intercollegiate competition who are the underrepresented sex.

44. Fed.Reg. at 71,417.

FN54. *Id.* Section 86.41 as interpreted in the Policy Interpretation also allows the OCR to look at other factors in this inquiry including the competitive opportunities provided in terms of the competitive team schedules available to both sexes.

The OCR assesses whether males and females are allowed to compete at levels reflecting their interests and abilities by evaluating both the (a) opportunity for individuals of each sex to participate in intercollegiate competition ["opportunity"] and (b) for athletes of each sex to have competitive team schedules which equally reflect their abilities ["competition"]. [FN55] The Policy Interpretation proceeds to provide standards for determining whether these two requirements are met.

FN55. Id. at 71,418.

First, as to the requirement that both sexes be allowed the "opportunity" to participate in accordance with their interests, compliance will be assessed in any one of the following ways:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where members of one sex have been and are under represented among intercollegiate athletics, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a *913 continuing practice of program expansion.... whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. [FN56]

FN56. Id. These three factors have become known as the "three pronged analysis" or "safe harbor" and have become the subject of much discussion and confusion. They will be discussed fully in this opinion.

Assessment of compliance with the second goal, requiring equality of "competition" for each sex reflecting their abilities, focuses on the following:

- (1) Whether the competitive schedules for men and women's teams on a program- wide basis affords proportionately similar numbers of male and female athletes equivalently advanced competition opportunities; or
- (2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex. [FN57]

FN57. Id.

[15] In addressing the question of whether LSU effectively accommodated women's interest and ability to participate in sports by providing equal levels of competition for men and women, both plaintiffs and defendants argue, primarily, that the first prong of the "opportunity" factor and the first

prong of the "competition" factor--both of which require the Department to assess proportionality between the sexes--should be acknowledged as a "safe harbor" or determinative of the overall issue, for educational institutions. In other words, plaintiffs and defendants desire this Court to find that, so long as males and females are represented in athletics in the same proportion as found in the general student population and are given numerically proportionate opportunity to participate in advanced competition, the university should be found to be in compliance with Title IX and, if numerical proportionality is not found, the institute should be found to be in violation of Title IX. This Court disagrees with either proposition and the analysis leading to such a result, and denies most emphatically so to hold.

In arguing that sufficient opportunity will be granted by achieving substantially similar numerical proportionality between the sexes among athletes as is found in the general student population, defendants rely upon specific language from jurisprudence which supports their position. This Court is not unaware of the Roberts, Cohen and Horner [FN58] holdings and, in fact, the explicit language within Roberts and Cohen, that one "may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." [FN59] The Fifth Circuit has not spoken to this issue and this Court is not bound by Roberts, Cohen and Horner.

FN58. This Court also is aware of the Kelley opinion which indicates that prong one is a presumption and the institution has the burden of proof on prong two and three. Kelley, 35 F.3d at 271. This Court does not find Kelley correct, either.

FN59. Cohen, 991 F.2d at 898.

Further, this Court finds those decisions erroneous in this regard. To accept the interpretation in Roberts, Cohen and Horner, and the argument made by defendants, one must assume that interest and ability to participate in sports is equal as between all men and women on all campuses. For instance, if a university has 50% female students and 50% male students, the assumption, under this argument must follow that the same percentage of its male population as its female population has the ability to participate and the interest or desire to participate in sports at the same competitive level. A review of Roberts, Cohen and Horner finds no evidence to prove or disprove

this assumption; nor has LSU or the plaintiffs in this case presented any evidence to support this assumption.

Without some basis for such a pivotal assumption, this Court is loathe to join others in creating the "safe harbor" or dispositive assumption for which defendants and plaintiffs argue. Rather, it seems much more logical that interest in participation and levels *914 of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time. To assume, and thereby mandate, an unsupported and static determination of interest and ability as the cornerstone of the analysis can lead to unjust results.

[16] The Cohen, Roberts and Horner decisions, in defining equal numerical percentages or "proportionality" as a "safe harbor," strongly rely on each other and on a stated administrative deference. This Court is not unaware of the necessity to grant great deference to an administrative agency and in particular an administrative agency that was specifically required by Congress to promulgate interpretative regulations. However, the jurisprudential emphasis on numerical "proportionality" is not found within the statute or the regulations; rather, it is inferred from language in the Policy Interpretation and ignores other language within the Policy Interpretation and the statute which argues against such an inference.

[17] Title IX does not mandate equal numbers of participants. Rather, it prohibits exclusion based on sex and requires equal opportunity to participate for both sexes. As appears in the Policy Interpretation, inherent in this prohibition and mandate is knowledge of the desire to participate, the ability to participate and the level of competition involved. Ceasing the inquiry at the point of numerical proportionality does not comport with the mandate of the statute.

Section 1681(a) of Title IX specifically provides the mandate of Title IX shall not be interpreted to require preferential or disparate treatment to members of one sex based on proportionality. Rather, those percentages should be considered as "tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." Consequently, the clear language of the statute prohibits the interpretation of numerical

proportionality argued by both defendants and plaintiffs. Therefore, to the extent that the Policy Interpretation operates to allow a "safe harbor" of numerical proportionality of competition, this Court rejects that reading as well as the concept of the "safe harbor." While the safe harbor concept has the virtue of being simplicity itself, this Court will not join in assuming that athletic directors in this country are incapable of meeting the burden of Title IX and its regulations which incorporates a knowledge regarding their student body, effective analysis of and meeting students' needs, and filling those needs in a non-discriminatory fashion. Rather, this Court finds the proper reading of the Policy Interpretation--and the proper analysis under effective accommodation--allows for consideration of all factors listed therein in determining whether the university has provided equal opportunity and levels of competition for males and females.

The Policy Interpretation, being crafted by an agency which has a great deal of knowledge and understanding of the particulars of assessing university athletics, provides a helpful guide to a thoughtful analysis of the mandate of Title IX. However, to the extent that the Policy Interpretation suggests by use of the disjunctive "or" that a mere reliance upon substantial numerical proportionality between the sexes suffices, it is contrary to the explicit language in 20 U.S.C. § 1681(b) and will not be followed herein. With this exception, the bulk of the analysis of compliance described in the Policy Interpretation will be adopted in this context.

III. Application to the Instant Facts

[18] The Pineda plaintiffs allege that LSU discriminated against them by not effectively accommodating their interest and ability to participate in intercollegiate varsity fast pitch softball. Under the statute, regulation, and Policy Interpretation, analysis of plaintiffs' claim proceeds as follows. In determining whether LSU has subjected its female students to discrimination based upon sex, this Court will look to whether its policies are discriminatory in language or effect, whether substantial and unjustified disparities exist within the program as a whole between opportunities afforded male and female students, or whether substantial disparities exist in individual segments between opportunities afforded male and female students *915 such as to deny equal athletic opportunity. This determination will be based upon an evaluation of whether LSU has

effectively accommodated its students' interests and abilities. [FN60] As noted above, effective accommodation of interests and abilities requires the selection of sports appropriate to the student body's interests and that the level of competition reflect the ability of athletes available to participate.

FN60. The other two areas identified by the Policy Interpretation as posing the potential for discriminatory acts--awarding of scholarships and treatment of women's teams--are not at direct issue in this matter.

Clearly, the pivotal element of the analysis in this case is the question of effective accommodation of interests and abilities. Of primary importance to the analysis is the requirement that LSU know what the interests and abilities of its female students are. Without that knowledge, neither LSU nor this Court can evaluate with true certainty whether LSU is effectively accommodating those interests and abilities in a sex-neutral way.

[19] After hearing all the evidence presented, this Court finds LSU presented no credible evidence to establish what the interests and abilities of its student population are or have ever been. LSU has no method, discriminatory or otherwise, by which this determination can be made. LSU is and has been ignorant of the interests and abilities of its student population. [FN61]

FN61. LSU could have obtained this information in a variety of ways, including, but not limited to:

- (1) Requests by students that a sport be added;
- (2) Requests that an 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 a 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.

Information also could be obtained through discussions with amateur athletic associations or community sports leagues or, perhaps the simplest solution, the inclusion of a "participation and interest" question on the admissions form to the university. However,

there was no testimony to support that any credible attempt was made to gather such information.

Without any basis for determining whether LSU's athletics program is accommodating the actual interests and abilities found on campus, this Court is relegated to ruling on the question of discrimination based upon indirect evidence such as raw data regarding the student population and testimony of the athletic program's director and officers.

Plaintiffs established that LSU's student population during the relevant period was approximately 51% male and 49% female and LSU's athletic participation for the same period was approximately 71% male and 29% female. [FN62] Throughout the relevant period, LSU fielded a men's baseball team. Plaintiffs and LSU provided considerable evidence at trial that fast pitch softball, traditionally played by women, is the closest equivalent sport to baseball, traditionally played by men.

FN62. Document # 190--Pre-Trial Stipulations.

Plaintiffs established that sufficient interest and ability existed in 1979 for LSU to field a successful Division I varsity fast pitch softball team; in 1983 LSU disbanded that team and has not produced credible evidence of the reason for that decision. Plaintiffs established that interest and participation in fast pitch softball has not decreased since 1979; rather, it has increased nationally, regionally, locally and within the Louisiana high schools which act as primary feeders for LSU. Plaintiffs further established that, on the intercollegiate level, varsity fast pitch softball teams have increased in number since 1979. Therefore, this Court finds that the interest and ability within the LSU student population to participate in women's athletics--fast pitch softball, in particular--has not decreased since 1979 rather, should have increased.

Additionally, plaintiffs presented credible evidence that they have an interest in playing intercollegiate varsity fast pitch softball as well as substantial ability to play fast pitch softball.

***916** LSU presented some evidence that sufficient interest and ability to participate in fast pitch softball at the Division I intercollegiate varsity level is not now nor since 1993 has been found on the LSU campus. However, this Court did not find the

evidence presented by LSU to be credible, rather found such interest and ability did exist on LSU's campus. Even were that the case, however, OCR specifically recognizes that compliance with Title IX can include competition on levels other than the intercollegiate level, i.e., the club or intramural level. [FN63]

FN63. It does not escape this Court's attention that 45 C.F.R. § 86.41(c) notes that a recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. The inquiry is not limited solely to varsity intercollegiate activity. (emphasis added)

Plaintiffs established that intercollegiate play is provided for male students with similar interests and abilities by way of the varsity baseball team. The evidence is uncontroverted that, during the relevant time period, LSU provided absolutely no opportunities for women to compete in fast pitch softball at any level whatsoever.

By not fielding any women's fast pitch softball team for any level of competition, LSU has not been accommodating the interests and abilities of Plaintiffs individually and at least one segment of its female student athlete population. This finding, together with the large disproportionality between its male and female athlete populations compared to the general student body, and testimony presented by the LSU's Athletics Director [FN64], suggest that sex discrimination accounts for the discrepancies.

FN64. See Intent discussion, *infra*, as well as findings throughout this opinion.

[20][21] Under the Policy Interpretation, an educational institution which is proved not to be effectively accommodating the interests and abilities of the underrepresented sex but is able to demonstrate a history and continuing practice of program expansion demonstrably responsive to the developing interests and abilities of the underrepresented sex may still be found to be in compliance with Title IX. [FN65] Assuming--without addressing the wisdom of allowing a university to avoid a finding of non-compliance when, as a matter of fact, non-compliance has been proved--that this element of the analysis properly is incorporated herein, this Court finds that LSU has not provided credible evidence of such a

history and practice. Quite the contrary, this Court finds that historically LSU has demonstrated a practice not to expand women's athletics at the university before it became absolutely necessary to do so.

FN65. 44 Fed.Reg. at 71,418.

Prior to the decisions made in 1993, no new women's teams had been added for 14 years. The last action LSU took to change the number of women's sports on its campus prior to 1993 was to eliminate a successful Division I intercollegiate fast pitch softball team, with no credible reason given for such a move.

LSU argues it has added two additional intercollegiate varsity women's sports, thereby demonstrating a history and pattern of expanding women's athletics. LSU's argument does not win the day. First, it has not yet added the two sports. In 1993, LSU made a verbal commitment to add a women's intercollegiate varsity fast pitch softball team and an intercollegiate varsity women's soccer team. However, this Court finds that LSU has not yet lived up to its verbal commitment. Softball is not yet in competition, nor is this Court convinced it will be in full and effective competition in 1996, as LSU claims; soccer is operating under considerable handicaps which handicaps demonstrate LSU's inadequate commitment to the team.

Secondly, this Court finds the evidence shows that LSU's decision to add two intercollegiate varsity women's sports was neither for the purpose of encouraging women's athletics, nor for responding to an increasing interest and ability in women's athletics on campus. In adding the two teams, LSU chose merely to follow the decisions made by the Southeastern Conference concerning whether to add additional women's teams, the time table for adding the new teams, and *917 the actual institution of additional women's sports.

Not only did LSU fail to demonstrate a history and practice of expanding women's athletics on campus, but the plaintiffs proved that LSU's history and practice of not expanding women's teams extended beyond its own campus to the National Collegiate Athletic Association. Credible evidence was presented that LSU led a minority move to resist proposed changes toward gender equity in athletics within the NCAA. Despite the efforts of the minority group, the NCAA and the Southeastern Conference

recognized the need for expansion of women's athletics, thus dragging LSU along with the tide of change.

Under the Policy Interpretation an educational institution which is proved not to be effectively accommodating the interests and abilities of the underrepresented sex but is able to demonstrate an adequate plan to redress its violations can nonetheless be found to be in compliance with Title IX. [FN66] Assuming--without addressing the wisdom of allowing a university to avoid a finding of non-compliance when, as a matter of fact, non-compliance has been proved--that this element of the analysis properly is incorporated herein, this Court finds that LSU has not provided credible evidence of the existence of an adequate plan. Full discussion of and reasons for this finding are found under separate heading.

FN66. 44 Fed.Reg. at 71,418-19.

For the foregoing reasons, this Court finds that LSU has not been accommodating the interests and abilities of its female student athletes. Moreover, LSU has not demonstrated a history and continuing practice of expanding athletic opportunities for its female student athletes nor an adequate plan to redress its violations. Based upon these findings and conclusions, this Court hereby DECLARES THAT LSU IS IN VIOLATION OF TITLE IX WITH RESPECT TO WOMEN'S ATHLETICS.

IV. Remedy

In view of the finding that LSU is in violation of Title IX, the question then becomes: to what remedy is each plaintiff entitled? Plaintiffs have requested both monetary and equitable relief herein.

A. Monetary Damages

The United States Supreme Court has specifically held that monetary damages are available under Title IX for intentional discrimination. [FN67] With regard to monetary damages for unintentional discrimination, however, neither the Supreme Court nor the Fifth Circuit Court of Appeals has specifically determined the question. Being without guidance from Congress or binding jurisprudence, this Court is left to infer the proper standard for granting monetary relief for proven violations under Title IX.

FN67. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75, 112 S.Ct. 1028, 1037, 117 L.Ed.2d 208 (1992).

In 1983, the Supreme Court issued a decision in *Guardians Association v. Civil Service Commission of the City of New York*. [FN68] *Guardians* was a Title VI challenge to employment practices by the City of New York, an entity which receives funding from the federal government. Title VI prohibits race, color, and national origin discrimination by any program or activity receiving federal financial assistance. [FN69] The district court found discriminatory effect but no discriminatory intent in the employment practices under scrutiny. Several of the justices found that compensatory relief should not be granted for unintentional violations of Title VI. [FN70]

FN68. 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983).

FN69. 42 U.S.C. § 2000d.

FN70. *Guardians*, 463 U.S. at 603-604, 103 S.Ct. at 3232-33.

While *Guardians* is a Title VI case rather than a Title IX case, its analysis provides useful guidance because Title VI and Title IX are, themselves, very closely analogous. The similarities are obvious between Title VI, which prohibits race, color, and national origin discrimination by all recipients of federal *918 funding, and Title IX, which prohibits sex discrimination by educational institutions and programs which receive federal funding. The Court in *Guardians* recognized these parallels.

Still later, in *Cannon v. University of Chicago* [441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)] (citation omitted) the Court, applying the factors specified in *Cort v. Ash* [422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)] (citation omitted) held that private parties could sue to enforce the prohibitions of Title IX ... against gender-based discrimination in any educational program supported by federal funds. A major part of the analysis was that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended similar remedies to be available under Title IX. [FN71]

FN71. *Id.* at 594, 103 S.Ct. at 3228.

One of the issues with which the Guardians Court struggled was the question of whether the relief available in private Title VI enforcement actions should be limited to declaratory and injunctive relief and what role intent plays in the cause of action and remedy under Title VI. Unfortunately, the Court was unable to fully resolve the question to a certainty. Indeed, the uncertainty was such that six opinions were filed in Guardians. [FN72]

FN72. Justice White announced the judgment of the Court and announced the opinion in Parts I, III, IV, and V of which Justice Rehnquist joined. Justice Powell concurred in the judgment and filed an opinion in which Chief Justice Berger joined and in part of which Justice Rehnquist joined. Justice Rehnquist filed an opinion concurring in the judgment. Justice O'Connor filed an opinion concurring in the judgment. Justice Marshall dissented and filed an opinion. Justice Stevens dissented and filed an opinion in which Justice Brennan and Justice Blackman joined.

The Court clearly was divided on the question. The division and resulting ambiguity of the decision is highlighted by fn. 27 of the primary opinion and the concurring opinions of Justices Powell and O'Connor and their discussion of the Court's action in *Regents of the University of California v. Bakke*, 438 U.S. 265, 412-418, 98 S.Ct. 2733, 2810-2813, 57 L.Ed.2d 750 (1978).

The clear division of the Court on these issues create question as to the breadth of the actual holding of the Court in Guardians, on the question of intent.

[22][23] Although Guardians cannot be said to have finally resolved the intent issue, this Court finds that the opinion provides guidance for the analysis of the question. When Congress enacts legislation pursuant to its Spending Power, placing compliance requirements on states and entities receiving federal funds, the Court will presume that Congress does not thereby intend to create a private right of action entitling citizens to recover monetary damages for non-compliance with the statutory requirements absent a showing that the non-compliance is intentional. [FN73] This presumption may be overcome by a clear declaration by Congress to the contrary. [FN74] Plaintiffs have neither suggested nor provided any evidence that Title IX was not enacted pursuant to the Spending Power. Plaintiffs have not presented argument to this Court that

Congress intended to overcome the Pennhurst presumption, nor has this Court discovered evidence in its own research to suggest such a congressional intent. Therefore, in line with Pennhurst and the Guardians result, this Court finds that monetary damages are not recoverable under Title IX absent a finding of intentional discrimination.

FN73. See Guardians, 463 U.S. at 599, 103 S.Ct. at 3231 (1983); *Pennhurst State School v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

FN74. Guardians, 463 U.S. at 599, 103 S.Ct. at 3231.

[24] LSU is in violation of Title IX for failure effectively to accommodate the interests and abilities of its female students to participate in athletics. Based upon the testimony of LSU's Athletics Director and others familiar with the management of athletics at the university, and although the question is a very close one, this Court holds that the violations are not intentional. Rather, they are a result of arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the byproduct of resistance to change.

***919** LSU's ignorance about the state of compliance with Title IX was ably demonstrated at trial. The evidence is clear that LSU has no idea, whatsoever, what interests and abilities in athletics are to be found in its student body. Furthermore, the evidence also is absolutely clear that there is a marked disparity between the gender divide in the student population and that in the athletic population. Despite the fact that these two rather significant indicators could be interpreted to suggest that there might be a problem, Athletic Director Dean testified that he believed and continues to believe his "women's athletics" program to be "wonderful." In fact, he believed his program to be so wonderful that he invited an investigator from the Department of Education's Office of Civil Rights to visit LSU to evaluate the athletics program's compliance with Title IX. Ms. Bonnette's findings [FN75] confirmed Dean's ignorance of the actual state of compliance with Title IX by his athletic program.

FN75. Although not a formal investigation, Ms. Bonnette made several suggestions for improvement upon her visit to LSU. Plaintiffs' Exhibit # 133.

Dean's testimony regarding his opinion that the women's athletics program is "wonderful" is credible. This Court accepts that Dean believes his program is wonderful, otherwise he would not have invited OCR to LSU to assess the program. When one is intentionally breaking the law, one does not invite those who enforce that law to come and look over your shoulder. Dean's opinion seems to have its source in the fact that LSU's women's teams fielded during the relevant time frame performed well in competition. This one-dimensional assessment of the athletics program, in this Court's opinion, created an arrogance on the part of the athletics management which has been--and continues to be--undaunted by the facts which suggest otherwise. However, LSU's arrogant ignorance, resulting in a violation of the law, does not amount to intentional discrimination. LSU is saved from the conclusion that it intended to discriminate in part by the fact that the jurisprudence and regulations regarding Title IX have been confused and unclear from the very beginning and Dean's contradictory actions.

As noted above, Title IX was enacted in 1972. Regulations were not promulgated until 1975. The Policy Interpretation, which explicitly recognized that universities were having grave difficulty evaluating whether they were in compliance with the law, was issued in 1979. The Supreme Court ruled, in 1984, that the law did not apply to specific programs, but only to entire university systems. Congress did not revise the law in response to the Supreme Court's holding until 1988. There have been remarkably few cases interpreting Title IX since that time, and many of them contain language and analyses antithetical to the statutory language, making their guidance highly suspect. Thus, confusion has reigned in the Title IX arena, giving universities reluctant to comply a great excuse for failing to do so.

As found hereinabove, LSU has clearly been one of those universities which has been extremely reluctant to change in light of Title IX, one which has shown no enthusiasm, whatsoever, to embrace change--enthusiastically or otherwise-- for the purpose of bringing to an end sex discrimination in its athletics program. LSU's athletic department was established in 1897 as a male domain. Throughout the 100 years since its inception, LSU has provided greater athletic opportunity for its male than female students. As noted earlier, LSU's history with regard to women's athletics and its accommodation of women student athletes has been, at best, one of passive resistance to

change. Further, this resistance has not limited itself to the LSU campus. LSU moved forward to better accommodate its women's teams' needs only when it believed it was required to do so. Even when the university became convinced that forward movement was necessary, as it did in 1993, it moved forward following its conference, with no cohesive plan, but through a progression of starts, stops, and stalls.

This Court finds that the source of LSU's resistance to change in favor of compliance with Title IX is two-fold: LSU's assessment of its program as "wonderful"; and its archaic *920 view of women and athletics. LSU's approach suggests ignorance of the changed social fabric in this country. LSU's outmoded approach to athletics includes antiquated assumptions about women's athletic interests and abilities and a failure to integrate the women's athletic program into the overall athletic framework at the university.

A primary factor in LSU's resistance has been Dean's opinion that the women's program is "wonderful." This evaluation, as noted above, seems to be based upon the fact that many of the women's teams which have been fielded for the past 15 or so years have been competitively successful regionally and at times, nationally. In acknowledging the competitive success of certain of the few women's teams, Dean seems to have reached the end of his assessment of the program: successfully competitive teams means a "wonderful" program. In focusing solely on this element, Dean led himself to believe that he was fully accommodating the female student population; therefore, with LSU's women's program being in the forefront of "women's athletics," there was no urgency toward expansion of athletic opportunities for women. Dean testified at trial he still believes his "women's program" to be wonderful; therefore, Dean's opinion seems to have remained notwithstanding the input of OCR's Ms. Bonnette, nor the aforementioned handicaps under which the women's soccer team is laboring or the fact that the fast pitch softball team has yet to come fully online three years after he acknowledged the need for additional accommodation of women's athletic interests and abilities, or his total ignorance of the true interests and abilities of his female student population.

In the seven decades that LSU's athletic department was in existence prior to the enactment of Title IX, disparate treatment of male and female athletes might

have been understood by a distinctly different social fabric than exists today. This disparate treatment was based upon assumptions about women's interests and abilities which were argued to be limited by social parameters imposed upon women's behavior which no longer prevail, locally, regionally or nationally. Rather than taking notice of the enormous social change which has taken place in the past 25 years, LSU has continued to assume athletics is as it once was, a traditionally male domain, and its women students did not want to participate in athletics in the same manner and to the same extent as its men, and acted accordingly. By failing to investigate or test its assumptions about its female students, LSU remained ignorant of its student population and of the changing social and athletic world. Seemingly, the university remains unaware that females who participate in varsity sport are athletes who happen to be female and not females who happen to wish to be athletes, and that today's athletic programs encompass both male and female sports rather than being two separate worlds.

The Pinedas have proved LSU's assumptions wrong, in at least one respect. How wrong LSU has been cannot be known unless and until LSU identifies the desire and ability of its female student population to participate in sports and evaluates that information against the participation opportunities offered its male and female students.

In addition to outdated assumptions, LSU also continues as a practical reality, to segregate its athletic program from its women's athletic program. In the years since the enactment of Title IX, athletics has become gender-neutral; athletics at LSU has not.

Whereas the country has moved toward a view of college athletics which encompasses athletics as a whole, LSU continues to have its athletic program, traditionally exclusively for males, and its "women's program" for women. Although the two programs are combined under the same loose administrative umbrella, this Court finds they are seen and treated as separate and apart.

LSU sees its "women's program" as just that--a women's program. The "women's program" is something separate, distinct, and apart from the "athletic program." It is this dichotomy which creates the problem and defines LSU's actions here. When it bolstered LSU's reputation to do so, the university did accommodate women's interests and abilities in order to field successful women's teams. However, because

this arena is outside the traditional athletic program, it has *921 not commanded a comparable focus of enthusiastic commitment.

This Court finds that LSU, through the actions of its Athletic Director, Joe Dean, was negligent in not adapting to the changing social and athletic landscape. However, LSU's actions are the byproduct of arrogant ignorance, the adherence to outdated attitudes and assumptions, and the confusion surrounding Title IX and its true intent, rather than the result of intentional discrimination. As this Court finds no intent on the part of LSU to discriminate on the basis of sex, there can be no damages awarded to the Pinedas. Consequently, there will be no Phase Two of the trial.

B. Equitable Relief: Reasonable and Adequate Plan

The Policy Interpretation issued by OCR includes enforcement provisions. [FN76] With regard to enforcement, OCR has determined that, once a university has been found to be in violation of Title IX, it can avoid a finding of non-compliance by having in place an adequate plan for remedying the violations within a reasonable period of time. In the context of this suit, this Court is not at liberty to find the university in violation of Title IX then decline to take any action as a result of that finding. However, the question of whether LSU has a reasonable and adequate plan to remedy its violations of Title IX is relevant at this juncture.

FN76. 44 Fed.Reg. at 71,418-19.

The process of creating, molding, expanding, and otherwise adjusting an athletic program is a long one. An athletic program cannot be established overnight, or even over a few months. First comes the process of finding a competent coach for the new team--a search which can take months. Next, LSU, not unreasonably, allowed its new coaches one year to set up their teams, including recruiting players, accumulating necessary equipment, and setting up the program itself.

Because of the time delays inherent in the process of remedying Title IX violations, immediate relief often simply is not available. In view of the inevitable time delay, and this Court's lack of expertise in micromanaging athletics departments, William Davis, Joe Dean and the Louisiana Board of Supervisors are ORDERED to produce a reasonable and adequate

plan to bring LSU's athletics program into compliance with Title IX.

[25] This Court finds that, at this time, LSU has no adequate plan. LSU has only verbal commitments, supported by vague intentions, resulting in erratic, random action. No cohesive, structured plan designed to encompass the complexity of the problem exists. This lack has already cost LSU's athletics department: the NCAA Self-Study resulted in only provisional certification, rather than full certification. [FN77]

FN77. Plaintiffs' Exhibits Nos. 820-822. Correspondence from NCAA to Chancellor William Davis and from Chancellor Davis to NCAA concerning the need for LSU to submit a "comprehensive institutional plan for addressing gender equity in its intercollegiate athletics program."

At trial, LSU presented testimony that it was "in the process" of creating a written plan for addressing the NCAA's concern with gender equity in its intercollegiate athletics program. However, no writing of any nature was presented, nor did the testimony support a finding that a true plan existed - written or otherwise. Instead of a plan, this Court heard only unsupported, shifting, vague assertions.

This Court finds there is no credible evidence to support a finding that an adequate plan to address LSU's violations of Title IX exists. In fact, there is no plan of any kind, at all. No plan exists to institute a method to identify the interests and abilities within the male and female student populations at LSU, nor a plan to evaluate the athletic opportunities presented in light of those identified interests and abilities, [FN78] nor even a ***922** plan to effectively and timely implement the decision it has already made to add intercollegiate varsity women's soccer and fast pitch softball. [FN79]

FN78. Title IX Athletics Investigator's Manual, p. 27. Although the Investigator's Manual indicates "[a] survey or assessment of interests and abilities is not required by Title IX regulations or by the Policy Interpretation. A survey or assessment 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 its students." (emphasis added).

FN79. This Court is not unaware of the testimony by certain members of the LSU faculty that a "plan" for instituting and implementing soccer and fast pitch softball does exist, although not written. This Court is not holding that a plan always need be written to exist; however, this Court finds under the evidence presented in this case that no true plan of any kind exists.

The lack of a reasonable and adequate plan for implementing the women's soccer program is clear from a brief review of the implementation progress thus far. LSU made a commitment to add women's intercollegiate varsity soccer in 1993. Coach Hickey, the soccer coach, was hired by LSU in August, 1994, and was given time to develop her program prior to intercollegiate competition in Fall 1995. A soccer field was designated, which also acted as the football competition field for an adjoining high school, University High. Although modifications were made to this field, including the moving of certain fences and extension of the field in order to accommodate soccer, the field remained a "crowned field" and smaller than most regulation soccer fields with fencing which limited outbound play and posed a safety hazard--all of which is problematic for soccer play. Similarly, it became apparent with the commencement of the 1995 soccer season, and coextensively the LSU football season, that the practice field assigned to the soccer team was not acceptable. The practice field traditionally has been used as a parking lot during LSU varsity football games, resulting in damage to the turf, debris, and other hazardous playing conditions.

As late as October 1995, when trial commenced, land was being sought to construct a proper soccer facility.

Testimony indicated land had been identified and new "plans" were in development to construct a permanent soccer facility. At time of trial, two years after LSU's commitment to institute soccer, "plans" for the women's soccer team's facility are, at best, sketchy and indeterminate. The nature and scope of the facility has not been identified, no credible date for completion was given, no concrete plans for the facility exist, and no final allotment of funds has occurred. LSU has been involved in reactive crisis management rather than planning of any type.

The "plan" with regard to the softball team is similarly nebulous. Commitment to add a women's fast pitch softball team was made by LSU in 1993. Intercollegiate competitive softball is scheduled to

begin in 1996. In January, 1996, one coach has been hired and limited recruiting has occurred, but effective intercollegiate competition in fast pitch softball within the next few months remains a promise rather than a reality. The history of the softball facility is even more checkered than that of the soccer facility. The plans for the facility were continuing to unfold during the trial in October, 1995 notwithstanding LSU's decision and commitment over two years earlier to add intercollegiate varsity fast pitch softball. This Court finds it highly unlikely that the complete facility as described by LSU officials at trial will be available for intercollegiate varsity play on the LSU campus for the 1996 season.

This brief review of the history of the development of women's soccer and fast pitch softball reveals that LSU has relegated both to an afterthought and has engaged in crisis management when forced to act. No plan exists for implementation of these two programs, nor does any plan exist for bringing the university into compliance with Title IX.

This Court ORDERS William Davis, Joe Dean and the Louisiana Board of Supervisors immediately to effectively accommodate LSU's female population pursuant to Title IX or to submit an adequate plan for such compliance as expeditiously as possible but within twenty (20) days of receipt of this Order.

Plaintiffs also have asked this Court for specific injunctive relief. This Court DENIES all requests for specific injunctive relief prayed for by plaintiffs beyond the additional equitable relief of ordering LSU to comply with Title IX. In making its denial, this Court notes that the remaining relief requested by plaintiffs is of a type not mandated by Title IX and certain of the requests would not grant relief to the named plaintiffs. Title IX does not require specific intercollegiate *923 sports be added or specific intercollegiate sports be reduced or that aggregate expenditures for members of each sex be equal, [FN80] nor does this Court believe that any of denied injunctive relief is appropriate under the factual findings made by this Court.

FN80. 45 C.F.R. § 86.41(c).

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds

for teams for one sex in assessing equality of opportunity for members of each sex. (emphasis added)

CLASS

Plaintiffs had moved this Court for certification of an injunction class, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), of "all LSU women students enrolled at any time since February, 1993 or who seek to enroll or become enrolled during the course of this litigation and who seek or have sought to participate and or were deterred from participating in intercollegiate varsity athletics funded by LSU."

Federal Rules of Civil Procedure 23 demands that all the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) be satisfied for certification of a class. [FN81]

FN81. Federal Rule of Civil Procedure 23(a) provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Federal Rule of Civil Procedure 23(b) states:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

- (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

[26][27] The purpose of class actions is to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." [FN82] "In determining the propriety of a class action, the question is not whether plaintiff or the plaintiffs have stated a cause of action or will prevail on the merits, but whether the requirements of Federal Rules of Civil Procedure 23 are met." [FN83]

Movants have the burden of demonstrating the propriety of class certification. [FN84] A class action may only be certified if, after a rigorous analysis, the trial court is satisfied that the prerequisites of Rule 23(a) have been met. [FN85] "The District Court has wide discretion in deciding whether to certify a proposed class." [FN86]

FN82. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155, 102 S.Ct. 2364, 2369, 72 L.Ed.2d 740 (1982), (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176 (1979)).

FN83. *Floyd v. Bowen*, 833 F.2d 529, 534 (5th Cir.1987) (quoting *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424 (5th Cir.1971)).

FN84. *Murillo v. Musegades*, 809 F.Supp. 487, 501 (W.D.Tex.1982).

FN85. *Falcon*, 457 U.S. at 156, 102 S.Ct. at 2370.

FN86. *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir.1993), cert. denied sub. nom., *Trinity Industries, Inc. v. Shipex*, 510 U.S. 991, 114 S.Ct. 548, 126 L.Ed.2d 450 (1993).

This Court found in its original ruling of September 14, 1995, based upon the evidence presented at that time, that the Pederson plaintiffs had Article III standing to assert a claim pursuant to Title IX based on LSU's alleged failure to provide effective accommodation in varsity athletics and that plaintiffs had the requisite standing to seek class certification based on that claim of ineffective accommodation. However, as noted above, after hearing full evidence at trial this Court has found that the Pederson plaintiffs do not have standing to assert claims for ineffective accommodation and their claims have been dismissed. This Court has further held that only the Pinedas have the necessary standing to bring suit, even as to the limited question *924 of effective accommodation. As such, only the Pinedas are eligible to act as the representatives of a putative class.

Therefore, this Court considered only the Pinedas' request for class certification and only for those claims for which standing exists. [FN87] As stated, plaintiffs requested a class defined as "all LSU women students enrolled at any time since February,

1993 or who seek to enroll or become enrolled during the course of this litigation and who seek or have sought to participate and/or were deterred from participating in intercollegiate varsity athletics funded by LSU."

FN87. See *Warth v. Seldin*, 422 U.S. at 502, 95 S.Ct. at 2207; *O'Shea v. Littleton*, 414 U.S. at 494, 94 S.Ct. at 675.

However, in a September 14, 1995 ruling, this Court held that a class would be maintained as to the only issue for which the plaintiffs had been determined to have standing, i.e., claims for effective accommodation. This ruling necessitated delineation of the class as follows: [FN88]

FN88. Pursuant to Fed.R.Civ.Pro. 23 and Fed.R.Civ.Pro. 16, this Court has discretion in determining whether a class action is "to be so maintained," the scope of the class for which plaintiffs will be allowed to litigate, and the terms and handling of a class action. This Court decertified the class by Memorandum Ruling dated January 11, 1996.

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.

This Court further held the class certification to be provisional, instructing plaintiffs that additional proof would be necessary in order for the class to be fully certified. However, thereafter, this Court determined that certification was improvidently granted, and decertified the class. [FN89]

FN89. Fed.R.Civ.P. 23(c)(1) specifically provides that an order allowing a class action to be maintained may be conditional, and may be altered or amended before the decision on the merits. See Memorandum Ruling of January 11, 1996.

This Court cautioned plaintiffs' counsel in its original ruling that the evidence presented on numerosity was not sufficient to uphold a class certification and granted plaintiffs the opportunity to bolster that information. This Court remained unconvinced that such numerosity exists. However, even if numerosity

were sufficient to sustain class certification, the time was ripe for revisiting the entire question of class.

[28] Efficiency and economy of litigation is the principal purpose underlying Rule 23 certification. [FN90] This Court is acutely aware that the purpose for which Rule 23 was created is to allow for efficiency and economy of litigation.

FN90. *American Pipe & Construction Co. v. The State of Utah*, 414 U.S. 538, 553, 94 S.Ct. 756, 766, 38 L.Ed.2d 713 (1974).

Certification of a class in this matter would have served two primary purposes. First, litigation on behalf of the entire class would allow for an opportunity to remedy the entirety of the harm inflicted by LSU's failure to effectively accommodate its female population. Second, according to plaintiffs, a class is necessary to protect the future viability of this Court's judgment and jurisdiction. These are addressed in turn.

Plaintiffs' complaint sought monetary relief for the named individuals and equitable relief for both the individuals and the class. Monetary relief has hereinabove been denied the individually named plaintiffs due to a failure to prove the requisite intent necessary to allow for monetary damages and would also, thus, be denied to any class which might be certified. [FN91]

FN91. Plaintiffs have not requested monetary damages for the class as of trial.

Based upon a finding that Title IX has been violated, plaintiffs have been granted equitable relief in the form of a declaration that LSU is out of compliance with Title IX and an injunction for LSU to either come into compliance immediately or provide this Court with an adequate plan to do so with all due haste.

First, as to putative class members who attended LSU in the past or are now attending the university, it is probable that, by *925 violating Title IX, LSU has also injured other female students at LSU. Plaintiffs argued that class certification was necessary in order to provide a remedy to other female students who may have been harmed. This argument, however, was not persuasive. In view of the lack of a finding of intent, others who may have been harmed in the past would likewise not be entitled to monetary relief.

As to the equitable relief, it is broadly construed to inure to the benefit of all female athletes who seek equal opportunity to participate in sports who are presently attending or in the future will attend LSU and would not benefit those no longer at LSU.

Second, as to putative class members who will, in the future, attend LSU, plaintiffs argue the possibility exists that LSU will once again violate Title IX after being ordered to comply by this Court. Should that event occur, anyone who wishes can make a complaint with the Office of Civil Rights and instigate an administrative investigation and evaluation of LSU. Further, any woman who believes she has sustained personal, individualized injury, can at that time petition a Court for redress for her particular individual injury. Consequently, potential future injured parties will not, and should not, be bound by this Court's finding on intent as to future action by LSU. If LSU, after having had its actions reviewed by this Court and being ordered into compliance, decides to violate Title IX, intent will and should be a new issue for determination at that time. To bind future litigants by this Court's present findings as to intent would be unjust. Therefore, to create a class to include future potential litigants would have been unjust. Consequently, to certify a class to include those future putative members would not have benefited efficiency and economy and would, moreover, have created the possibility of unjust result.

In addition to arguing that class certification was necessary to properly remedy the harm inflicted by LSU, plaintiffs also argued that certification was necessary in order to allow for continuance of this Court's jurisdiction, if necessary, beyond the date that the Pinedas graduate. This argument also did not carry great weight. Assuming, arguendo, that compliance will not be achieved prior to the Pinedas' leaving LSU, there would need be adjustment of named plaintiffs. However, should that event occur, this Court recognizes no reason not to allow plaintiffs an opportunity to substitute other plaintiffs with standing at that time. A very similar proceeding would be necessary, even if a class were certified. Class representatives, as noted above, must have standing individually, in order to litigate on behalf of a class. Were the Pinedas to be appointed as class representatives and lose their standing, plaintiffs' counsel would require an opportunity to seek appointment of new class representatives. In either circumstance, the adjustment would be necessary.

Therefore, certification of a class would not have effected the efficiency or economy of the proceeding in the event the Pinedas lose their standing for equitable relief. Without that affirmative need for class certification to protect this Court's jurisdiction, this Court was not inclined to make this matter more complicated than it necessarily must be.

Consequently, this Court found that, notwithstanding the arguments of numerosity, which in and of themselves are inherently weak, the underlying purpose of Rule 23 to promote judicial efficiency and economy would not have been met by certifying a class herein.

This Court did not hold that in a Title IX case with facts different from those presently before the Court, a class certification could not be desirable and proper; however, under the particular facts of this case, this Court found that class certification would not have acted to encourage the underlying purpose of efficiency and economy of litigation.

After hearing all arguments and weighing all evidence presented herein, this Court found that, certification of a class would not have acted to increase the efficiency or economy of this litigation. Rather, certification of a class would have had the opposite effect. Consequently, under the authority and discretion granted to this Court, the class was DECERTIFIED by Memorandum Ruling *926 prior to final decision on the merits. [FN92]

FN92. Fed.R.Civ.Pro. 23(c)(1). Memorandum Ruling of January 11, 1996.

ATTORNEY'S FEES

Plaintiffs seek attorney's fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 90 Stat. 2641, as amended, 42 U.S.C. § 1988, which provides in pertinent part:

In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 ..., or title VI of the Civil Rights Act of 1964 ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (emphasis added)

The Supreme Court continues to define "prevailing party," and thus, has determined that "Congress intended to permit the ... award of counsel fees only

when a party has prevailed on the merits." *Farrar v. Hobby*, 506 U.S. 103, 109, 113 S.Ct. 566, 572, 121 L.Ed.2d 494 (1992) (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670 (1980)) (per curiam). [FN93]

FN93. Plaintiff, Joseph Farrar, "[F]iled a lawsuit demanding 17 million dollars from six defendants. After 10 years of litigation and two trips to the Court of Appeals, he got one dollar from one defendant." *Farrar*, 506 U.S. at 116, 113 S.Ct. at 575 (O'Connor, J., concurring).

The district court granted plaintiff \$280,000 in fees, \$27,932 in expenses and \$9,730 in prejudgment interest. The Fifth Circuit, reversed the fee award, finding "the plaintiffs were not prevailing parties and therefore, ineligible for fees under § 1988." *Farrar*, 506 U.S. at 107, 113 S.Ct. at 571.

The Supreme Court found that Farrar was a "prevailing party;" however, declined to grant attorney's fees pursuant to 42 U.S.C. § 1988, on the basis that plaintiff's "failure to prove an essential element of his claim for monetary relief" should result in "no fee at all." *Farrar*, 506 U.S. at 115, 113 S.Ct. at 575.

Accordingly, "in order to qualify for attorney's fees under § 1988 a plaintiff must be a 'prevailing party.'" *Farrar*, 506 U.S. at 109, 113 S.Ct. at 572. The Supreme Court has granted a " 'generous formulation' of the term," holding " 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Farrar*, 506 U.S. at 109, 113 S.Ct. at 572 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978))).

The Supreme Court also notes, "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Farrar*, 506 U.S. at 109, 113 S.Ct. at 572 (quoting *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3104, 87 L.Ed.2d 114 (1985)).

Against this background, the Supreme Court further defined the definition of "prevailing party" in three (3) cases prior to their decision in *Farrar* in 1992.

[FN94] Accordingly, in order to qualify as a "prevailing party" a plaintiff is required to prove "the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Hewitt*, 482 U.S. at 761, 107 S.Ct. at 2676 (emphasis omitted). [FN95] The Supreme Court makes clear in *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (per curiam), "that a judgment--declaratory or otherwise--will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the *927 defendant toward the plaintiff." *Farrar*, 506 U.S. at 110, 113 S.Ct. at 572 (quoting *Rhodes*, 488 U.S. at 4, 109 S.Ct. at 203). In *Rhodes* the declaratory judgment subsequently resulted in "modification of prison policies," however, it did not effect either plaintiff as "one of whom was dead and the other released." *Rhodes*, 488 U.S. at 4, 109 S.Ct. at 203. [FN96]

FN94. *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (per curiam); *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987).

In *Hewitt* the Supreme Court denied "prevailing party" status to an inmate in an action against state prison officials for alleged due process violations when his claim resulted in no relief on the merits, only an "interlocutory ruling that his complaint should not have been dismissed for failure to state a Constitutional claim." *Hewitt*, 482 U.S. at 760, 107 S.Ct. at 2675-76.

FN95. In *Rhodes*, the Supreme Court declined to award attorney's fees based on the grant of a declaratory judgment which by the time the district court entered judgment, one of the plaintiffs had died and the other was no longer in custody. *Rhodes*, 488 U.S. at 2, 109 S.Ct. at 202.

FN96. In *Texas State Teachers Assn. v. Garland Independent School District*, the Court further defined its rulings in *Hewitt* and *Rhodes* and held, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers*, 489 U.S. at 792, 109 S.Ct. at 1493.

In *Texas State Teachers*, The Supreme Court further emphasized that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Id.* at 792-793, 109 S.Ct. at 1493. The Court

found the plaintiffs to be prevailing parties as they "obtained a judgment vindicating [their] First Amendment rights [as] public employees" and "materially altered the [defendant] school district's policy limiting the rights of teachers to communicate with each other concerning employee organizations and union activities." *Id.* at 793, 109 S.Ct. at 1494.

[29] Accordingly, the present status of "prevailing party" in a civil rights litigation pursuant to 42 U.S.C. § 1988 is now defined as follows:

[a] civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt*, supra, 482 U.S. at 760, 107 S.Ct. at 2675, or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. See *Hewitt*, supra, 482 U.S. at 764, 107 S.Ct. at 2677. Otherwise the judgment or settlement cannot be said to "affect [t]he behavior of the defendant toward the plaintiff." *Rhodes*, 488 U.S. at 4, 109 S.Ct. at 203. Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. *Texas State Teachers*, supra, 489 U.S. at 792-793, 109 S.Ct. at 1493. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. [FN97]

FN97. *Farrar*, 506 U.S. at 111-12, 113 S.Ct. at 573.

Therefore, plaintiffs' "eligibility" for attorney's fees rests on "the material alteration of the legal relationship between the parties." *Farrar*, 506 U.S. at 111, 113 S.Ct. at 573. "Of itself, 'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status." *Farrar*, 506 U.S. at 112, 113 S.Ct. at 573-74 (quoting *Hewitt*, 482 U.S. at 762, 107 S.Ct. at 2676). Further, "[N]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant."

Farrar, 506 U.S. at 113, 113 S.Ct. at 574.

[30][31] The Pinedas have prevailed in this matter by forcing LSU to provide opportunity for them to participate in a fast pitch softball program which is effectively planned and implemented. They will be granted the opportunity to try out for the newly created intercollegiate varsity fast pitch softball team which has the necessary tools to effectively compete in Division I play. Although LSU argues it had committed to institute fast pitch softball prior to the Pinedas' suit and had done so as of trial, this Court did not find LSU credible as to its commitment to fully implement its decision. However, now LSU must immediately fully institute and accommodate a Division I fast pitch softball team or provide an adequate plan for such implementation. The Pinedas can now try out for and if successful, play for the team in a competitive facility and with all necessary tools to effectively compete or for a team which has an adequate plan for such implementation. But for the Pinedas, this Court is convinced LSU would have continued to drag its feet. Although defendants argue the Pinedas have not forced change--this Court disagrees. The change might be subtle, but *928 it is sufficient to be a prevailing party. [FN98] The degree of change does not control the award of attorney's fees, rather, impacts the amount of attorney's fees awarded. [FN99]

FN98. Farrar, 506 U.S. 103, 113 S.Ct. 566. See supra note 93 and accompanying text.

FN99. Id.

[32] This Court has determined plaintiffs, Cindy and Karla Pineda, are eligible for a fee award based on their "prevailing party" status. However, the inquiry under § 1988 does not end with a determination that plaintiffs are "prevailing parties." Having determined that this litigation "materially alters the legal relationship between the parties," a determination must now be made as to the "degree of plaintiff's overall success [which] goes to the reasonableness of a fee award." *Texas State Teachers*, 489 U.S. at 793, 109 S.Ct. at 1493; *Farrar*, 506 U.S. at 114, 113 S.Ct. at 574; *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

The Supreme Court instructs "[i]ndeed, 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar*, 506 U.S. at 114, 113 S.Ct. at 574 (quoting *Hensley*,

461 U.S. at 436, 103 S.Ct. at 1941).

The Pinedas sought declaratory, injunctive and monetary relief from defendants. As stated, this Court denied the preliminary injunctive relief and via this opinion, has declined to grant the particularized injunctive relief sought. Further, this Court found plaintiffs failed to prove the requisite element of intent necessary to justify monetary damages. Therefore, the only relief sought by plaintiffs which has been granted by this Court is declaratory relief wherein this Court has found LSU is not in compliance with the mandates of Title IX and thus, injunctive relief ordering LSU to immediately comply or present a plan which will address said non-compliance.

[33] The Supreme Court in *Farrar* discusses the responsibility of the court in its determination of reasonable fees that may be granted under § 1988 and instructs "[I]f a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount."

Farrar, 506 U.S. at 114, 113 S.Ct. at 574 (quoting *Hensley*, 461 U.S. at 436, 103 S.Ct. at 1941). Further, "[W]here recovery of private damages is the purpose of ... civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Farrar*, 506 U.S. at 114, 113 S.Ct. at 575 (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 585, 106 S.Ct. 2686, 2700, 91 L.Ed.2d 466 (1986)). "Such a comparison promotes the court's 'central' responsibility 'to make the assessment of what is a reasonable fee under the circumstances of the case.'" *Farrar*, 506 U.S. at 115, 113 S.Ct. at 575 (quoting *Blanchard v. Bergeron*, 489 U.S. 87, 96, 109 S.Ct. 939, 946, 103 L.Ed.2d 67 (1989)).

Plaintiffs chose to file a private right of action rather than to file an administrative complaint with OCR. Monetary damages are allowable for plaintiffs in a private right of action; they are not allowable under an administrative action under OCR. The declaratory relief granted here is of the same nature which could be provided by OCR through the administrative proceeding. Consequently, the monetary damages, arguably, were at least one of the, if not the primary, purpose for the exercise of a private right of action.

[34] The Supreme Court further instructs that any damages awarded pursuant to § 1988 "must always be

designed 'to compensate injuries' caused by the [constitutional] deprivation." Farrar, 506 U.S. at 115, 113 S.Ct. at 575 (quoting Memphis Community School District v. Stachura, 477 U.S. 299, 309, 106 S.Ct. 2537, 2544 (1986) (quoting Carey v. Piphus, 435 U.S. 247, 256-57, 264, 98 S.Ct. 1042, 1048-49, 1052, 55 L.Ed.2d 252 (1978))). Further, the Supreme Court admonishes "that fee awards under § 1988 were never intended to 'produce windfalls to attorneys.'" Farrar, 506 U.S. at 115, 113 S.Ct. at 575 (quoting Riverside, 477 U.S. at 580, 106 S.Ct. at 2697 (plurality opinion) (quoting S.Rep. No., 94-1011, p. 6 (1976) *929 U.S.Code Cong. & Admin.News, 1976, pp. 5908, 5913)).

[35] Existing jurisprudence instructs this Court to reduce the hours claimed by plaintiffs' counsel to account for time expended on unsuccessful claims. The Supreme Court in both Hensley and Texas State Teachers instructs as follows:

When claims are based on different legal facts and legal theories, the district court should treat the claims as separate suits and award attorneys fees only for time expended on the successful claims. On the other hand, when the claims arise from a common core of facts and involve related legal theories, the district court should attempt to arrive at a reasonable fee award 'either by attempting to identify the specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff.'

Wyatt, 928 F.2d 718, 724 (citing Hensley, 461 U.S. at 434-36, 103 S.Ct. at 1939-41); Texas State Teachers, 489 U.S. at 789-90, 109 S.Ct. at 1492.

In this litigation, the Court has found that the Pinedas are prevailing parties such that they are eligible for an award of attorney's fees. However, suit was initially instituted by the Pederson plaintiffs who the Court has found did not have the requisite standing. The claims of the Pederson plaintiffs were dismissed; therefore, they are not prevailing parties as defined by the Supreme Court. Thus, this litigation presents both of the factual scenarios outlined by the Supreme Court.

First, this is a consolidated action, therefore, the claims of the Pederson plaintiffs and the Pinedas, although similar, are distinct. Judge Polozola, on March 30, 1995, signed the order consolidating the Pineda case, transferred from the Eastern District, with the Pederson case then pending before this Court. However, it was not until May 25, 1995 that

this Court signed the Joint Response to Consolidation and Addendum to the Scheduling Order which fully consolidated both the Pederson and Pineda actions. Accordingly, as in Wyatt, supra there is a distinct severable point between the two (2) claims such that they may be treated as separate suits. Accordingly, this Court will award attorney's fees only from May 25, 1995 forward. [FN100]

FN100. In Wyatt, the Fifth Circuit awarded fees for hours expended after the date of a declaratory judgment and further reduced the hours claimed by 50% prior to the declaratory judgment. Wyatt, 928 F.2d at 724.

[36] Further, as admonished by the Supreme Court, this Court must account for the lack of success of the Pederson plaintiffs and the limited success of the Pinedas in this litigation, which requires the Court to "identify specific hours that should be eliminated or ... reduce the award to account for the limited success of the plaintiffs." Hensley, 461 U.S. at 434-436, 103 S.Ct. at 1939-41; See also, Texas State Teachers, 489 U.S. at 790-91, 109 S.Ct. at 1492. Accordingly, this Court will address only those hours and expenses which reflect the work which would have been done in order to present the Pineda claim in this litigation.

As both parties agreed that should attorney's fees become an issue, proof of same could be produced after Phase I, plaintiffs are hereby ORDERED to present within twenty (20) days of filing of this opinion full documentation and any evidence they feel necessary to establish the amount spent on the Pineda claim as limited by this Court. Once received, this Court will make its determination of the amount of attorney's fees to award to the Pinedas.

PLAINTIFFS' MOTION FOR SANCTIONS

Plaintiffs have filed motion requesting this Court sanction defendants, "Louisiana State University, Joe Dean, William E. Davis, defendants' counsel, and any related parties" for allegedly withholding documents. The plaintiffs assert Federal Rules of Civil Procedure 16 and 26, 28 U.S.C. § 1927, and this Court's inherent power to control its proceedings as the basis for sanctions. The plaintiffs request this Court grant the following sanctions:

*930 (1) Enter a finding of fact adverse to Joe Dean, William E. Davis, Pat Culbertson, David Bahnsen, and Gregory LaFleur with respect to their credibility on the claim that LSU did not know the

National Collegiate Athletic Association ("NCAA") required LSU to submit a written plan on achieving gender equity;

(2) Enter a finding of fact that LSU does not have, and has never had, even in draft form, a plan for complying with Title IX;

(3) Enter a finding of fact that even if LSU had a plan for complying with Title IX, LSU did not commit it to writing because to have done so would have resulted in an admission that LSU was not in compliance with Title IX and was then operating under an inadequate time table and plan for compliance;

(4) Enter a finding of fact that LSU deliberately delayed developing or even drafting a plan until after trial to avoid necessary and inevitable admissions;

(5) Order the defendants and their attorneys to locate any and all documents responsive to discovery requests that were not produced and, under oath, certify specifically what was done to locate same;

(6) Determine each person and entity responsible for withholding documents, reprimand same, and levy monetary sanctions to be paid either to the Plaintiffs or the Court, or into a scholarship fund for female athletes, with the provision that the sanctions be paid personally by the responsible parties and not reimbursed by LSU, the Tiger Athletic Foundation, or any other entity; and

(7) Award plaintiffs the attorney's fees incurred in bringing this Motion for Sanctions.

I. Specific Violations Urged by Plaintiffs

The plaintiffs allege first that various letters between LSU and officials of the NCAA were within the scope of plaintiffs' requests for production of documents but were not produced by the defendants until October 30, 1995, the day before the defendants rested at trial. Plaintiffs made several requests, including the production of "[a]ll documents that record, reference, or otherwise reflect or relate to communications of LSU, Dean and/or Davis with any member(s) of the NCAA from 1984 to the present regarding Title IX, gender equity, and/or LSU's, Dean's and/or Davis' suggestion or desire to withdraw from the NCAA," "all documents which reflect, refer or relate to LSU's gender equity study, LSU's cooperation with the OCR with respect to any formal or informal gender equity studies or investigations, and LSU's response to the Southeastern Conference's and/or National Collegiate Athletic Association's

gender equity studies."

Certain documents were provided pursuant to these requests; however, plaintiffs argue the following were not timely produced and fall within the requests:

(1) December 9, 1994 facsimile from LSU Executive Vice-Chancellor James M. Coleman to David Bahnsen, LSU Assistant Athletic Director for NCAA compliance, and Pat Culbertson, Chair of LSU's Athletic Counsel, concerning the NCAA's Peer-Review Team's Report on LSU's self-study;

(2) January 13, 1995 letter from Robert W. Thomas, NCAA Compliance Representative, to David Bahnsen, LSU Assistant Athletic Director for NCAA compliance regarding LSU's plan for addressing gender issues;

(3) January 17, 1995 letter from LSU Executive Vice-Chancellor James M. Coleman to Robert W. Thomas, NCAA Compliance Representative, enclosing LSU's response to the Peer Review Team's report on LSU's self-study;

(4) March 2, 1995 letter from R. Gerald Turner, Chair of the NCAA Committee on Athletic Certification to LSU Chancellor William E. Davis, enclosing a summary of the NCAA Committee on Athletics Certification's decision to certify LSU only provisionally pending LSU's submission of a written gender-equity plan;

(5) May 16, 1995 letter from LSU Chancellor Davis to R. Gerald Turner, Chair of the NCAA Committee on Athletic Certification, complaining that the self-study instrument did not require a written gender-equity plan; and

***931** (6) June 6, 1995 letter from R. Gerald Turner, Chair of the NCAA Committee on Athletic Certification to LSU Chancellor William E. Davis, regarding the need for a written plan addressing gender issues.

Plaintiffs also requested all documents which "reflect, refer or relate to any and all efforts by LSU to establish women's softball as a varsity sport" and "[d]ocuments which provide a complete list of all athletic facilities which LSU has plans for or is considering constructing or renovating, including an estimate of the costs for such construction/renovation and the planned revenue sources for each construction/renovation." Again, certain documents were produced pursuant to these requests; however, plaintiffs allege that during trial testimony, witnesses associated with LSU [FN101] testified regarding plans, drawings, and itemization of costs for a proposed new softball facility which had not been

produced.

FN101. Chancellor William E. Davis, Vice-Chancellor Baudin, and Softball Coach Cathy Compton.

Plaintiffs also requested "[a]ll surveys or assessments of student interest in all athletics from 1984 to the present" and "[a]ll documents which regard or reflect, in any way, efforts undertaken by LSU from the 1984-1985 academic year until the present to determine the interest of LSU students in LSU's intercollegiate sports program in general and/or in particular sports." Once again plaintiffs allege LSU Chancellor Davis and LSU Director of Recreational Sports Randy Mast testified LSU conducted surveys of students regarding their sports interests. The surveys referenced by the witnesses were not produced by defendants until defendants submitted their response to plaintiffs' Motion for Sanctions. [FN102]

FN102. The defendants attempted to introduce testimony concerning the surveys regarding interest in recreational sports at trial. The introduction was objected to by plaintiffs and was stricken by this Court due to defendants' failure to produce the documents during discovery. However, the testimony was nonetheless, not relevant to any fact at issue as the survey did not contain information relevant to the Court.

The plaintiffs also requested "[e]very document ... addressed from ... Beth Pederson." At trial, Soccer Coach Miriam Hickey testified regarding a letter written to her by Beth Pederson. Coach Hickey testified the letter was delivered to her by Beth Pederson on August 31, 1995; however, LSU did not produce the letter until during trial. The letter was introduced into evidence by the defendants at trial without objection by plaintiffs.

Finally, plaintiffs assert that during the course of deposition, defendant, Joe Dean, was specifically asked if he had created any written documents following the LSU visit by Valerie Bonnette of the Office of Civil Rights. Dean testified in deposition that no written document was created following the OCR visit. In a second deposition, Dean again testified he did not recall writing a memo following Ms. Bonnette's visit. However, a memo dated March 25, 1993, was written by Joe Dean following Ms. Bonnette's visit. Plaintiffs allege they first obtained a

copy of this memo during the deposition of volleyball coach Scott Luster on July 15, 1994.

In response, LSU asserts its correspondence with the NCAA regarding the NCAA Peer Review was not within the scope of plaintiff's request for production because the Peer Review was not related to Title IX. LSU argues gender equity was only a small "sub-part" of the NCAA Peer Review and the Review ultimately concluded LSU was "making a conscious effort to embrace the principles of gender equity." LSU further argued any written plan for addressing gender equity issues would have been inadmissible at trial under Federal Rule of Evidence 407 as a subsequent remedial measure.

LSU asserts the failure to produce the softball facility plans was inadvertent. The person coordinating the document production at LSU was unavailable and consequently, counsel attempted to contact the various offices to obtain documents. Counsel candidly admitted he failed to request the documents from the university official who had possession of those documents because that office was not located within the Athletic Department office building. LSU argues the late production of those documents did not prejudice the plaintiffs.

***932** As to the survey documents, LSU argues the surveys of university students do not assess the students' interest in athletics and therefore, are not within the discovery requests. However, the surveys do ask whether LSU's reputation in intercollegiate sports affected the students' decision to attend LSU. LSU argues the recreational sports survey is within the plaintiffs' discovery requests only if the request is given its broadest possible interpretation as the surveys do not relate to intercollegiate athletics.

LSU counsel assert they first became aware of the Beth Pederson letter during trial testimony. After testimony regarding the letter was heard, plaintiffs' counsel requested a copy of the letter. LSU counsel thereafter obtained a copy of the letter from Coach Hickey and produced the letter during trial. LSU also points out that plaintiff had knowledge of the letter and asserts no prejudice resulted to the plaintiffs due the production of the letter during trial.

LSU asserts the March 25, 1993 memo from Joe Dean regarding the OCR visit was produced in a timely fashion. The memo was produced to plaintiffs during the July 15, 1994 deposition of Scott Luster.

Plaintiffs claim they were not aware of the memo until Scott Luster's deposition; however, on July 14, 1994, plaintiffs' counsel asked Joe Dean specific and detailed questions about a memo regarding the OCR visit on March 25, 1993. Therefore, LSU argues plaintiffs had knowledge of the memo prior to its production.

II. Legal Basis For Sanctions

Plaintiffs argue Federal Rules of Civil Procedure 16 and 26, 28 U.S.C. § 1927, and this Court's inherent power to control its proceedings provide this Court with authority to sanction defendants, their attorneys, or both for their alleged violations of the discovery process.

Plaintiffs allege that due to the failure of the defendants to produce the above referenced documents, the defendants violated paragraph 7 of the Court's December 14, 1994 Scheduling Order. Paragraph 7 directed "all discovery must be completed on or before the deadline [of July 24, 1995]." Federal Rule of Civil Procedure 16(f) provides:

[i]f a party or party's attorney fails to obey a scheduling, ... order ... the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

The sanctions incorporated by the reference from Rule 37 of Civil Procedure include:

- B. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
- C. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; and
- D. In lieu of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit

to a physical or mental examination.

Federal Rule of Civil Procedure 37(b)(2)(B), (C), and (D).

The plaintiffs also allege the failure to produce the documents was a violation of Federal Rule of Civil Procedure 26(e) and (g). Rule 26(e)(2) provides:

A party is under a duty seasonably to amend a prior response to a ... request for production ... if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Rule 26(g)(2) provides that:

Every discovery ... response ... made by a party represented by an attorney shall *933 be signed by at least one attorney of record ... The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

- (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
- (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
- (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Rule 26(g)(3) provides for the following sanctions for a violation of Rule 26(g)(2).

If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

The plaintiffs also argue defendants' counsel are liable under 28 U.S.C. § 1927 based on discovery violations. 28 U.S.C. § 1927 provides:

[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be

required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

[37][38][39] Awards under 28 U.S.C. § 1927 are penal in nature. *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1382 (5th Cir.1979) *aff'd* in relevant part sub. nom. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). "Strict construction of the statute is necessary so that the legitimate zeal of an attorney in representing her client is not dampened." *Browning v. Kramer*, 931 F.2d 340, 344 (5th Cir.1991) (citations omitted). Section 1927 authorizes awards only against attorneys, not against the parties. *Id.* Finally, Section 1927 "creates liability only for excess costs, expenses and attorney's fees reasonably incurred because of the attorney's unreasonable and vexatious multiplication of the proceedings." *Id.* Therefore, the district court must identify and demonstrate the actual fees and costs which the proscribed conduct has caused. *Id.* at 346.

[40][41] Plaintiffs also assert the defendants' alleged violations of discovery requests and failure to provide documents may be sanctioned under this Court's inherent power. In *Chambers v. NASCO, Inc.*, the United States Supreme Court discussed the longstanding doctrine that courts have certain implied powers which are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 501 U.S. 32, 43, 111 S.Ct. 2123, 2132, 115 L.Ed.2d 27 (1991) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631, 82 S.Ct. 1386, 1388-1389, 8 L.Ed.2d 734 (1962)). Inherent powers must be exercised with restraint and discretion including "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45, 111 S.Ct. at 2132-33. A court's inherent power is both "broader and narrower" than the various statutes and rules which provide for sanctions.

Id. at 46, 111 S.Ct. at 2134. The Court's inherent power "extends to a full range of litigation abuses" but may only be used in cases of "bad faith conduct or willful disobedience" whereas other rules and statutes do not require a finding of bad faith but are limited to the specific noted violations. *Id.* at 46-47, 111 S.Ct. at 2134.

[42] Plaintiffs concede that under Fifth Circuit jurisprudence the threshold for the use of this Court's

inherent power to sanction is high. *Reed v. Iowa Marine & Repair *934 Corp.*, 16 F.3d 82, 84 (5th Cir.1994). Also, in *Topalian v. Ehrman*, the Fifth Circuit noted that when considering sanctions under any authority "the district court should carefully choose sanctions that foster the appropriate purpose of the rule, depending on the parties, the violation, and the nature of the case." 3 F.3d 931, 936 (5th Cir.1993) (quoting *Thomas v. Capital Security Services*, 836 F.2d 866, 877 (5th Cir.1988) (en banc)). Therefore, a district court's findings regarding sanctions should reflect the following four (4) factors:

- (1) What conduct is being punished or is sought to be deterred by the sanction;
- (2) What expenses or costs were caused by the violation of the rule;
- (3) Were the costs and expenses "reasonable," as opposed to self-imposed, mitigatable, or the result of delay in seeking court intervention; and
- (4) Was the sanction the least severe sanction adequate to achieve the purpose of the rule under which it was imposed.

Topalian, 3 F.3d at 937 (citations omitted). [FN103]

FN103. The Fifth Circuit has also noted that the degree of specificity and explanation required in the sanction order varies according to "the particular circumstances of a case, including the severity of the violation, the significance of the sanctions, and the effect of the award." *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 883 (5th Cir.1988). Substantial awards for sanctions will be reviewed by the appellate court more rigorously; however, a denial of sanctions will be reviewed using the same analysis. *Id.*

III. Analysis of Sanctions

[43][44] This Court finds that as to the correspondence between various persons at LSU and the NCAA, such correspondence did fall within the plaintiffs' requests for production and should have been produced by defendants at the appropriate time during discovery and certainly prior to the time of trial. Despite LSU's assertion that the documents were irrelevant and inadmissible, admissibility is not the standard for discovery. Although the information ultimately might be found to be inadmissible, the standard for discovery is not admissibility, rather is whether or not the material could be reasonably anticipated to lead to discoverable material. The LSU/NCAA correspondence clearly addresses issues of gender equity, and therefore falls within the

plaintiffs' requests for production. Regardless of LSU's belief regarding the relationship of the documents to Title IX or to the ultimate admissibility and relevance of the documents, the documents fall squarely within plaintiffs' request for production and within the standard for discovery. LSU was aware of the documents and failed to produce them.

This Court finds that as to the plans, drawings, and itemization of costs for the proposed softball field, such documents were within the plaintiffs' requests for production and should have been produced by the defendants during discovery. Counsel for LSU admits inadvertent failure to obtain these documents but argues no prejudice resulted to the plaintiffs. However, that determination addresses the need for sanctions not whether the documents should have been produced. This Court finds that these documents should have been produced to plaintiffs; however, accepts counsel's assertion that the failure to do so was inadvertent given LSU's disorganized, reactive approach to its commitment to add women's fast pitch softball.

This Court finds that as to the documents regarding the survey of LSU students as to the quality and importance of recreational services [FN104] and the "New Student Survey" of all LSU students, [FN105] such documents fall within the plaintiffs' requests for production and should have been produced during discovery. [FN106] LSU argues the documents were *935 not relevant. Again, under discovery, the standard is not relevance, but whether the information reasonably could lead to the discovery of relevant information and this Court finds said documents should have been produced. LSU's counsel also assert they were not aware of the recreational surveys until testimony given during trial. Consequently, LSU argues sanctions are not due. As LSU, itself, elicited testimony as to the existence of this evidence, this Court does not find LSU to have been so foolish as to hide or "rat-hole" documents within discovery and then attempt to introduce testimony as to their existence at trial. Consequently, this Court accepts that, for whatever reason, LSU's counsel did not become aware of the information until trial. Further, pursuant to objection of plaintiffs, this Court did not allow defendants to introduce the testimony concerning these documents at trial. This Court notes the information within the survey was not relevant to the question at issue and therefore, this Court finds no true prejudice to plaintiffs.

FN104. These documents are attached to Defendants' Response to Plaintiffs' Motion for Sanctions as Exhibit 6.

FN105. These documents are attached to Defendants' Response to Plaintiffs' Motion for Sanctions as Exhibit 5.

FN106. Although the information ultimately might be found to be irrelevant to a fact at issue, the standard for discovery is whether or not the material could be reasonably anticipated to lead to discoverable evidence. Further, as defendants attempted to produce testimony as to these surveys, clearly, defendants felt the information relevant and consequently, should have produced same pursuant to a validly issued discovery request.

[45] This Court finds that although the letter from Beth Pederson to Coach Miriam Hickey dated August 31, 1995 falls within the plaintiffs' requests for production, because it was written by the plaintiff herself and delivered by the plaintiff to LSU plaintiffs had equal knowledge of same. Therefore, although there might be a technical violation of the discovery provisions, this Court finds no prejudice to the plaintiffs resulted.

[46] Finally, as to the March 25, 1993 memo written by Joe Dean regarding the OCR visit to LSU, although failure to produce reflects at best very poor memory on the part of Joe Dean, this memo was provided to plaintiffs by defendants on July 15, 1994. Therefore, it was provided to plaintiffs much earlier than the deadline for the completion of discovery and prior to the Plaintiffs' Second Request for Production of Documents. Further, given the specific questioning of Joe Dean regarding this issue during his deposition on July 14, 1994, LSU asserts plaintiffs had full knowledge of the memo prior to that time. Further, once plaintiffs obtained the documents at Luster's deposition, plaintiffs could have petitioned the Court then to allow redeposition of Dean or whatever relief they felt would have removed any prejudice they felt ensued. This was not done. Further, plaintiffs relied extensively upon the memo at trial. Therefore, again, although there might be technical violation of the discovery provisions, this Court finds no prejudice to plaintiffs resulted.

Therefore, this Court finds the failure of the defendants to comply with the requests for production

as to the NCAA documents, the softball plan documents, and the survey documents was a violation of this Court's Scheduling Order and therefore, Federal Rule of Civil Procedure 16(f). Such documents were not produced until during trial, an unacceptable time for production of documents falling within the scope of plaintiffs' requested discovery and clearly beyond the deadline for discovery set forth in the Scheduling Order.

Pursuant to Federal Rule of Civil Procedure 16(f), the Court may sanction a party for failure to obey a scheduling order in a manner which is just and the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of the non-compliance with this rule, including attorney's fees unless the non-compliance was substantially justified or such an award would be unjust.

Defendants' failure to produce the NCAA documents, the softball plan documents, and the survey documents is also a violation of Federal Rule of Civil Procedure 26(e)(2) which requires a party to "seasonably" amend a prior response to a request for production when the party realizes the response was incomplete or incorrect. Rule 26 does not specifically provide for sanctions for a violation of Rule 26(e)(2). [FN107]

FN107. This Court realizes that Federal Rule of Civil Procedure 26(g)(3) specifically provides for sanctions, however, that provision for sanctions specifically addresses sanctions for a violation of the certification requirement set out in Rule 26(g).

The failure to provide the March 25, 1993 Joe Dean memo is not a violation of either Rule 16(f) or 26(e)(2). The memo was clearly provided prior to the deadline for completion *936 of discovery contained within the scheduling order. Therefore, there is no violation of Rule 16(f). The memo was provided to plaintiffs in the course of the deposition of Scott Luster which confirmed such a memo existed. It appears from the deposition of Joe Dean taken the day before the deposition of Scott Luster that plaintiffs had very particularized knowledge of the memo at that time. Plaintiffs could have petitioned the Court to redepose Joe Dean as a result of the memo; however, did not do so. Further, there is no violation under Rule 26(e)(2) for failure to update a prior incomplete or incorrect response to discovery if

the information is otherwise known to the plaintiffs. Therefore, there is no violation of Rule 26(e)(2).

The failure to provide Pederson's letter to plaintiffs prior to trial is not a violation of either Rule 16(f) or 26(e)(2). The letter was not delivered to Coach Hickey by plaintiff until after the deadline for the close of discovery contained in the scheduling order and LSU counsel did not learn about the letter until testimony given at trial. After such testimony, LSU obtained a copy of the letter from Coach Hickey and provided same to plaintiffs. Therefore, LSU complied with the duties set forth in Rule 26(e)(2).

[47] The discovery provided by LSU in response to plaintiffs' numerous requests was voluminous; plaintiffs presented massive numbers of exhibits pursuant to the Scheduling Order for possible introduction at trial. LSU's response to plaintiffs' motions for sanctions asserts that LSU attempted to respond to all of plaintiffs' discovery requests in good faith and acted with no intent to conceal any documents. LSU also argues no prejudice resulted to plaintiffs. Based upon the conduct of counsel for both plaintiffs and defendants throughout this case and defendants' explanation, this Court does not find the defendants or defendants' attorneys deliberately withheld the requested documents. Instead, this Court finds defendants' failure to produce the requested documents is illustrative of LSU's lack of organization in connection with the administration of women's athletics which permeates this entire case and defense counsel's mistaken reliance upon an incorrect standard for production under discovery. As this Court finds defendants' conduct was not deliberate, this Court finds no violation of Federal Rule of Civil Procedure 26(g)(2), no violation of 28 U.S.C. § 1927, and no basis for levying sanctions under this Court's inherent authority. [FN108]

FN108. Federal Rule of Civil Procedure 26(g)(2) requires that the signature of an attorney on a discovery response constitutes a certification to the best of the signor's knowledge, information and belief which is formed after reasonable inquiry. This Court finds that such reasonable inquiry was conducted. 28 U.S.C. § 1927 requires a finding that an attorney acted unreasonably and vexatiously. This Court finds that defendants did not act unreasonably or vexatiously. The use of this Court's inherent powers to sanction defendants requires a finding that the defendants acted with bad faith or with

willful disobedience. This Court finds that defendants' violations were not sufficiently deliberate or in bad faith such as to warrant this exceptional action.

Therefore, this Court will consider sanctions only as to defendants' violations of Federal Rule of Civil Procedure 16(f) for failure of the defendants to comply with the Scheduling Order and for defendants' violations of Rule 26(e) for failure to timely supplement production of documents. Because the same underlying conduct forms the basis for the violations of Rules 26(e)(2) and 16(f), [FN109] this Court will award sanctions under the standard set forth in Rule 16(f) as Rule 26(e)(2) does not set forth specific standards for sanctions.

FN109. The failure to produce the NCAA documents, the softball plan documents, and the survey documents is the underlying conduct for the violations of both rules.

Defendants' failure to produce the NCAA documents, the softball plan documents, and the survey of students documents were all violations of Federal Rules of Civil Procedure 16(f) and 26(e). However, this Court finds that sanctions should be awarded only for the failure to produce the NCAA documents. As to the NCAA documents, the defendants were aware of these documents, aware of the discovery requests, and should have produced these documents pursuant to the discovery requests. Defendants' decision to substitute their judgment as to the documents' relevance for the standard for discovery *937 is unacceptable and will be sanctioned by this Court.

However, this Court finds that as to the softball plan documents and the survey documents, no sanctions will be awarded. As to the softball plan documents, this Court has found that the failure to produce these documents was inadvertent and was acknowledged by the defendants. Furthermore, the failure to produce these documents was not prejudicial to the plaintiffs as these documents were presented to the Court and were relied upon by the Court in making a determination against LSU. Furthermore this Court recognizes the softball plan documents continued to evolve up through and beyond trial; however, this does not relieve defendants of their obligation to produce same as they evolved. Nonetheless, this Court will not award sanctions for defendants' failure to produce the softball plan documents as such an

award would be unjust under the particular facts of this case.

[48] As to the survey documents, this Court has found the defendants were unaware these documents existed and there was no deliberate attempt to conceal these documents as shown by defendants' attempt to introduce testimony concerning them at trial. Furthermore, plaintiffs first learned of these documents during trial and testimony of these documents was not allowed into evidence upon plaintiffs' objection and therefore, had no impact on the amount of trial preparation done by plaintiffs' attorneys. Finally, the survey documents could not have been relevant to the decision made by this Court. Therefore, no sanctions will be awarded based on the failure to produce the survey documents as such an award would be unjust.

[49] Defendants' failure to produce the NCAA documents, however, clearly effected plaintiffs' trial strategy and the amount of work done by the plaintiffs during the course of the trial. This matter was tried to the Court and the Court obtained and considered all the referenced documents and relied upon several when holding LSU to be in violation of Title IX. Consequently, no palpable prejudice resulted to the plaintiffs. This Court cautions that if this had been a jury trial, or if the documents had been of a different nature, this might not have been the result. However, as this Court fully reviewed all documents and relied upon certain of the documents when ruling against LSU, plaintiffs' outcome was not prejudiced. This Court is not unaware, however, of the potential prejudice sustained by plaintiffs by having new and relevant information surface after plaintiffs had planned their trial strategy.

Therefore, based on the violation of Federal Rules of Civil Procedure 16(f) and 26(e) for failure to provide the NCAA documents, this Court GRANTS plaintiffs' Motion for Sanctions pursuant to Rule 16(f). Defendants shall pay the reasonable expenses, including attorney's fees, incurred by the plaintiffs' attorneys directly resulting from defendants' failure to provide the NCAA documents prior to trial.

This Court ORDERS sanctions in an amount equal to the expenses or costs caused by the defendants' violation. However, the plaintiffs' attorneys must establish what costs and expenses, if any, were actually incurred as a result of defendants' actions and that the amount of sanctions requested is reasonable

as opposed to self-imposed, mitigatable, or the result of delay in seeking court intervention. Plaintiffs must establish the amount of costs, expenses, and attorney's fees directly resulting from the violation.

[50] Finally, this Court finds as required, that the sanction ordered is the least severe sanction adequate to achieve the purpose of the rule. Attorneys and parties should not be allowed to fall back on an excuse of inadvertence, poor judgment or mistake as to law in order to escape their obligations under discovery.

Plaintiffs have fifteen (15) days to produce documentary evidence of the costs, expenses, and attorney's fees, if any, incurred for only those violations noted by the Court as a basis for sanction. Upon receipt of plaintiffs' documentary evidence, this Court will make its award of sanctions.

***938 ORDER**

Considering the foregoing memorandum ruling:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that William Davis, Joe Dean and the Louisiana Board of Supervisors immediately effectively accommodate LSU's female student population pursuant to Title IX or submit an adequate plan for such compliance as expeditiously as possible within twenty (20) days of receipt of this Order.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that attorney's fees will be awarded only from May 25, 1995 forward. Plaintiffs are hereby ORDERED to present within twenty (20) days of filing of this Order full documentation and any evidence they feel necessary to establish the amount spent on the Pineda claim as limited by this Court's Opinion. Upon receipt, a determination of the amount of attorney's fees to be awarded to the Pinedas and will be made.

This Court GRANTS in part plaintiffs' Motion for Sanctions pursuant to Federal Rule of Civil Procedure 16(f), for defendants' failure to provide the NCAA documents. Defendants shall pay reasonable expenses, including attorney's fees, incurred by plaintiffs' attorneys directly resulting from defendants' failure to provide the NCAA documents prior to trial. Plaintiffs have fifteen (15) days to produce documentary evidence of the costs, expenses, and attorney's fees, if any, incurred for those violations noted by the Court as a basis for the sanctions. Upon

receipt, the Court will make its determination of the amount of attorney's fees owed to plaintiffs.

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*198 F.3d 763, *, 1999 U.S. App. LEXIS 32475, **;
99 Cal. Daily Op. Service 9775; 99 Daily Journal DAR 12585*

STEPHEN NEAL; JONATHAN ARCHULETA; BRENT CAMERON; MATT CORONA; MOSES DELFIN; LIONEL HALSEY; BRAD HULL; MIKE MENDOZA; KIRK METZ; JASON RILEY; ANDY VARNER; LARRY VASQUEZ; NATHAN VASQUEZ; ERIN KELLY; NATALIE MORROW; FRIENDS OF BAKERSFIELD WRESTLING; KERN COUNTY WRESTLING ASSOCIATION; NATIONAL WRESTLING COACHES ASSOCIATION; DAVID AFOA; NICK BRADLEY; ELIZAR CEBALLOS; RAPHAEL DAVIS; RUBEN DELEON; DON DELFIN; JOSH FACTOR; JEFF GARDNER; MAX HARRIS; THOMAS JUAREZ; BRETT LOBEL; KEVIN MEANS; JASON MERRELL; IAN NELMS; ROBBIE ODELL; TITO ORTIZ; JOSH READY; MAX SCHURKAMP; JOE YOUNAN; SEBA CLEMENTE, Plaintiffs-Appellees, and JEREMY BRIDGES; DAN CORPSTEIN; TONY DE SOUZA; DEMETRIO DURAN; DAVID MOLANO; JASON RAMSTETTER; ERIC ROWE; RYAN SHEETS; COBY WRIGHT; JESSICA AREVALO; CINDY JORGENSEN; JESSICA RAMSEY; ABBY SCHWARZBERG; LORI STOCKER; DIANA WESENDUNK, Plaintiffs, v. THE BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITIES; CALIFORNIA STATE UNIVERSITY, BAKERSFIELD; BARRY MUNITZ; TOMAS ARCINIEGA; RUDY CARVAJAL, Defendants-Appellants.

No. 99-15316

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

198 F.3d 763; 1999 U.S. App. LEXIS 32475; 99 Cal. Daily Op. Service 9775; 99 Daily Journal DAR 12585

November 4, 1999, Argued and Submitted, San Francisco, California

December 15, 1999, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-97-05009-REC. Robert E. Coyle, Chief District Judge, Presiding.

DISPOSITION: REVERSED and VACATED.

COUNSEL: Peter W. Davis, Crosby, Heafey, Roach & May, San Francisco, California, for the defendants-appellants.

Mark Martel, Palo Alto, California, for the plaintiffs-appellees.

Josephine R. Potuto, University of Nebraska College of Law, Lincoln, Nebraska, for the amici.

JUDGES: Before: William C. Canby, Jr., Cynthia Holcomb Hall, and Susan P. Graber, Circuit Judges. Opinion by Judge Hall.

OPINIONBY: CYNTHIA HOLCOMB HALL

OPINION:

[*765] HALL, Circuit Judge:

The instant case requires us to consider whether **Title IX** prevents a university in which male students occupy a disproportionately high percentage of athletic roster spots from making gender-conscious decisions to reduce the proportion of roster spots assigned to men. We hold that **Title IX** does not bar such remedial actions.

The Board of Trustees of the California State Universities and other defendants appeal from the district

court's order granting the motion of Neal and other plaintiffs for a preliminary injunction. Neal's suit alleged that the decision [**2] of California State University, Bakersfield ("CSUB") to reduce the number of spots on its men's wrestling team, undertaken as part of a university-wide program to achieve "substantial proportionality" between each gender's participation in varsity sports and its composition in the campus's student body, violated **Title IX** and the Equal Protection Clause of the United States Constitution. The district court determined that regulations promulgated pursuant to **Title IX**, and CSUB's program, which was modeled after those regulations, violated **Title IX**. The district court declined to reach the merits of the constitutional challenge, but did hold that the regulations interpreting **Title IX** "raised serious constitutional questions" and rejected Plaintiffs' construction of **Title IX** on that alternative ground. This Court has jurisdiction to review the district court's granting of a preliminary injunction under 28 U.S.C. § 1292(a)(1). We reverse, and vacate the injunction.

I.

Defendant/Appellant CSUB is a large public university where female students outnumbered male students by roughly 64% to 36% in 1996. The composition of CSUB's varsity athletic rosters, however, was [**3] quite different. In the 1992-93 academic year, male students took 61% of the university's spots on athletic rosters and received 68% of CSUB's available athletic scholarship money.

This imbalance helped prompt a lawsuit by the California chapter of the National Organization for Women, alleging that the California State University system was violating a state law that is similar to the federal government's **Title IX**. That lawsuit eventually settled, resulting in a consent decree mandating, inter alia, that each Cal State campus have a proportion of female athletes that was within five percentage points of the proportion of female undergraduate students at that school. This portion of the consent decree was patterned after the first part of the three-part **Title IX** compliance test promulgated by the Department of Education's Office for Civil Rights ("OCR").

When the university agreed to the consent decree, California was slowly emerging from a recession, and state funding for higher education was declining. As a result, CSUB administrators were seriously constrained in what they could spend on athletic programs. The university chose to adopt squad size targets, which would encourage [**4] the expansion of the women's teams while limiting the size of the men's teams. In order to comply with the consent decree, CSUB opted for smaller men's teams across the board, rejecting the alternative of eliminating some men's teams entirely. CSUB's plan was designed to bring it into compliance with the consent decree by the 1997-98 academic year, meaning that female students would fill at least 55% of the spaces on the school's athletic teams. n1

-----Footnotes-----

n1 This figure assumed 60% female enrollment for that year.

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

As part of this across-the-board reduction in the number of slots available to men's athletic teams, the size of the men's wrestling team was capped at 27. Although the reduction was protested vigorously by wrestling coach Terry Kerr, and team captain Stephen Neal expressed concerns [*766] that a smaller squad would prove less competitive, the smaller CSUB team performed exceptionally well, winning the Pac-10 Conference title and finishing third in the nation in 1996. In 1996-97, the men's wrestling roster was capped [**5] at 25, and four of these spots went unused. Nevertheless, in response to the rumored elimination of the men's wrestling team, on January 10, 1997, the team filed the instant lawsuit, alleging that the university's policy capping the size of the men's team constituted discrimination on the basis of gender in violation of **Title IX** and the Equal Protection Clause of the Federal Constitution.

The team sought declaratory and injunctive relief to prevent the squad size reductions. CSUB responded by filing a motion to dismiss. The district court initially granted a temporary restraining order preventing the reductions, then granted a preliminary injunction to prevent CSUB from reducing the size of the wrestling team. The district court concluded as a matter of fact that CSUB's primary motivation for capping the size of the men's teams was to meet the gender proportionality requirements in the consent

decree. The district court concluded as a matter of law that capping the male teams in order to comply with the consent decree violated **Title IX**. Although the district court refused to rule on Plaintiffs' equal protection challenge to the CSUB policy, the court did reject a reading of **Title IX** that created a "safe harbor" for any school that achieved substantial proportionality between the percentage of athletes of one gender and the percentage of students of that same gender. The court concluded that such an approach would raise serious questions under the Equal Protection Clause, and that a desire to avoid reaching such questions, in and of itself, constituted "ample reason for rejecting the safe harbor idea as part of **Title IX**."

II.

On appeal, this Court reviews the district court's grant of a preliminary injunction for abuse of discretion, and "that discretion is abused where the district court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998) (citation and internal quotation marks omitted), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999). The district court's interpretation of **Title IX** is reviewed de novo. See *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999).

III.

This case has its origins in Congress's passage of **Title IX** in 1972. **Title IX** was Congress's response to significant concerns about discrimination against women in education. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523-524 & n.13, 72 L. Ed. 2d 299, 102 S. Ct. 1912 (1982). In the words of the legislation's primary sponsor, Senator Birch Bayh, **Title IX** was enacted to "provide for the women of America something that is rightfully theirs - an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5808 (1972); see also *Bell*, 456 U.S. at 526-27 ("Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction And, because §§ 901 and 902 originated as a floor amendment . . . Senator Bayh's statements - which were made on the same day the amendment was passed . . . are the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902.").

The regulations promulgated pursuant to **Title IX** require schools receiving federal funding to "provide equal athletic opportunity for members of both sexes". 34 C.F.R. § 106.41(c). [*767] In evaluating schools' compliance with that provision, one factor that will be considered is "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes". *Id.* at § 106.41(c)(1). At the same time, "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 . . . colleges." *Williams v. School Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993). The drafters of these regulations recognized a situation that Congress well understood: Male athletes had been given an enormous head start in the race against their female counterparts for athletic resources, and **Title IX** would prompt universities to level the proverbial playing field.

Appellees recognize that, given this backdrop, it would be imprudent to argue that **Title IX** prohibits the use of all gender-conscious remedies. Appellees therefore suggest that gender-conscious remedies are [*9] appropriate only when necessary to ensure that schools provide opportunities to males and females in proportion to their relative levels of interest in sports participation. By contrast, Appellants contend that schools may make gender-conscious decisions about sports-funding levels to correct for an imbalance between the composition of the undergraduate student body and the composition of the undergraduate student athletic participants pool. This disagreement has real significance: Men's expressed interest in participating in varsity sports is apparently higher than women's at the present time - although the "interest gap" continues to narrow - so permitting gender-conscious remedies until the proportions of students and athletes are roughly proportional gives universities more remedial freedom than permitting remedies only until expressed interest and varsity roster spots correspond.

Appellees' argument that equal opportunity is achieved when each gender's athletic participation roughly matches its interest in participating is hardly novel. Several courts of appeals have considered and rejected Appellees' approach as fundamentally inconsistent with the purpose of **Title IX**.

Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993) [****10**] ("*Cohen I*"), n2 was the first case to rule on the issues raised in the instant appeal. In *Cohen I*, female members of Brown's volleyball and gymnastics teams brought suit under **Title IX** after the university eliminated their teams. Women comprised 48% of the school's student body, but less than 37% of the athletes on campus. See *id.* at 892.

-----Footnotes-----

n2 The First Circuit numbers the *Cohen* decisions differently. Because we discuss only two opinions, we refer to them as *Cohen I* and *Cohen II*.

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

A The *Cohen I* court interpreted **Title IX**'s requirements in light of the three-part test set forth in the Policy Interpretation promulgated by the Department of Health, Education, and Welfare in 1979. n3 That test is used to assess whether a school's athletic program is in compliance with **Title IX**. A university's athletics program is **Title IX**-compliant if it satisfies *one* of the following conditions:

- A* (1) . . . Intercollegiate level participation opportunities for male and female students [****11**] are provided in numbers substantially proportionate to their respective enrollments; or
- A* (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, . . . the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- A* [***768**] (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, . . . it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 71,418 (1979). Appellees attack only the first part of this test, which declares a university **Title IX**-compliant if participation levels for each gender are "substantially proportionate" to their representation in the student body.

-----Footnotes-----

n3 The OCR later was authorized by Congress to issue **Title IX**'s regulations with respect to athletic opportunities. See Pub. L. No. 93-380, 88 Stat. 612 (1974).

-----End Footnotes----- [****12**]

The *Cohen I* court explicitly rejected Brown's argument that, because male athletes were more interested in athletics, the school could bring itself into **Title IX** compliance by providing females with fewer athletic roster spots "as long as the school's response is in direct proportion to the comparative levels of interest." *Cohen I*, 991 F.2d at 899. In *Cohen II*, the rejection of Brown's argument was even more emphatic: "Brown's relative interests approach cannot withstand scrutiny on either legal or policy grounds, 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 v. Brown Univ.*, 101 F.3d 155, 174 (1st Cir. 1996) ("*Cohen II*") (citations and internal quotations marks omitted).

Under *Cohen I*, if a university wanted to comply with the first part of the three-part test, it had to provide "athletics opportunities in proportion to the gender composition of the student body," not in proportion to the expressed interests of men and women. *Id.* at 176; *see also Favia v. Indiana Univ. of Penn.*, 7 F.3d 332, 343 (3d Cir. 1993) [**13] (observing that a university whose student body was 56% female, but whose athletic teams were 43% female, would "appear not to be in Title IX compliance"). The reason for *Cohen I*'s rejection of Brown's/Appellees' "interest" test was clear enough: "Given that the survey of interests and abilities would begin under circumstances where men's athletic teams have a considerable head start, such a rule would almost certainly blunt the exhortation that schools should 'take into account the nationally increasing levels of women's interests and abilities' and avoid 'disadvantaging members of an underrepresented sex . . .'" 991 F.2d at 900 (quoting 44 Fed. Reg. at 71,417). In other words, Appellees' interpretation of Title IX would have allowed universities to do little or nothing to equalize men's and women's opportunities if they could point to data showing that women were less interested in sports. But a central aspect of Title IX's purpose was to encourage women to participate in sports: The increased number of roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships. n4 As the [**14] First Circuit held in *Cohen II*, "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 less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of [**769] women's interests and abilities." *Cohen II*, 101 F.3d at 178-79; *cf. Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) ("Moreover, while reliance on the interest of the member schools in adding a sanctioned sport may appear to be gender-neutral, it is a method which has great potential for perpetuating gender-based discrimination. Under the district court's reasoning, a school system's compliance with Title IX can be measured by the personal views of administrators of individual schools, irrespective of whether these views achieve Title IX's equal opportunity requirement.").

-----Footnotes-----

n4 That is, the creation of additional athletic spots for women would prompt universities to recruit more female athletes, in the long run shifting women's demand curve for sports participation. As more women participated, social norms discouraging women's participation in sports presumably would be further eroded, prompting additional increases in women's participation levels. *Cf. Note, Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 Harv. L. Rev. 1627, 1640 (1997) ("In effect, the 'substantially proportionate' approach recognizes that women's attitudes toward sports are socially constructed and have been limited by discrimination and gender stereotypes. Congress passed Title IX to combat such discrimination and stereotypes, thereby changing the social environment in which girls and women develop, or do not develop, interests in sports.").

-----End Footnotes----- [**15]

Appellees and the district court relied heavily on a lone district court opinion, *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892 (M.D. La. 1996), which criticized the Policy Interpretation test's first part. However, this criticism is entirely dicta: The court still found Louisiana State University ("LSU") to be in violation of Title IX and ordered it to bring itself into Title IX compliance immediately, hinting that it should do so by funding women's soccer and softball teams. *See id.* at 922. The court never addressed the issue of whether LSU could bring itself into Title IX compliance by cutting the opportunities available to male athletes because the parties there never suggested such an approach. Moreover, the *Pederson* court misunderstood the reasoning behind *Cohen*, *Roberts*, and *Horner*. The *Pederson* court held that these circuit court opinions relied upon an erroneous assumption that men and women were equally interested in playing sports. *See id.* at 913-14. As is explained above, those courts emphasized that women's interest in sports appeared to be lower than men's, but that the genders' interests were [**16] slowly but surely converging, which was precisely the reason why requiring only that each gender's expressed interest in participating be accommodated equally would freeze the inequality of the status quo.

✎ Title IX is a dynamic statute, not a static one. It envisions continuing progress toward the goal of equal

opportunity for all athletes and recognizes that, where society has conditioned women to expect less than their fair share of the athletic opportunities, women's interest in participating in sports will not rise to a par with men's overnight. The percentage of college athletes who are women rose from 15% in 1972 to 37% in 1998, and **Title IX** is at least partially responsible for this trend of increased participation by women. See Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 Creighton L. Rev. 1107, 1107 (1998). **Title IX** has altered women's preferences, making them more interested in sports, and more likely to become student athletes. See Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 Harv. L. Rev. 1627, 1640-41 (1997). Adopting Appellees' interest-based [**17] test for **Title IX** compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed **Title IX**'s enactment. n5

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n5 We also view as instructive this Court's precedent in *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994). That case involved a **Title IX** suit brought by female prisoners that challenged the lack of vocational educational programs in women's facilities relative to those available in men's facilities. Although the regulations at issue in *Jeldness* are different from those at issue here, the prison context is somewhat analogous because, as with college athletic teams, "sex segregation is the accepted norm" in prisons. *Id.* at 1228. In *Jeldness*, we rejected the view that differing interest levels among the genders would justify providing women with significantly fewer educational opportunities than men. See *id.* at 1229.

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

A number of courts of appeals have addressed another potentially [**18] dispositive issue in this appeal - namely, whether **Title IX** permits a university to diminish athletic opportunities available to men so as to bring them into line with the lower athletic opportunities available to women. Every [**770] court, in construing the Policy Interpretation and the text of **Title IX**, has held that a university may bring itself into **Title IX** compliance by increasing athletic opportunities for the underrepresented gender (women in this case) or by decreasing athletic opportunities for the overrepresented gender (men in this case). See *Horner*, 43 F.3d at 275; *Kelley v. Board of Trustees*, 35 F.3d 265, 269 (7th Cir. 1994); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) ("We recognize that in times of economic hardship, few schools will be able to satisfy **Title IX**'s effective accommodation requirement by continuing to expand their women's athletics programs. . . . Financially strapped institutions may still comply with **Title IX** by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate [**19] population."); *Cohen I*, 991 F.2d at 898 n.15 ("**Title IX** does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent)."). An extensive survey of **Title IX**'s legislative history and the regulations promulgated to apply its provisions to college athletics concluded that boosters of male sports argued vociferously before Congress that the proposed regulations would require schools to shift resources from men's programs to women's programs, but that Congress nevertheless sided "with women's advocates" by deciding not to repeal the HEW's athletics-related **Title IX** regulations. Mary Jo Festle, *Playing Nice: Politics and Apologies in Women's Sports* 171-76 (1996). Congress thus appears to have believed that **Title IX** would result in funding reductions to male athletic programs. If a university wishes to [**20] comply with **Title IX** by leveling down programs instead of ratcheting them up, as Appellant has done here, **Title IX** is not offended.

There is a second reason why a reversal of the district court's order granting injunctive relief on the **Title IX** claim is warranted. The district court failed to defer properly to the interpretation of **Title IX** put forward by the administrative agency that is explicitly authorized to enforce its provisions. It is well-established that the federal courts are to defer substantially to an agency's interpretation of its own regulations. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150, 111 S. Ct.

1171, 113 L. Ed. 2d 117 (1991). The Department of Education, "acting through its OCR [is] the administrative agency charged with administering **Title IX**." *Cohen I*, 991 F.2d 888 at 895. In this instance, Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under **Title IX**. See Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); *Kelley*, 35 F.3d at 269 n.3; *Roberts*, 998 F.2d at 828; *Cohen I*, 991 F.2d at 895. Under *Chevron*, where Congress has expressly **[**21]** delegated to an agency the power to "elucidate a specific provision of the statute by regulation," that agency's regulations should be accorded "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron USA v. NRDC*, 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

Appellees deem *Chevron* inapplicable on the ground that OCR's interpretation violates the plain meaning of the statute. n6 Under their interpretation, **Title IX** bars universities from disadvantaging any **[*771]** student athlete on the basis of his or her gender. But the plain meaning of the nondiscrimination principle set forth in 20 U.S.C. § 1681(a) does not bar remedial actions designed to achieve substantial proportionality between athletic rosters and student bodies. Indeed, Appellees' interpretation of 20 U.S.C. § 1681(a)'s plain meaning would render 1681(b) superfluous. After all, § 1681(b) states that **Title IX** does not require

any education institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the **[**22]** 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 n7

If § 1681(a) already bars the type of remedial action that Appellant engaged in pursuant to the consent decree, then § 1681(b)'s provision that **Title IX** does not require such remedial action would be mere surplusage. "Statutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 209, 136 L. Ed. 2d 644, 117 S. Ct. 660 (1997).

-----Footnotes-----

n6 20 U.S.C. § 1681(a) reads:

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

n7 Because the OCR's three-part test gives universities two avenues other than substantial proportionality for bringing themselves into **Title IX** compliance, it does not conflict with § 1681(b).

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

Moreover, we deem it highly instructive that, at oral argument, Appellees conceded that their proposed interpretation of **Title IX**, whereby a university could permissibly discriminate on the basis of sex in order to ensure that each gender's interests in athletic participation were equally accommodated, is just as contrary to 1681(a)'s purported plain meaning as the interpretation advanced by the OCR and Appellants is.

We also note that Appellees' interpretation of **Title IX's** text has been rejected explicitly by the Seventh Circuit, see *Kelley*, 35 F.3d at 270, as well as the OCR, and implicitly rejected by the other circuits that have held that a school may cut the number of male athletic slots in order to bring itself into compliance with **Title IX**. See *Horner*, 43 F.3d at 275; *Roberts*, 998 F.2d at 830; *Cohen I*, 991 F.2d at 898 n.15.

Under such circumstances, it is clear that OCR's interpretation of **Title IX's** athletics provisions merits deference under *Martin* and *Chevron*. In *Cohen II* and *Kelley* the courts held that 34 C.F.R. § 106.41 deserved controlling weight under *Chevron* and that the OCR Policy [**24] Interpretation deserved substantial deference under *Martin*. See *Cohen II*, 101 F.3d at 173; *Kelley*, 35 F.3d at 270-71; see also *Favia v. Indiana Univ. of Penn.*, 812 F. Supp. 578, 584 (W.D. Pa.) (holding that "OCR's policy interpretation deserves our great deference" under *Chevron*), *aff'd* 7 F.3d 332 (3d Cir. 1993). Similarly, in the case before us, the 1996 OCR Clarification and the Cantu letter explaining it merit deference under *Martin*. These clarifications essentially adopted the reasoning of *Cohen I* as OCR policy. Under these clarifications' clear wording, an institution in which male athletes are overrepresented can bring itself into **Title IX** compliance by reducing sufficiently the number of roster spots available to men.

Finally, the district court below rejected the interpretation of **Title IX** advocated by the OCR and Appellants on the ground that such a reading of the statute might violate the Constitution. In the court's words, OCR's interpretation would

effectively transform **Title IX** from an anti-discrimination statute to a statute enacted to remedy past discrimination, thus subjecting it to [**25] heightened scrutiny. Without speculating whether **Title IX** would survive such searching constitutional scrutiny, the court notes that it remains unsatisfied with the *Cohen* majority's treatment of these important questions. The court is satisfied that avoiding serious constitutional questions [**72] such as an equal protection challenge to a very important Congressional statute is itself ample reason for rejecting the safe harbor idea as part of **Title IX**.

The district court thus strained to interpret **Title IX** in a way that ostensibly would avoid these concerns. In doing so, it followed the interpretive methodology laid out by the Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979). Chief Justice Burger, writing for the *Catholic Bishop* majority, announced that the Court would decline to construe an act of Congress "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religious Clauses." *Id.* at 507; see also *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988) [**26] ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation: Statutes and the Creation of Public Policy* 675-87 (2d ed. 1995) (discussing *Catholic Bishop* and the canon of construing statutes so as to avoid constitutional problems). Under *Catholic Bishop*, the inquiry properly raised on appeal is not whether the OCR's interpretation of **Title IX** is unconstitutional, but whether it "raises serious constitutional questions." We answer that question in the negative.

The First and Seventh Circuits both have considered at length the constitutionality of the first prong of the OCR's test. In *Cohen I*, 991 F.2d at 899-901; *Cohen II*, 101 F.3d at 181-84; and *Kelley*, 35 F.3d at 272-73, the courts emphatically rejected the claim that the Policy Interpretation was unconstitutional under the Fourteenth Amendment. The separate reasoning in the two *Cohen* opinions is particularly well-developed. It applied [**27] intermediate scrutiny, which we would also do were we addressing the constitutional merits. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) ("When the government classifies by gender, it must demonstrate that the classification is substantially related to an important governmental interest, requiring an 'exceedingly persuasive' justification."). *Cohen II* noted that the Policy Interpretation furthered the "clearly important" objectives of "avoiding the use of federal resources to support discriminatory practices, and providing individual citizens effective protection against those practices." 101 F.3d at 184 (citation and internal quotations omitted). Moreover, it found that "judicial enforcement of federal anti-discrimination statutes is at least an important governmental objective." *Id.* And *Cohen II* held that the district court's relief, which was essentially identical to what the OCR Policy Interpretation calls for, was "clearly substantially related" to these objectives. *Id.* Along the same lines, the Seventh Circuit has held that "the remedial scheme established by **Title IX** and the applicable regulation and [**28] policy interpretation are clearly substantially related to" the objective of prohibiting "educational institutions from discriminating on the basis of sex." *Kelley*, 35 F.3d at 272. We adopt the reasoning of *Cohen I*, *Cohen II*, and *Kelley*, and hold that the constitutional analysis contained therein persuasively disposes of any serious constitutional concerns

that might be raised in relation to the OCR Policy Interpretation. n8 The district court's [*773] final basis for rejecting the OCR's interpretation of **Title IX** was therefore erroneous.

-----Footnotes-----

n8 The amicus brief filed by USA Wrestling and a number of other organizations repeatedly invokes the *Adarand* line of cases and Title VII precedents to suggest that the scope of remedial action to correct for disparities among groups is quite limited. Those precedents are not relevant in the context of collegiate athletics. Unlike most employment settings, athletic teams are gender segregated, and universities must decide beforehand how many athletic opportunities they will allocate to each sex. As a result, determining whether discrimination exists in athletic programs *requires* gender-conscious, group-wide comparisons. Because men are not 'qualified' for women's teams (and vice versa), athletics require a gender conscious allocation of opportunities in the first instance. The paradigm that has motivated the Supreme Court's more recent reverse-discrimination jurisprudence simply does not fit the case at bar. *See Cohen II*, 101 F.3d at 181 ("While *Adarand* does make new law, the law it makes is wholly irrelevant to the disposition of this appeal . . .").

-----End Footnotes----- [**29]

IV.

This past summer, 90,185 enthusiastic fans crowded into Pasadena's historic Rose Bowl for the finals of the Women's World Cup soccer match. An estimated 40 million television viewers also tuned in to watch a thrilling battle between the American and Chinese teams. The match ended when American defender Brandi Chastain fired the ball past Chinese goalkeeper Gao Hong, breaking a 4-4 shootout tie. *See Grant Wahl, Out of this World with the Cup on the Line, A Last-Second Hunch and a Clutch Left Foot Lifted the U.S. to a Breathtaking Victory over China, Sports Illustrated*, July 19, 1999, at 38. The victory sparked a national celebration and a realization by many that women's sports could be just as exciting, competitive, and lucrative as men's sports. And the victorious athletes understood as well as anyone the connection between a 27-year-old statute and tangible progress in women's athletics. *See Scott M. Reid, Title IX Scores Big for U.S. Soccer, Orange County Reg.*, July 6, 1999, at D1 (quoting Chastain's statement that "all of this is because of **Title IX**"); Patrick Hruby, *On Top of the World Scurry Saves Day, Chastain Wins It for U.S.*, *Wash. Times*, [**30] July 11, 1999, at A1 (quoting defender Kate Sobrero's statement that "we're all **Title IX** babies, and this shows it's working"). **Title IX** has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics. Today we join our sister circuits in holding that **Title IX** does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies. We REVERSE, and VACATE the preliminary injunction.

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198 F.3d 633, *; 1999 U.S. App. LEXIS 31969, **

Chris Boulahanis, Edward C. Vanduyne, Jamie R. Burton, et al., Plaintiffs-Appellants, v. Board of Regents, a body politic and corporate, **Illinois State** University, Thomas Wallace, et al., Defendants-Appellees.

No. 99-1561

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

198 F.3d 633; 1999 U.S. App. LEXIS 31969

October 27, 1999, Argued
December 3, 1999, Decided

PRIOR HISTORY: [****1**] Appeal from the United States District Court for the Central District of Illinois, Peoria Division. No. 95 CR 1371. Joe Billy McDade, Chief Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For CHRIS BOULAHANIS, EDWARD C. VANDUYNE, JAMIE R. BURTON, BRYAN S. SIMKINS, GREGORY J. HALL, Plaintiffs - Appellants: Donald W. Anderson, BURDITT & RADZIUS, Chicago, IL USA. Louis S. Goldstein, GOLDSTEIN & FLUXGOLD, Chicago, IL USA.

For BOARD OF REGENTS, ILLINOIS STATE UNIVERSITY, THOMAS WALLACE, RICK GREENSPAN, LINDA HERMAN, Defendants - Appellees: Tom Schanzle-Haskins, GIFFIN, WINNING, COHEN & BODEWES, Springfield, IL USA.

For ILLINOIS HIGH SCHOOL ASSOCIATION, INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION, INCORPORATED, WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, CALIFORNIA INTERSCHOLASTIC FEDERATION, LOUISIANA HIGH SCHOOL ATHLETIC ASSOICATION, Amici Curiae: Daniel V. Kinsella, ROOKS, PITTS & POUST, Chicago, IL USA.

JUDGES: Before Harlington Wood, Jr., Flaum, and Evans, Circuit Judges. HARLINGTON WOOD, JR., Circuit Judge, concurring.

OPINIONBY: FLAUM

OPINION: [*634] Flaum, *Circuit Judge*. The plaintiffs-appellants, a group of former and prospective athletes at Illinois State University (the "University"), appeal the district court's grant of summary judgment [*635] to the University, alleging that the actions of the University in eliminating its men's wrestling and men's soccer programs constitute a violation of **Title IX** of the Education Amendments of 1972, 20 U.S.C. § 1681. In addition, the plaintiffs-appellants appeal the district court's dismissal of various claims of sex discrimination and race discrimination under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) arising out of the same University actions, arguing that the district court incorrectly deemed those claims to be preempted. For the reasons set out below, we agree with the judgment of the district court and affirm.

I. Facts

In [****2**] the fall of 1993, the Gender Equity Committee of Illinois State University undertook a year-long investigation of gender equity and **Title IX** compliance at the University. The results of this study indicated that enrollment at the University was 45% male and 55% female, while athletic participation was 66% male and 34% female. The study concluded that these numbers did not constitute equitable participation opportunities for women. In response to this conclusion, the University began to

consider ways to bring itself into compliance with **Title IX**.

Under **Title IX**, Illinois State University is required to "provide equal athletic opportunity" for men and women. 34 C.F.R. § 106.41(c). Equal opportunities are to be evaluated according to the following ten factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and **[**3]** competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; and (10) Publicity.

Id. In addition to these considerations, an "institution may violate **Title IX** solely by failing to accommodate the interests and abilities of student athletes of both sexes." Kelley v. Board of Trustees, 35 F.3d 265, 268 (7th Cir. 1994) (citing Roberts v. Colorado St. Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888, 897-98 (1st Cir. 1993)).

In order to effectively accommodate the athletic interests of both male and female students, the University had three options under the policy interpretations of **Title IX** promulgated by the Office of Civil Rights: (1) provide participation opportunities for men and women that are substantially proportionate to their respective rates of enrollment as full-time undergraduate students; or (2) demonstrate a history and continuing practice of program expansion for the under-represented sex; or (3) fully and effectively accommodate the interests and abilities of the under-represented sex. 44 Fed. Reg. 71,418 (1979). **[**4]** Because the University had not added a women's sports program in over ten years, and because it did not believe it could accommodate effectively the interests and abilities of its women students, the University focused on achieving the goal of substantial proportionality. The University's desire to bring itself into compliance with **Title IX** through a showing of substantial proportionality was intensified by a 1995 audit by the National Collegiate Athletic Association. The results of that audit showed that the University was not in conformity with the requirements of **Title IX**.

The University considered ten options to achieve compliance with **Title IX**. These options included: (1) dropping men's wrestling; (2) dropping men's wrestling and men's soccer; (3) dropping men's wrestling, men's soccer, and men's tennis; (4) dropping men's wrestling and adding women's **[*636]** soccer; (5) dropping men's wrestling and men's soccer and adding women's soccer; (6) dropping men's wrestling, men's soccer, and men's tennis and adding women's soccer; (7) adding women's soccer; (8) adding women's soccer and bringing women to full funding; (9) dropping men's wrestling and men's soccer, adding women's soccer, and **[**5]** adjusting men's rosters and women's grants in aid; and (10) dropping men's wrestling and men's soccer, adding women's soccer, and adjusting men's rosters and grants in aid for both men and women. After careful consideration of these options, the University ultimately chose and implemented option number ten. This resulted in the addition of women's soccer and the elimination of men's soccer and men's wrestling. The implementation of this plan increased the athletic participation of women to 51.72% and decreased the athletic participation of men to 48.29%, thereby bringing the disparity between enrollment and participation to within three percentage points.

The plaintiffs-appellants are former members of the men's soccer and men's wrestling teams at Illinois State University who, as a consequence of the University's elimination of those programs under its gender equity plan, were no longer able to participate in those sports at the University. They contend that the University's decision to eliminate the programs in which they participated was based on sex, and is therefore a violation of **Title IX**. They also allege various violations of their constitutional rights under both Section **[**6]** 1983 and Section 1985(3). The district court granted the University summary judgment on the **Title IX** claim, and dismissed the constitutional claims as preempted by the availability

of a **Title IX** claim. It is from these decisions that the plaintiffs-appellants now appeal.

II. Analysis

We review the district court's grant of summary judgment to Illinois State University *de novo*. See Johnson v. Zema Sys. Corp., 170 F.3d 734, 742 (7th Cir. 1999). In order to overcome summary judgment, the plaintiffs-appellants must show specific facts sufficient to raise a genuine issue for trial. Fed.R.Civ.P. 56(c); see Shermer v. Illinois Dep't of Transp., 171 F.3d 475, 477 (7th Cir. 1999) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). In determining whether a genuine issue of material fact exists, we must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. See Senner v. Northcentral Technical College, 113 F.3d 750, 754 (7th Cir. 1997). "A genuine issue for trial exists only when a reasonable jury could find for the party ^{***7} opposing the motion based on the record as a whole." Roger v. Yellow Freight Sys., Inc., 21 F.3d 146, 149 (7th Cir. 1994).

A.

Title IX states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The plaintiffs-appellants contend that the University's actions in eliminating the men's soccer and men's wrestling programs were based solely on the sex of the participants. According to the plaintiffs-appellants, because these discriminatory actions would not have been taken "but for" the sex of the participants, the actions violate **Title IX** on its face. See International Union v. Johnson Controls, Inc., 499 U.S. 187, 200, 113 L. Ed. 2d 158, 111 S. Ct. 1196 (1991) (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 711, 55 L. Ed. 2d 657, 98 S. Ct. 1370 (1978) (citation omitted) (stating that the simple test for discrimination is "whether the evidence shows 'treatment of a person in a manner which ^{***8} but for that person's sex would have been different'")).

^{***637} The plaintiffs-appellants' argument is similar to one this Court has already considered in Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994). The plaintiffs in Kelley were members of the men's swimming team at the University of Illinois. That program was eliminated in an attempt by that university to cut its athletic budget by getting rid of teams that were not competitive on a national level. Although the men's swimming team at the University of Illinois was eliminated on this basis, the women's swimming program was maintained because of concerns about compliance with **Title IX**. *Id.* at 269. Members of the University of Illinois's men's swimming team, like the plaintiffs-appellants in this case, challenged the university's cancellation of the athletic program in which they participated as a violation of **Title IX**. We rejected that challenge, holding that the elimination of men's swimming did not violate **Title IX** because "men's participation in athletics [continued] to be more than substantially proportionate to their presence in [the University of Illinois's] student body." *Id.* at 270. ^{***9}

The plaintiffs-appellants contend that our decision in Kelley is distinguishable from the facts of this case, and is therefore not controlling. In attempting to distinguish Kelley, the plaintiffs-appellants rely on the financial and budgetary considerations that motivated the University of Illinois's athletic department to eliminate men's swimming. See *id.* at 269. According to the plaintiffs-appellants, a decision that is motivated by financial concerns, even if it includes sex-based considerations, does not violate **Title IX**. In contrast, a decision like the one in this case, that is motivated by the sex of the participants, does violate **Title IX**. In short, the plaintiffs-appellants attempt to draw a distinction between decisions in which sex is a consideration (as in Kelley) and decisions in which sex serves as the motivating factor (as in the present case).

We are not persuaded by the plaintiffs-appellants' attempt to distinguish decisions to eliminate athletic programs motivated by financial concerns from those based on considerations of sex. That distinction ignores the fact that a university's decision as to which athletic programs to offer necessarily entails budgetary ^{***10} considerations. For universities, decisions about cutting or adding athletic programs are based on a consideration of many factors including: the total size of the athletic department, which is governed by budgetary considerations, and the distribution of programs among men and women, which

is governed by **Title IX** concerns. To say that one decision is financial, while another is sex-based, assumes that these two aspects can be neatly separated. They cannot. Absent financial concerns, Illinois State University presumably would rather have added women's programs while keeping its men's programs intact. Similarly, in the absence of **Title IX** concerns, the University of Illinois in *Kelley* would have cut both its men's and women's swimming programs in order to save money. n1 Ultimately, both the decision of the University in this case and the decision of the University of Illinois at issue in *Kelley* were based on a combination of financial and sex-based concerns that are not easily distinguished.

-----Footnotes-----

n1 This is clearly illustrated by the fact that the University of Illinois "did not eliminate the women's swimming program because the school's legal counsel advised that such action would put the university at risk of violating **Title IX**." *Kelley*, 35 F.3d at 269.

-----End Footnotes----- [**11]

When analyzed against the backdrop of the multiple concerns at work in a university's decision to eliminate an athletic program, the plaintiffs-appellants' argument raises significant practical concerns. In *Kelley*, we held the policy interpretations issued by the Office of Civil Rights to be a reasonable exercise of that agency's congressionally-delegated discretion to interpret the law. *Kelley*, 35 F.3d at 270-71 (holding that the policy guidelines are entitled to deference because they are neither arbitrary or capricious, nor manifestly contrary [**638] to the statute) (citing *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) (stating that where Congress has expressly delegated the task of interpretation to an agency the resulting interpretations are to be granted "controlling weight")); see also *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (stating that "the degree of deference [given to agency interpretations] is particularly high in **Title IX** cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under **Title IX** [**12] IX"). Those policy interpretations clearly state that universities may demonstrate compliance with **Title IX** by showing that participation of the underrepresented sex is substantially proportionate to their enrollment at the university. 44 Fed. Reg. 71,418. In light of this interpretation, a holding that universities cannot achieve substantial proportionality by cutting men's programs is tantamount to a requirement that universities achieve substantial proportionality through additional spending to add women's sports programs. This result would ignore the financial and budgetary constraints that universities face. See *Roberts v. Colorado St. Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) ("In times of economic hardship, few schools will be able to satisfy **Title IX's** effective accommodation requirement by continuing to expand their women's athletic programs."). Unless we are willing to mandate such spending, the agency's substantial proportionality rule must be read to allow the elimination of men's athletic programs to achieve compliance with **Title IX**.

The plaintiffs-appellants do not see such potential spending mandates as a problem because they read *Kelley* [**13] to permit the elimination of men's programs in order to address budgetary concerns. At the same time, they assume that such financially-motivated decisions can be readily discerned by courts. Yet given the practical difficulty of distinguishing financial and sex-based concerns, the effect of accepting such a distinction would only force universities under serious budget constraints to cast decisions made under the shadow of **Title IX** as financial ones. To be safe, they might even go so far as to add women's programs in order to create the kind of budgetary constraints that would justify cutting men's programs. In either case, the plaintiffs-appellants would be no better off than they are under existing law. Because we conclude that the plaintiffs-appellants' distinction would place universities in an unmanageable position, we reject the plaintiffs-appellants' attempt to distinguish *Kelley*.

As we noted in *Kelley*, the elimination of men's athletic programs is not a violation of **Title IX** as long as men's participation in athletics continues to be "substantially proportionate" to their enrollment. n2 See *Kelley*, 35 F.3d at 270. After the elimination [**639] of men's soccer and men's [**14] wrestling at the University, the athletic participation of men remained within three percentage points of enrollment. The plaintiffs-appellants do not contend that this disparity is outside the requirements of substantial proportionality. Because the University has achieved substantial proportionality between men's

enrollment and men's participation in athletics, it is presumed to have accommodated the athletic interests of that sex. See *Kelley*, 35 F.3d at 271; see also *Roberts*, 998 F.2d at 829 ("Substantial proportionality' between athletic participation and undergraduate enrollment provides a safe harbor for recipients under **Title IX**."); *Cohen*, 991 F.2d at 897-98 ("[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."). Under such circumstances, Illinois State University's actions in eliminating the programs at issue do not constitute a violation of **Title IX**.

-----Footnotes-----

n2 In an *amicus* brief to the Court, a group composed of various high school athletic associations argues that **Title IX's** attempt to prohibit sex-based discrimination at federally-funded institutions, when coupled with the use of substantial proportionality as a benchmark for compliance and the budgetary constraints that universities face, has the perverse consequence of forcing institutions to decrease athletic opportunities for men. As the *amici* note, such a result does not, at least when viewed in isolation, benefit women. According to the *amici*, a possible solution to this is to allow institutions subject to suit under **Title IX** to assert Title VII defenses.

It is difficult to see how Title VII defenses could be applied in **Title IX** cases. As we stated in *Kelley*, "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. 5,807 (1972) (statement of Sen. Birch Bayh); 117 Cong. Rec. 30,407 (1971) (same)). Given the unique problems raised by discrimination in athletic opportunity, it would be inappropriate to import a body of law developed in other contexts.

-----End Footnotes----- [**15]

B.

The plaintiffs-appellants next contend that if **Title IX** is construed to permit the elimination of men's programs for reasons of sex, then **Title IX** as interpreted would violate the Equal Protection Clause. The plaintiffs-appellants' argument is based on the idea that discrimination based on sex is permissible only when it is substantially related to an important government objective. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990) (establishing an intermediate standard of scrutiny for sex discrimination); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982) (same). The plaintiffs-appellants do not challenge the assertion that assisting an under-represented group to achieve additional opportunities would constitute an important government objective. They do argue that when viewed in isolation, the elimination of men's wrestling and men's soccer only served to decrease opportunities for men without providing any additional opportunities for women. As such, the plaintiffs-appellants contend that increased opportunities for women cannot be the important government [**16] objective justifying this sex-based discrimination by the University.

As was the case with plaintiffs-appellants' first claim, this Court addressed the equal protection issue in *Kelley* and rejected it. As we held in *Kelley*, "**Title IX's** stated objective is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex." *Kelley*, 35 F.3d at 272. The elimination of sex-based discrimination in federally-funded educational institutions is an important government objective, and the actions of Illinois State University in eliminating the men's soccer and men's wrestling programs were substantially related to that objective. See *id.* (citing *Mississippi Univ. for Women*, 458 U.S. at 728 ("[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.")). In light of these conclusions, we repeat our holding in *Kelley* that "while the effect of **Title IX** and the relevant regulation and policy interpretation is that institutions will sometimes consider gender [**17] when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution." *Id.*

C.

The plaintiffs-appellants also brought numerous claims against both the University and individual University officials under Section 1983 and Section 1985(3) of Title 42, arguing that they have a protected property interest in participating in athletics. The district court dismissed these claims under our decision in *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th [*640] Cir. 1996). In that case, we held that the availability of a **Title IX** claim preempted claims under Section 1983. *Id.* at 862. This holding was based on our interpretation of **Title IX's** statutory scheme, and our understanding that "Congress saw **Title IX** as the device for redressing any grievance arising from a violation of federal civil rights by an educational institution." *Id.* at 863. We further determined that, "through the establishment of [**Title IX's**] statutory regime, Congress effectively superseded a cause of action under § 1983" *Id.*

1. Sex-Based Discrimination Under Section 1983

The plaintiffs-appellants do not dispute the general [**18] preemption principle set forth in *Waid*, but they do contend this principle is not applicable to their Section 1983 claims based on sex discrimination. The plaintiffs-appellants' argument rests on the idea that the existence of preemption depends on the availability of a claim under **Title IX**, and a distinction between claims against institutions and claims against individuals. We have previously held that **Title IX** provides for suit only against institutions; it does not allow for suits against individual defendants. *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1019 (7th Cir. 1997). The plaintiffs-appellants contend that because individual claims are not available under **Title IX**, individual claims must be available under Section 1983. Under this interpretation of *Waid*, **Title IX** preempts only Section 1983 suits against institutions, and the district court erred in dismissing the plaintiffs-appellants' claims against the individual defendants. After a review of our holding in *Waid*, we disagree.

By focusing on the availability of a claim against individual defendants, the plaintiffs-appellants misconstrue the doctrine of preemption. In providing for the [**19] remedies available under **Title IX**, Congress has created a regime for the redress of sex discrimination in athletic opportunities at federally-funded institutions. In order to be comprehensive, that regime need not include possible claims against both the institution and individuals involved. The fact that individual claims are not available under **Title IX** means that Congress has chosen suits against institutions as the means of redressing such wrongs. See *Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981) (holding that "when the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983"). As we noted in *Waid*, in establishing **Title IX**, "Congress intended to place the burden of compliance with civil rights law on educational institutions themselves, not on the individual officials associated with those institutions." *Waid*, 91 F.3d at 862. Here plaintiffs-appellants have a **Title IX** claim against Illinois State University. Under our holding in *Waid*, the district court was correct [**20] in determining that the availability of that claim preempts the remedies available for sex discrimination under Section 1983.

2. Race-Based Claims Under Section 1983 and Section 1985(3) n3

-----Footnotes-----

n3 Section 1985(3) provides that "if two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages" 42 U.S.C. § 1985(3).

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

The plaintiffs-appellants also contend that the district court erred in dismissing their constitutional claims based on racial discrimination under Section 1983 and Section 1985(3). The district court

determined that these claims, like the sex-based claims brought under Section 1983, were preempted by the availability of a **Title IX** claim. The court reasoned that [*641] **Title IX** was the exclusive means Congress provided [**21] for the redress of sex discrimination at federally-funded institutions, and that this exclusivity precluded any claim under Section 1983 and Section 1985(3) even in regard to claims based on racial discrimination. While we agree with the district court in regard to sex-based claims, its reasoning as to the race-based claims does not take into consideration that **Title IX** should serve as the exclusive source of claims against federally-funded institutions only when sex-based discrimination is alleged; when the discrimination at issue is race-based, **Title IX** preemption does not apply.

Nevertheless, the district court came to the correct result. The proper means of asserting claims based on allegations of racial discrimination by the University is Title VI, which prohibits "discrimination under any program or activity receiving Federal financial assistance" based on "race, color, or national origin." Civil Rights Act of 1964, § 601 of Title VI, 42 U.S.C. § 2000d. The plaintiffs-appellants made a Title VI claim alleging race discrimination before the district court, and the court resolved that claim against the plaintiffs-appellants on summary judgment. n4 We [**22] have previously held that the availability of this claim precludes resort to a Section 1983 claim based on the same allegations of race discrimination. *Alexander v. Chicago Park District*, 773 F.2d 850, 856 (7th Cir. 1985) ("We hold that private actions based on Title VI may not be brought under § 1983."). Our logic in *Alexander* was based on our understanding that "where a statute provides its own comprehensive enforcement scheme that scheme may not be bypassed by pleading an underlying violation of the statute and bringing suit directly under § 1983." *Id.* This logic applies equally to Section 1985(3) claims, because pleading under that statute would also allow plaintiffs to circumvent the comprehensive structure Congress created to address the problem of racial discrimination at federally-funded institutions. See *Great Am. Federal S. & L. v. Novotny*, 442 U.S. 366, 378, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979) (holding that Title VII may not be bypassed through resort to Section 1985(3)). Where Congress has set up an enforcement mechanism with full remedies, as it has with Title VI, that regulatory structure may not be bypassed by resort to laws of more general applicability like Section 1983 [**23] and Section 1985(3). See *National Sea Clammers*, 453 U.S. at 20; see also *Waid*, 91 F.3d at 862-63 (arguing that "access to the full panoply of judicial remedies" is an indication that Congress intended a statutory regime to be exclusive).

-----Footnotes-----

n4 The district court reasoned that, even assuming the plaintiffs-appellants made a proper statistical showing of disparate impact, the University's desire to comply with **Title IX** was a legitimate non-discriminatory reason for its actions in eliminating the men's wrestling and men's soccer teams. Once the University presented a legitimate non-discriminatory reason for its actions, the plaintiffs-appellants were required to come forward with equally effective alternatives with less disparate impact. Because the plaintiffs-appellants failed to carry this burden by providing such alternatives, the district court granted the University's motion for summary judgment on the plaintiffs-appellants' Title VI claim. See *Harper v. Board of Regents*, 35 F. Supp. 2d 1118, 1124 (C.D. Ill. 1999).

-----End Footnotes----- [**24]

III. Conclusion

The district court correctly determined that the actions of Illinois State University in eliminating its men's soccer and men's wrestling programs did not violate **Title IX** or the Equal Protection Clause. The district court also correctly held the plaintiffs-appellants' remaining constitutional claims to be preempted. Accordingly, we AFFIRM the decision of the district court.

AFFIRMED

CONCURBY: HARLINGTON WOOD, JR.

CONCUR: HARLINGTON WOOD, JR., *Circuit Judge*, concurring. I fully join in this well-reasoned opinion, and only expand on a thought already expressed.

[*642] The ideal situation, though not anticipated as a practical matter, might nevertheless sometime surprisingly arise; that would be where a university has the money and the desire to accommodate all its students of either sex who have the interest and sports ability to be competitive. Even if not competitive on a national level, it should suffice to be competitive at least at conference level. The extra sports funding needed may not show up in the budget. However, a school recognizing the many advantages of a broad sports program might be able to tighten up less important aspects of its budget in order to help [**25] fund its athletic programs for eligible students of both sexes. The legislature, realizing the situation, might also respond favorably. Under those conditions, I would expect the school not to be curtailed in its sports programs because of a proportionality formula which, in that situation, would be irrelevant. Student athletes would neither be helped nor hindered by the proportionality formula. Participation is more important than percentages.

One point concerning the financial aspect of this case does concern me. In the school's brief, reference is made to "Appellants' implication" that the Athletic Department would have \$ 400,000 in unexpected revenues due to pending legislation which was awaiting the Governor's signature. Plaintiffs argued that, because of the predicted influx of money, this case is distinguished from *Kelley* in that it was not based on both budgetary and gender considerations, but solely upon gender. Plaintiffs asserted that, if received, the \$ 400,000 would have provided sufficient funds to maintain the men's soccer and wrestling teams and add female sports programs. The school does not directly deny that the sum may have, at some point, become available to the [**26] Athletic Department. The school's answer is merely that there is nothing in the record about it. As we cannot go outside the record, I am willing to assume that the school is not purposely avoiding a direct answer. However, if that extra money was, in fact, available, I would not decide this case on summary judgment but would send it back for exploration of the Athletic Department's financial situation.

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Divider Title: _____

525 U.S. 459; 119 S. Ct. 924, *;
1999 U.S. LEXIS 1511, **; 142 L. Ed. 2d 929, ***

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER v. R. M. SMITH

No. 98-84

SUPREME COURT OF THE UNITED STATES

525 U.S. 459; 119 S. Ct. 924; 1999 U.S. LEXIS 1511; 142 L. Ed. 2d 929; 67 U.S.L.W. 4130; 99 Cal. Daily Op. Service 1345; 99 Daily Journal DAR 1669; 1999 Colo. J. C.A.R. 878; 12 Fla. Law W. Fed. S 110

January 20, 1999, Argued
February 23, 1999, Decided

NOTICE: [**1]

The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY:

As Amended: November 9, 1999.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

DISPOSITION: 139 F.3d 180, vacated and remanded.

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DECISION: Dues payments received from members that received federal funds held not to suffice to make National Collegiate Athletic Association subject to sex discrimination suit under Title IX of Education Amendments of 1972, as amended (20 USCS 1681 et seq.).

SUMMARY: Under Title IX of the Education Amendments of 1972, as amended (20 USCS 1681 et seq.), 20 USCS 1681(a) proscribes sex discrimination in "any education program or activity receiving Federal financial assistance." An individual (1) brought suit in the United States District Court for the Western District of Pennsylvania against a private, unincorporated, and nationwide athletic association of public and private colleges and universities; and (2) included a Title IX claim alleging that the association--through refusing to waive, on behalf of the individual during her postgraduate years, a bylaw restricting postbaccalaureate participation in intercollegiate athletics--had discriminated against her on the basis of sex by denying her permission to play intercollegiate volleyball at federally assisted institutions. However, the District Court, in granting a defense motion to dismiss, expressed the view that (1) the individual's Title IX claim had to be dismissed because of her failure to allege that the association was a recipient of federal funds; and (2) even if it were assumed that the association received dues from member schools which received federal funds, the association's connections with federal funding would be "too far attenuated" to subject it to the mandates of Title IX (978 F Supp 213, 1997 US Dist LEXIS 12220). The District Court then denied a motion by the individual for leave to amend her complaint. On appeal, the United States Court of Appeals for the Third Circuit, in reversing the refusal to allow an amendment of the complaint and in ordering a remand, expressed the view that an allegation in the individual's proposed amended complaint--that the association received dues from member institutions which received federal funds--would be sufficient, if proven, to bring the association within the scope of Title IX as a recipient of federal funds (139 F3d 180, 1998 US App LEXIS 4694).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Ginsburg, J., expressing the unanimous view of the court, it was held that dues payments received from members that received federal funds would not suffice, without more, to make the association subject to suit under Title IX, for (1) a United States Department of Education regulation (34 CFR 106.2(h)) accorded with the teaching of the Supreme Court's precedents that (a) entities that received federal assistance, whether directly or through an intermediary, were recipients within the meaning of Title IX, but (b) entities that only benefited economically from federal assistance were not; and (2) at most, the association's receipt of dues demonstrated that the association indirectly benefited from the federal assistance allegedly afforded to the association's members.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[***HN1]

CIVIL RIGHTS §56

-- suit against private association -- sex discrimination -- intercollegiate athletics

Headnote: [1A] [1B] [1C] [1D] [1E]

Dues payments received from members that receive federal funds will not suffice, without more, to make a private, unincorporated, and nationwide athletic association of public and private colleges and universities subject to suit under Title IX of the Education Amendments of 1972, as amended (20 USCS 1681 et seq.), which, in 20 USCS 1681(a), proscribes sex discrimination in "any education program or activity receiving Federal financial assistance," for (1) even though all of the association's operations would be subject to Title IX if any part of the association received federal assistance, a United States Department of Education regulation (34 CFR 106.2(h)) accords with the teaching of the United States Supreme Court's precedents that (a) entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX, but (b) entities that only benefit economically from federal assistance are not; (2) at most, the association's receipt of dues demonstrates that the association indirectly benefits from the federal assistance afforded to the association's members, where (a) it is alleged that the association receives dues from federally funded members, but (b) there is no allegation that members paid their dues with federal funds earmarked for that purpose; (3) two asserted distinctions--that the association supposedly (a) was created by, and is comprised of, schools that receive federal funds, and (b) governs members with respect to athletic rules--do not bear on the narrow question whether an entity that receives dues from recipients of federal funds is for that reason a recipient itself; and (4) the result is not changed by the fact that the case involves an individual's private claim--that the association discriminated against her on the basis of sex by denying her permission to play intercollegiate volleyball at federally assisted institutions--rather than an enforcement action by the government, because the implied private right of action that is available under 1681(a) is not potentially broader than the government's enforcement authority that is expressly provided by 20 USCS 1682.

[***HN2]

APPEAL §1692.2

-- remand -- issues not decided below -- what may be considered below

Headnote: [2A] [2B] [2C] [2D]

In vacating, on certiorari, a Federal Court of Appeals' judgment in favor of an individual--who claimed that a private, unincorporated, and nationwide athletic association of public and private colleges and universities had discriminated against her on the basis of sex, in violation of Title IX of the Education Amendments of 1972, as amended (20 USCS 1681 et seq.), by denying her permission to play intercollegiate volleyball at federally assisted institutions--and in remanding the case for further proceedings, the United States Supreme Court, having held that dues payments received from members that received federal funds would not suffice to make the association subject to suit under Title IX, will decline to decide in the first instance the issues concerning two alternative theories for bringing the association under the prescriptions of Title IX--and will leave resolution of these issues to the courts below on remand--as (1) these issues were not decided below, and (2) the Supreme Court is not positioned to make or currently review factfindings on any alternative theory urged by the individual.

SYLLABUS: The National Collegiate Athletic Association (NCAA) has adopted rules governing the

intercollegiate athletics programs of its member colleges and universities. Among these rules is the Postbaccalaureate Bylaw, which allows a postgraduate student-athlete to participate in intercollegiate athletics only at the institution that awarded her undergraduate degree. Respondent Smith played intercollegiate volleyball for two seasons at St. Bonaventure University. After she graduated from St. Bonaventure, Smith enrolled in postgraduate programs at Hofstra University and the University of Pittsburgh. She sought to play intercollegiate volleyball at those schools, but the NCAA denied [**2] her eligibility on the basis of its postbaccalaureate restrictions. At Smith's request, Hofstra and the University of Pittsburgh petitioned the NCAA to waive the restrictions, but, each time, the NCAA refused. Smith filed this lawsuit *pro se*, alleging, among other things, that the NCAA had violated Title IX of the Education Amendments of 1972, which proscribes sex discrimination in "any education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681(a). The NCAA moved to dismiss on the ground that the complaint failed to allege that the NCAA is a recipient of federal financial assistance. In opposition, Smith argued that the NCAA governs the federally funded intercollegiate athletics programs of its members, that these programs are educational, and that the NCAA benefited economically from its members' receipt of federal funds. Concluding that the alleged connections between the NCAA and federal financial assistance to member institutions were too attenuated to sustain a Title IX claim, the District Court dismissed the suit. Smith then moved for leave to amend her complaint to allege that the NCAA receives federal assistance through other recipients and [**3] operates an educational activity that benefits from such assistance. The District Court denied the motion as moot. Reversing that denial, the Third Circuit held that the NCAA's receipt of dues from federally funded member institutions would suffice to bring the NCAA within the scope of Title IX.

Held: Dues payments from recipients of federal funds do not suffice to subject the NCAA to suit under Title IX. Pp. 5-10.

(a) The Third Circuit's decision is inconsistent with the governing statute, regulation, and this Court's decisions. Title IX defines "program or activity" to include "all of the operations of . . . a . . . postsecondary institution . . . any part of which is extended Federal financial assistance," § 1687(2)(A), and provides institution-wide coverage for entities "principally engaged in the business of providing education" services, § 1687(3)(A)(ii), and for entities created by two or more covered entities, § 1687(4). Thus, if any part of the NCAA received federal financial assistance, all NCAA operations would be subject to Title IX. This Court has twice considered when an entity qualifies as a recipient of federal financial assistance. In *Grove City* [**4] *College v. Bell*, 465 U.S. 555, 563-570, the Court held that a college qualifies as a recipient when it enrolls students who receive federal funds earmarked for educational expenses. The Court found "no hint" that Title IX distinguishes between direct institutional assistance and aid received by a school indirectly through its students. *Id.* at 564. Later, in *Department of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, the Court held that § 504 of the Rehabilitation Act of 1973 -- which prohibits discrimination based on disability in substantially the same terms that Title IX uses to prohibit sex discrimination -- does not apply to commercial airlines by virtue of the Government's program of financial assistance to airports. The Court concluded that § 504 covers those who receive the aid, not those who simply benefit from it. *Id.* at 607. In declining to apply *Paralyzed Veterans'* "recipient" definition on the ground that it was inconsistent with 34 CFR § 106.2, a Title IX regulation issued by the Department of Education, the Third Circuit failed to give effect to the regulation in its entirety. Section 106.2(h) defines "recipient" to include any [**5] entity "to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance." The first part of this definition makes clear that Title IX coverage is not triggered when an entity merely benefits from federal funding. Thus, the regulation accords with the teaching of *Grove City* and *Paralyzed Veterans*: Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not. The Third Circuit's decision is inconsistent with this precedent. Unlike the earmarked student aid in *Grove City*, there is no allegation that NCAA members paid their dues with federal funds earmarked for that purpose. While the Third Circuit dispositively and, this Court holds, erroneously relied on the NCAA's receipt of dues from its members, the Third Circuit also noted that the relationship between the NCAA and its members is qualitatively different from that between the airlines and airport operators at issue in *Paralyzed Veterans* -- the NCAA is [**6] created by, and composed of, schools that receive federal funds, and the NCAA governs its members with respect to athletic rules. These distinctions do not bear on the narrow question

here decided: An entity that receives dues from recipients of federal funds does not thereby become a recipient itself. Pp. 5-8.

(b) The Court does not address the alternative grounds urged by respondent and the United States for bringing the NCAA under Title IX: (1) that the NCAA directly and indirectly receives federal financial assistance through the National Youth Sports Program; and (2) that, when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient. Those issues were not decided below; their resolution in the first instance is left to the lower courts on remand. See, e.g., *Roberts v. Galen of Va., Inc.*, 525 U.S. ___, ___. Pp. 9-10.

139 F.3d 180, vacated and remanded.

COUNSEL: John G. Roberts, Jr. argued the cause for petitioner.

Carter G. Phillips argued the cause for respondent.

JUDGES: GINSBURG, J., delivered the opinion for a unanimous Court.

OPINIONBY: GINSBURG

OPINION: [***934] [*926] JUSTICE GINSBURG delivered the Opinion of the Court. [***HR1A] [1A] [***HR2A] [2A]

This case concerns the amenability of the National [**7] Collegiate Athletic Association (NCAA or Association) to a private action under Title IX of the Education Amendments of 1972. The NCAA is an unincorporated association of approximately 1,200 members, including virtually all public and private universities and 4-year colleges conducting major athletic programs in the United States; the Association serves to maintain intercollegiate athletics as an integral part of its members' educational programs. Title IX proscribes sex discrimination in "any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The complainant in this case, Renee M. Smith, sued the NCAA under Title IX alleging that the Association discriminated against her on the basis of her sex by denying her permission to play intercollegiate volleyball at federally assisted institutions. Reversing the District Court's refusal to allow Smith to amend her *pro se* complaint, the Court of Appeals for the Third Circuit held that the NCAA's receipt of dues from federally funded member institutions would suffice to bring the Association within the scope of Title IX. We reject that determination as inconsistent with the governing statute, regulation, [**8] and Court decisions. Dues payments from recipients of federal funds, we hold, do not suffice to render the dues recipient subject to Title IX. We do not address alternative grounds, urged by respondent and the United States as *amicus curiae*, in support of Title IX's application to the NCAA in this litigation, and leave resolution of those grounds to the courts below on remand.

I

Rules adopted by the NCAA govern the intercollegiate athletics programs of its member colleges and universities; "by joining the NCAA, each member agrees to abide by and enforce [the Association's] rules." *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 183 (1988); see 1993-1994 NCAA [*927] Manual, NCAA Const., Arts. 1.2(h), 1.3.2, p. 1. Among these rules is the Postbaccalaureate Bylaw, which allows a postgraduate student-athlete to participate in intercollegiate athletics only at the institution that awarded her undergraduate degree. See 1993-94 NCAA Manual, Bylaw 14.1.8.2, at 123. n1

-----Footnotes-----

n1 The Postbaccalaureate Bylaw is an exception to the general NCAA rule restricting participation in intercollegiate athletics to students enrolled in a full-time program of studies leading to a baccalaureate

degree. See 1993-1994 NCAA Manual, Bylaw 14.1.8.1, at 123. In full, the Postbaccalaureate Bylaw provides:

"A student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period set forth in 14.2." Bylaw 14.1.8.2.

-----End Footnotes----- [**9]

Respondent Smith enrolled as an undergraduate at St. Bonaventure [***935] University, an NCAA member, in 1991. Smith joined the St. Bonaventure intercollegiate volleyball team in the fall of 1991 and remained on the team throughout the 1991-1992 and 1992-1993 athletic seasons. She elected not to play the following year.

Smith graduated from St. Bonaventure in 2 1/2 years. During the 1994-1995 athletic year, she was enrolled in a postgraduate program at Hofstra University; for the 1995-1996 athletic year, she enrolled in a different postgraduate program at the University of Pittsburgh. Smith sought to play intercollegiate volleyball during these athletic years, but the NCAA denied her eligibility on the basis of its postbaccalaureate restrictions. At Smith's request, Hofstra and the University of Pittsburgh petitioned the NCAA to waive the restrictions. Each time, the NCAA refused to grant a waiver.

In August 1996, Smith filed this lawsuit *pro se*, alleging, among other things, that the NCAA's refusal to waive the Postbaccalaureate Bylaw excluded her from participating in intercollegiate athletics at Hofstra and the University of Pittsburgh on the basis of her sex, in violation of Title [**10] IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. § 1681 *et seq.* n2 The complaint did not attack the Bylaw on its face, but instead alleged that the NCAA discriminates on the basis of sex by granting more waivers from eligibility restrictions to male than female postgraduate student-athletes. Complaint P26, Joint App. in Nos. 97-3346 and 97-3347 (CA3), p. 4 (hereinafter Joint App.); Amended Complaint P64, Joint App. 98.

-----Footnotes-----

n2 The complaint also stated a Sherman Act claim and a state contract law claim. The District Court dismissed the Sherman Act claim, 978 F. Supp. 213, 218 (WD Pa. 1997), and declined to retain supplemental jurisdiction over the state claim, *id.* at 220. The Court of Appeals affirmed the dismissal of the Sherman Act claim, 139 F.3d 180, 187 (CA3 1998), and this Court denied certiorari on that issue, see 524 U.S. 982 (1998).

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

The NCAA moved to dismiss Smith's Title IX claim on the ground that the complaint failed to allege that the NCAA is a recipient of federal [**11] financial assistance. In opposition, Smith argued that the NCAA governs the federally funded intercollegiate athletics programs of its members, that these programs are educational, and that the NCAA benefited economically from its members' receipt of federal funds. See Joint App. 55-56.

Concluding that the alleged connections between the NCAA and federal financial assistance to member institutions were "too far attenuated" to sustain a Title IX claim, the District Court dismissed the suit. 978 F. Supp. 213, 219, 220 (WD Pa. 1997). Smith then moved the District Court for leave to amend her complaint to add Hofstra and the University of Pittsburgh as defendants, see Amended Complaint P63, Joint App. 97, and to allege that the NCAA "receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such

assistance," *id.*, P65, Joint App. 98. The District Court denied the motion "as moot, [*928] the court having granted [the NCAA's] motion to dismiss." App. to Pet. for Cert. 36a.

The Court of Appeals for the Third Circuit reversed the District Court's refusal to grant leave to amend the complaint. 139 F.3d 180, [*12] 190 (1998). The Third Circuit agreed with the District Court that Smith's original [***936] complaint failed to state a Title IX claim. *Id.* at 189. But Smith's proposed amended complaint, the Court of Appeals said, "plainly alleges that the NCAA receives dues from member institutions, which receive federal funds." *Id.* at 190. That allegation, the Third Circuit held, "would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss." *Ibid.* Under the Third Circuit's ruling, all Smith would need to prove on remand to proceed is that the NCAA receives members' dues, a fact not in dispute.

The NCAA petitioned for this Court's review, alleging that the Court of Appeals' decision conflicted with *Department of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597 (1986). Pet. for Cert. 7-15. We granted certiorari, 524 U.S. 982 (1998), to decide whether a private organization that does not receive federal financial assistance is subject to Title IX because it receives payments from entities that do.

II [***HR1B] [1B]

Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides that "no [**13] person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." n3 Under the Civil Rights Restoration Act of 1987 (CRRA), 102 Stat. 28, 20 U.S.C. § 1687, a "program or activity" includes "all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance." § 1687(2)(A). The CRRA also provides institution-wide coverage for entities "principally engaged in the business of providing education" services, § 1687(3)(A)(ii), and for entities created by two or more covered entities, § 1687(4). n4 Thus, if any part of the NCAA received federal assistance, all NCAA operations would be subject to Title IX. [**14]

-----Footnotes-----

n3 The scope of several other federal antidiscrimination measures is defined in nearly identical terms. See § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (prohibiting race discrimination in "any program or activity receiving Federal financial assistance"); § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (prohibiting discrimination on the basis of disability in "any program or activity receiving Federal financial assistance"); and § 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102 (prohibiting discrimination on the basis of age in "any program or activity receiving Federal financial assistance").

n4 Congress enacted the Civil Rights Restoration Act of 1987 in response to Part III of our decision in *Grove City College v. Bell*, 465 U.S. 555, 570-574 (1984), which concluded that Title IX, as originally enacted, covered only the specific program receiving federal funding. See *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 73 (1992) (noting that Congress endeavored, in the CRRA of 1987, "to correct what it considered to be an unacceptable decision on our part in *Grove City*").

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

We have twice before considered when an entity qualifies as a recipient of federal financial assistance. In *Grove City College v. Bell*, 465 U.S. 555, 563-570 (1984), we held that a college receives federal financial assistance when it enrolls students who receive federal funds earmarked for educational expenses. Finding "no hint" that Title IX distinguishes "between [***937] direct institutional assistance and aid received by a school through its students," we concluded that Title IX "encompasses *all* forms of federal aid to education, direct or indirect." *Id.* at 564 (internal quotation [**15] marks omitted).

In *Paralyzed Veterans*, 477 U.S. at 603-612, we considered the scope of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination on the basis of disability in substantially

[*929] the same terms that Title IX uses to prohibit sex discrimination. In that case, a group representing disabled veterans contended that the Department of Transportation had authority to enforce § 504 against commercial air carriers by virtue of the Government's extensive program of financial assistance to airports. We held that airlines are not recipients of federal funds received by airport operators for airport construction projects, even when the funds are used for projects especially beneficial to the airlines. Application of § 504 to all who benefited economically from federal assistance, we observed, would yield almost "limitless coverage." 477 U.S. at 608. We concluded that "the statute covers those who receive the aid, but does not extend as far as those who benefit from it." Id. at 607. n5

-----Footnotes-----

n5 Smith suggests that *Paralyzed Veterans* does not control the question presented here because that case involved a Government enforcement action while this is a private suit. This argument hinges on Smith's position that the private right of action available under 20 U.S.C. § 1681(a) is potentially broader than the Government's enforcement authority provided by § 1682. We reject this position. There is no express authorization for private lawsuits in Title IX; in *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979), we concluded that Congress had intended to authorize a private right of action even though it failed to do so expressly. We think it would be anomalous to assume that Congress intended the implied private right of action to proscribe conduct that Government enforcement may not check. See 20 U.S.C. § 1682 (authorizing federal administrative enforcement by terminating the federal funding of any noncomplying recipient, § 1682(1), or "by any other means authorized by law," § 1682(2)).

-----End Footnotes----- [**16]

The Court of Appeals determined "not [to] apply the *Paralyzed Veterans* Court's definition of 'recipient' to Title IX," **139 F.3d at 189**, finding that definition inconsistent with 34 CFR § 106.2 (1997), a Title IX regulation issued by the Department of Education. The Third Circuit interpreted the Department's regulation to define a "recipient" as "an entity 'which operates an educational program or activity which receives or benefits' from federal funds." **139 F.3d at 189** (quoting § 106.2(h)). The court reasoned that § 106.2(h) extends Title IX to beneficiaries of federal funding as well as recipients. Applying the more limited rule of *Paralyzed Veterans*, the appeals court concluded, would "render the regulatory definition of 'recipient' under Title IX a nullity." *Ibid.*

The Third Circuit's reading of § 106.2(h) failed to give effect to the regulation in its entirety. Section 106.2(h) defines "recipient" to include any entity "to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance." The first part of this definition makes clear that [**17] Title IX coverage is not triggered when an entity merely benefits from federal funding. Thus, the regulation accords with the teaching of *Grove City* and *Paralyzed Veterans*: Entities [***938] that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not.

The Third Circuit's conclusion that the NCAA would be subject to the requirements of Title IX if it received dues from its federally funded members is inconsistent with this precedent. Unlike the earmarked student aid in *Grove City*, there is no allegation that NCAA members paid their dues with federal funds earmarked for that purpose. At most, the Association's receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage.

While the Court of Appeals dispositively relied on the NCAA's receipt of members' dues, it also noted distinctions between *Paralyzed Veterans* and this case: The NCAA is "created by and comprised of" schools that receive federal funds, and the Association governs [**18] its members "with respect to athletic rules." **139 F.3d at 188**. In these respects, the Third Circuit observed, the relationship between the Association and its members is "qualitatively different from that between airlines and airport operators." Id. at 189. Evident as these distinctions may be, they do [*930] not bear on the narrow question we decide today -- whether an entity that receives dues from recipients of federal funds is for that reason a recipient itself.

III [***HR2B] [2B]

Smith, joined by the United States as *amicus curiae*, presses two alternative theories for bringing the NCAA under the prescriptions of Title IX. n6 First, she asserts that the NCAA directly and indirectly receives federal financial assistance through the National Youth Sports Program NCAA administers. See Brief for Respondent 35-37, 39-41. n7 Second, Smith argues that when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient. See Brief for Respondent 41-46; Brief for United States as *Amicus Curiae* 20-27. [**19]

-----Footnotes-----

n6 Smith's brief to the Third Circuit alluded to these theories. See Brief for Appellant in Nos. 97-3346 and 97-3347 (CA3), pp. 5, 22 (arguing that the NCAA receives federal financial assistance through the National Youth Sports Program it operates); *ibid.* (arguing that an organization that assumes control over a federally funded program is thereby subject to Title IX).

n7 Two District Courts have found that the NCAA's relationship to the National Youth Sports Program creates an issue of fact regarding whether the NCAA is a recipient of federal financial assistance. See *Bowers v. National Collegiate Athletic Assn.*, 9 F. Supp. 2d 460, 494 (NJ 1998) (denying NCAA's motion for summary judgment in a Rehabilitation Act suit because "there are genuine questions of material fact as to whether the NCAA receives federal funds through the [National Youth Sports Program Fund]"); *Cureton v. National Collegiate Athletic Assn.*, No. Civ. A. 97-131, 1997 WL 634376, at * 2 (ED Pa., Oct. 9, 1997) (refusing NCAA's motion for summary judgment in a Title VI action). Also, the Department of Health and Human Services has issued two letter determinations that the NCAA is a recipient of federal assistance by virtue of the Department's grant to the National Youth Sports Program Fund. See Brief for United States as *Amicus Curiae* 19-20. We, of course, are not positioned to make or currently review factfindings on any alternative theory urged by respondent.

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

As in [**20] *Roberts v. Galen of Va., Inc.*, ante, at 253-254 (1999) and *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998), [***939] we do not decide in the first instance issues not decided below.

* * *

[***HR1E] [1E]

[***HR2D] [2D]

For the reasons stated, we conclude that the Court of Appeals erroneously held that dues payments from recipients of federal funds suffice to subject the NCAA to suit under Title IX. Accordingly, we vacate the judgment of the Third Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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