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# The Case for Requiring a Proportionality Test to Assess Compliance with Title IX in High School Athletics

PATRICK N. FINDLAY\*

## INTRODUCTION

**T**itle IX of the Educational Amendments of 1972 (“Title IX”)<sup>1</sup> has been interpreted to require, among other things, that educational institutions receiving federal funds ensure equal opportunity for both sexes to participate in interscholastic, intercollegiate, and intramural athletics.<sup>2</sup> In the thirty years since Title IX was enacted, the question of how to measure equal opportunity for both sexes in athletics has been answered only provisionally. The regulations promulgated by the Department of Education Office of Civil Rights (the “OCR”) under Title IX list ten factors to be considered in determining whether an institution is compliant with Title IX.<sup>3</sup> The first factor is whether the interests and

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1. Codified at 20 U.S.C. § 1681 (2002). Title IX states in relevant part that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .” *Id.* at § 1681(a).

2. 34 C.F.R. § 106.41(c) (2002). Though Title IX addresses many areas of educational policy, the focus here will be upon Title IX and athletics. References to Title IX hereafter only refer to the athletic opportunity aspect of Title IX and its regulations.

3. 34 C.F.R. § 106.41(c) (2002) provides:

*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;

abilities of both sexes are accommodated (the “accommodation of interests test”).<sup>4</sup> The accommodation of interests test has been debated often and is the focus of this paper. This test is particularly noteworthy because “an ‘institution may violate Title IX solely by failing to accommodate [effectively] the interests and abilities of student athletes of both sexes.’”<sup>5</sup>

Most of the attention paid to Title IX compliance has come through litigation against colleges and universities, and through the subsequent discourse (both academic and popular) covering the issues raised in such litigation. Though such litigation has been successful in achieving equality or preventing reversion to inequality in specific cases, additional energy should be focused upon achieving equality in high schools.<sup>6</sup> Specifically, I argue that the only way a secondary school should be considered to be in compliance with the accommodation of interests test is if the participation rates of each sex are substantially proportionate to the enrollment of each sex in the student body.<sup>7</sup> Further, if the OCR were to issue a policy statement to this effect, such action would be consistent with existing OCR regulations, would be consistent with Title IX itself, and would be constitutional.

#### POLICY BACKGROUND

In a 1979 policy interpretation,<sup>8</sup> the Department of Health, Education and Welfare<sup>9</sup> presented colleges and universities with three options for

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- (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.

*Id.*

4. *Id.*

5. *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 635 (7th Cir. 1999) (quoting *Kelley v. Bd. of Trustees*, 35 F.3d 265, 268 (7th Cir. 1994)).

6. “[I]t would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys’ athletic programs to the exclusion of girls’ athletic programs in high schools as well as colleges.” *Williams v. School Dist. of Bethlehem Pa.*, 998 F.2d 168, 175 (3d Cir. 1993).

7. For a discussion of how close to a perfect match between the sex ratios of athletes and the student body a school must maintain to meet a proportionality test, see Trudy Saunders Bredthauer, *Twenty-Five Years Under Title IX: Have We Made Progress?*, 31 CREIGHTON L. REV. 1107, 1113-17 (1998).

8. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt.86).

complying with the mandate to accommodate the interests of both sexes.<sup>10</sup> The first option is to provide athletic opportunities that are proportionate to the numbers of each sex enrolled at the institution (the “proportionality test”). “In essence the policy interpretation establishes a presumption that ‘effective accommodation’ has been achieved if males and females at a school participate in intercollegiate sports in numbers substantially proportionate to the number of students of each sex enrolled at the institution.”<sup>11</sup> This option serves as the model for the proposal put forth in this paper. The only differences between the first option in the policy interpretation and the instant proposal are that intercollegiate would be replaced with interscholastic and that the proposal would apply to secondary schools.

As the policy currently stands, colleges have two other means of establishing compliance with the accommodation of interests test if the proportionality test is not met. The second option allows a college or university to be considered in compliance if “it has a continuing practice of increasing the athletic opportunities of the underrepresented sex.”<sup>12</sup> Finally, a school may be considered in compliance if it “fully and effectively accommodate[s] the interests and abilities of the underrepresented sex.”<sup>13</sup> The second and third options are not part of the proposal put forth here.

9. The OCR took over responsibility for enforcement of Title IX from the Department of Health, Education and Welfare when the Department of Education was created. See *Kelley*, 35 F.3d at 269 n.3.

10. *Kelley*, 35 F.3d at 268 (quoting 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt.86)) cites the relevant part of the policy interpretation:

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

*Id.*

11. *Kelley*, 35 F.3d at 268.

12. *Id.*

13. *Boulahanis*, 198 F.3d at 635. This option is problematic because it does not address the obvious fact that girls must overcome the status quo. On the margin, girls that

## BENEFITS OF PARTICIPATION IN ATHLETICS

Other than the obvious goal of equality for its own sake, there are significant reasons for society to maximize girls' participation opportunities in high school athletics. The benefits for girls who participate in athletics as they grow up are numerous and have become increasingly well documented. Professor Becker feels that a girl's sense of self-worth stems in large part from "her bodily experiences and the extent to which they reflect her own agency."<sup>14</sup> After reviewing some studies that noted the positive effects of athletics on girls, Professor Becker concludes that "these studies suggest that feeling that one is in control with respect to one's own body is extremely important to the well-being of girls and women in our culture."<sup>15</sup>

According to a 1997 report from the President's Council on Physical Fitness and Sports, the benefits span the physical, academic, and emotional spectrum.<sup>16</sup> This report marked the first time that "an interdisciplinary approach has been used in a government document that examines the impact of sport and physical activity in the lives of girls."<sup>17</sup> "The conclusions are striking: regular physical activity [such as participating in school athletics] can reduce girls' risk of many of the chronic diseases of adulthood; female athletes do better academically and have lower school drop-out rates than their nonathletic counterparts; and, regular physical

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would otherwise participate in athletics will not participate because of the additional effort required to create a new team or otherwise indicate their interest. Boys, equally interested as these girls, will participate because there is no such inertia to overcome. Additionally, this option does not encourage schools to foster girls' interest in athletics. One could conceive of a way to use this option as an interim measure to prevent needless cuts of boys athletics in the few schools that are in the enviable position of being able to fund more athletic opportunities than students are interested in filling. However, high schools in this position are presumably rare. Such an option should only be permitted, if at all, for a very limited time as part of a comprehensive plan for encouraging additional girls to participate in order to quickly achieve compliance with the proportionality test. Additionally, waiver of the proportionality test in favor of this alternate test should only be available after the non-compliant school has already created and offered equal opportunities for each sex, thereby eliminating the inertia of the status quo.

14. Mary Becker, *Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169, 1178 (1998).

15. *Id.* at 1179.

16. THE PRESIDENT'S COUNCIL ON PHYSICAL FITNESS AND SPORTS REPORT, *Physical Activity and Sport in the Lives of Girls: Physical and Mental Health Dimensions from an Interdisciplinary Approach* (Spring 1997), available at <http://www.fitness.gov/girlssports.html> (last visited October 23, 2002) (hereinafter PCPFS REPORT).

17. PCPFS REPORT, *supra* note 16, *Letter from the Project Directors*.

activity can enhance girls' mental health, reducing symptoms of stress and depression and improving self-esteem."<sup>18</sup> Further, "recognition of physical activity and sport as an effective and money-saving public health asset is growing among researchers and policy makers."<sup>19</sup>

The significant health benefits are not surprising. However, it is the academic and emotional benefits that may have the greatest impact on society. "Research findings show that many high-school female athletes report higher grades and standardized test scores and lower dropout rates, and are more likely to go on to college than their nonathletic counterparts."<sup>20</sup> As women break through the remaining barriers to workplace equality, the well educated and academically successful will naturally have the most success in so doing.<sup>21</sup> Extracurricular athletics can play a significant role in this respect, furthering what should be a primary goal of an academic institution: to provide the tools for its students to succeed. Consequently, the societal interest in eliminating sex discrimination in school athletics is significant.

#### ATHLETIC PARTICIPATION RATES

Unfortunately, despite equal participation rates among girls and boys until age twelve, after age twelve, girls' participation rates drop off.<sup>22</sup> During the 2000-01 academic year, 41.5% of participants in high school athletics were girls.<sup>23</sup> Despite the nearly twenty percentage point difference in participation between boys and girls, the disparity is nowhere near as great as it was immediately before Title IX's enactment. In 1971, only 7.4% of high school athletes were girls.<sup>24</sup> The numbers speak for themselves in indicating that Title IX played a major role in this increase.

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18. PCPFS REPORT, *supra* note 16, *Message from the President's Counsel on Physical Fitness and Sports*.

19. PCPFS REPORT, *supra* note 16, *Executive Summary*.

20. *Id.*

21. Though only an imperfect proxy for success, earning potential increases dramatically as one completes more education. See Jennifer Cheeseman Day & Eric C. Newburger, United States Census Bureau, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings* (P23-210) (July 2002), available at <http://www.census.gov/prod/2002pubs/p23-210.pdf> (last visited October 23, 2002).

22. Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coach's View*, 62 BROOK. L. REV. 1039, 1043 (1996).

23. Calculation based upon: National Federation of State High School Associations, *2001 High School Participation Survey*, available at <http://www.nfhs.org/Participation/SportsPart01.htm> (last visited October 23, 2002).

24. *Id.*

The numbers from the 1973-74 academic year indicate a greater than four-fold increase in girls' participation rates from 1971.<sup>25</sup> It appears that this is a case of interest following opportunity; though the interest to some degree must have already existed.

The increase in girls' athletic participation has come without a corresponding decrease in boys' participation.<sup>26</sup> Boys' participation has fluctuated to a minimal degree, with no correlation to girls' participation and with participation in 2000-01 slightly higher than in 1971.<sup>27</sup>

The increase in girls' participation after Title IX does not necessarily reflect what percentage of girls would participate in athletics absent social and cultural pressure against it. That is to say, we do not know from the numbers alone whether the remaining participation disparity is somehow biological. However, the steady increase in participation over the past decade, with no indication of the trend slowing, certainly suggests that when given the opportunity and encouragement, girls will choose to participate in athletics at a rate similar to boys.

It is intuitive that greater participation in high school athletics will lead to greater participation in college athletics and beyond. One of the prevalent arguments leveled by some against a proportionality requirement in college-level Title IX enforcement is that in high school, girls participate less. As the argument goes, colleges cannot field teams that combine for equal participation rates if high school participation rates are so unequal.<sup>28</sup> Some base this argument on the additional ground that it is, "obvious to many that men and women do not [share an] equal interest in athletics."<sup>29</sup>

The idea that girls' low high school participation rates fundamentally affects their participation in college is well taken. That is why at least one intellectually honest commentator arguing against a proportionality requirement in college athletics has opined that, "the emphasis of Title IX enforcement must be aimed at junior high and high schools."<sup>30</sup> I hasten to

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25. *Id.*

26. *Id.*

27. *Id.*

28. See, e.g., Straubel, *supra* note 22, at 1043-44; Walter B. Connolly & Jeffrey D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845, 881 (1994).

29. Christopher Paul Reucher, Comment, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117, 133 (2001).

30. Straubel, *supra* note 22, at 1044 n.18.

note that I find this point to be valid only to the extent it encourages a better enforcement of Title IX at the lower school levels.<sup>31</sup>

Further, it is troublesome that females' alleged lower interest level in athletics is somehow used to justify discrimination against those women and girls who do want to participate. Of course, such an argument does not address any of the reasons why women are less interested in athletics in the first place. It is this gender stereotyping that reinforces the idea in too many girls' minds that athletics are not for them,<sup>32</sup> thereby artificially robbing them of the benefits of athletic participation. This deprives society of the positive externalities, or at least the decrease in negative externalities, that girls' participation in athletics could bring.

Even if there is some (as yet unproven) biological factor that causes boys to be more interested in sports than girls, that is itself not conclusive as to whether we should be content with significantly unequal participation levels, to say nothing of unequal support of those that do participate. The benefits to the girls and society are far too great to ignore. Society encourages children to participate in many beneficial activities for which children do not necessarily have a biological predisposition. Accordingly, a strict proportionality requirement should be enforced at the high school level regardless of biological factors, all of which, to date, seem to be nothing more than inaccurate gender stereotypes anyway.

#### ANALYSIS OF PROPORTIONALITY

Ideally, increasing numbers of female participants in high school athletics would not lead to decreases in males' opportunities. The social benefits of girls' participation in athletics are significant enough to prompt schools to increase overall funding whenever possible to accommodate increases in girls' athletics. Based upon the sharp increases in girls' participation without corresponding decreases in boys' participation as discussed before, this seems to be the way in which Title IX has primarily taken effect.

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31. This point fails as a conclusive argument against a proportionality test in college athletics, because there are still many college-bound senior female athletes that would participate in college women's athletics but for the lack of opportunity.

32. "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." Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1640 (1997).



Unfortunately in a world of limited resources, this Pareto optimal result may not always be possible. It is conceivable that sometimes boys' sports would be cut to release funds to be used for gains in girls' sports to meet a proportionality requirement. While not optimal, this is the lesser of two evils. If we assume that civil right statutes such as Title IX are intended to put the subjugated group in the position they would occupy absent the subjugation,<sup>33</sup> then cutting boys' sports to make way for girls is justifiable. That is, the boys to some extent unjustly benefited from discrimination against the girls in the first place. Shifting the proportion of participation only rectifies this ill-gotten gain.<sup>34</sup> Assuming that the benefits of athletic participation are similar for boys as they are for girls (though based on the self-esteem increases achieved by girls, the benefits may, in fact, be greater for girls than for boys), then so long as the mechanism for determining who plays and who does not play is equitable, society should be indifferent as to whether girls take some of the spots formerly taken by boys.

Additionally, society as a whole gains in the long run if ideas of equality are fostered. If increased athletic opportunity for girls results in increased work place opportunity for women, societal efficiency gains are inevitable. Qualified women will become less likely to be prevented artificially from filling roles they aspire to and are capable of fulfilling.

Some commentators are advancing the idea that men's and boys' sports are being cut, without corresponding increases in women's and girls' sports. That is, boys' teams are being cut in an apparent mean-spirited attempt to harm the boys, rather than to help the girls.<sup>35</sup> Professor Jeremy

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33. "Had Congress intended to entrench, rather than change, the status quo – with its historical emphasis on men's participation opportunities to the detriment of women's opportunities – it need not have gone to all the trouble of enacting Title IX." *Cohen v. Brown Univ.*, 101 F.3d 155, 180-81 (1st Cir. 1996) (hereinafter *Cohen II*).

34. For example, women's suffrage necessarily diluted the vote of every male voter so long as at least one woman voted. This does not mean that men were harmed for the sake of harming men. In reality the men, as well as the women, were simply put in the place they would have been in absent wrongful discrimination against women.

35. See, e.g., Steve Forbes, *Fact and Comment: Unpin This Silliness*, 169 *FORBES* 28 (April 15, 2002). For a more thoughtful critique of proportionality, see Richard A. Epstein, *Law and Economics: Just Scrap Title IX*, *Nat'l L.J.* (Oct. 14, 2002), available at <http://www.nlj.com/oped/101402epstein.shtml> (last visited October 23, 2002). Professor Epstein's economic analysis of college athletic programs would be relevant if female college students had been given full opportunity and encouragement to compete in athletics when they were girls. That is, if while growing up girls were encouraged to play sports the same as boys are encouraged, then eventually Title IX may become unnecessary. Professor Epstein's article presupposes that even in a world completely free of discrimination, females would be less likely than males to participate in athletics. There is no basis for such an

Rabkin writes, “rather than focus on expanding opportunities for women, the activists are content to curtail opportunities for men in order to achieve ‘equity.’”<sup>36</sup> This position is disingenuous and inaccurate.

There is no incentive to cut boys’ sports and not use that money for girls’ sports, unless the entire athletics budget is being decreased. In the case of an overall budget decrease, the girls still achieve a relative gain even if their budget is not increased. Girls’ sports would not be cut at all or as severely as they would be with a pro rata budget reduction. Of course, this analysis assumes rationally acting school boards and administrators. This may not be the case, but it would be a mistake to systemically penalize girls for the irrationality of administrators.

Professor Rabkin suggests, without support, that the creation of policy that validates irrational cuts meant to “punish male athletic programs” is part of the feminist agenda.<sup>37</sup> Of course, such an agenda would be misguided. However, proportionality does not cause administrators to act in such a way. By acting in such a way they are cutting off their nose to spite their face. In any case, it is not clear based upon participation numbers that large numbers of administrators are cutting boys’ opportunities at all, let alone acting punitively.<sup>38</sup>

Professor Rabkin’s invective, purportedly in defense of male wrestlers, might be better aimed at other male sports. Title IX and proportionality simply require gender equity. Proportionality does not dictate which sports are supported and offered within a sex’s athletic offerings. So long as women and girls are truly afforded equal opportunity there is no reason for “the activists” to care, in their capacity as gender equality activists, what sports in particular are retained or created, beyond possible concerns of gender stereotypes being reinforced through certain sports. If wrestling teams are cut, it may be because football or other sports were not cut. High profile cases of football and basketball teams being cut in the name of Title IX have yet to surface. This is not inherently undesirable. Once gender equity concerns are answered, I see nothing wrong with letting the market or political pressure choose, for example,

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assumption. Moreover, such analysis is completely unavailing with respect to high school athletics, where athletics do not generate significant revenue but arguably extol more benefits on the participants. Title IX should be used, not to change rational preferences, but rather, to free girls from adaptive preference formation.

36. Jeremy Rabkin, *Gender Benders: Feminists Beat Up on Male Wrestlers and Other Jocks*, 32 AM. SPECTATOR 58, 58 (Apr. 1999).

37. “Nonetheless, feminists are determined to punish male athletic programs to prove some abstract ideological point.” *Id.* at 59.

38. See, e.g., National Federation of State High School Associations, *2001 High School Participation Survey*, *supra* note 23.

baseball and basketball over wrestling for the boys, or basketball and track over lacrosse for the girls.

At least one feminist scholar, Professor Karen Tokarz, has argued for changes in Title IX, to not require equal opportunity for girls on girls' teams and equal support of those teams, but instead to call for the abolition of separate girls' teams.<sup>39</sup> Fearing reinforcement of gender stereotypes, Professor Tokarz argues that students should not be separated onto sex-segregated teams. "This solution [of separating teams by sex], while it cures the symptoms [of every female victory over a male needing an explanation], leaves the imperative in place and denies equal opportunity to individual females."<sup>40</sup>

This may be true if the sex-segregated teams are unequal. However, Professor Tokarz's premise, that separate necessarily means unequal (as is the case with race segregation), does not hold up. Strict enforcement of the provisions of Title IX not addressed in this paper,<sup>41</sup> brought about because of the raw numbers of girls and women playing sports as a result of proportionality, will not only lead to equal participation levels, but also increase the quality of that participation. If women and girls are undervalued as athletic participants, there is no reason to think that eliminating teams for females will somehow increase athletic opportunity for women, even if they are as good at the existing popular sports as their male counterparts. Rather than pretend there are no sex differences, thereby excluding many girls who would no longer be able to participate in sports such as track and field, we should increase the value we place on the qualities women and girls bring to their athletic pursuits.

Professor Tokarz does point out that sex differences are "average, and not absolute."<sup>42</sup> However, since the benefits of athletics are realized as much by average girls, creating a system that may favor only the exceptional female athlete (though this is itself not clear) misses the point entirely and is contrary to my goal of increasing the absolute participation rates of girls' athletic participation.

I fear that those uninterested in increasing athletic opportunity for girls or women, and with no interest in breaking down gender stereotypes, would wholeheartedly adopt Professor Tokarz's proposal, if not the reasoning behind it. It would be a substantial step backwards for gender equality.

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39. Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201, 244-45 (1985).

40. *Id.* at 245.

41. Specifically, 34 C.F.R. § 106.41(c)(2)-(10) (2002).

42. Tokarz, *supra* note 39, at 204.

Professor Tokarz's claim that the Fourteenth Amendment requires single sex teams has been refuted by the same reasoning that allows for the constitutionality of a proportionality mandate, as discussed later. Professor Tokarz does have a point, however, that teams should not be restricted to boys purely to prohibit participation by girls.

#### CONSISTENCY OF PROPORTIONALITY PROPOSAL WITH TITLE IX

Because strict proportionality is the optimal solution to the accommodation of interests test, the next question is whether such a mandate would be consistent with Title IX itself. If such an interpretation or regulation were at odds with Title IX, then the courts would void it as going beyond the regulatory agency's authority.<sup>43</sup>

Courts have repeatedly held that colleges may choose the proportionality test as a way of complying, in part, with Title IX.<sup>44</sup> To date, no court has found such a test inconsistent with Title IX. The First Circuit held that "because the agency's rendition [allowing for the proportionality test] stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor."<sup>45</sup>

All courts that have visited the issue agree that the current three-prong test does not contravene Title IX's language.<sup>46</sup> A mandate that high schools be deemed in compliance with Title IX only if the proportionality test is met is also consistent with Title IX. The other two options are merely mechanisms by which schools avoid the proportionality requirement. There is certainly no language in Title IX itself that calls for such alternative tests.

Further, there is nothing in the regulations implementing Title IX that must be changed to allow for a proportionality mandate for high schools. The current regulations require that the interests of both sexes be met.<sup>47</sup> If the same agency allows proportionality as a safe haven for the accommodation of interests test, there is no reason to think that further expanding on the policy interpretation that allows for proportionality in college athletics would suddenly be contradictory to the existing regulation.

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43. *Kelley*, 35 F.3d at 270-71 (citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)); see also *Boulahanis*, 198 F.3d at 637-38.

44. See *Boulahanis*, 198 F.3d 633; *Kelley*, 35 F.3d 265; *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154 (D.N.D. 2000); *Cohen II*, 101 F.3d 155 (1st Cir. 1996).

45. *Cohen v Brown Univ.*, 991 F.2d 888, 899 (1st Cir. 1993) (hereinafter *Cohen I*).

46. *Chalenor*, 142 F. Supp. 2d at 1157 n.8.

47. 34 C.F.R. § 106.41(c)(1) (2002).

To the extent that a proportionality requirement would contradict the current accommodation of interests test, the regulations should be changed to allow for proportionality as the exclusive test in high schools. This would in no way contravene Title IX's statutory language.

#### CONSTITUTIONALITY OF A PROPORTIONALITY MANDATE

Male participants of college sports that have been cut in the name of Title IX have brought Fourteenth Amendment equal protection claims against their universities. The fact that schools relied upon a proportionality test has not been found to violate the Equal Protection Clause, however.<sup>48</sup> "There is no doubt but that removing the legacy of sexual discrimination—including discrimination in the provision of extra-curricular offerings such as athletics—from our nation's educational institutions is an important governmental objective."<sup>49</sup>

Requiring proportionality in high school athletics does nothing more than remove the legacy of discrimination. "What is more, even if we were to assume, for argument's sake, that the regulation creates a gender classification slanted somewhat in favor of women, we would find no constitutional infirmity. It is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination."<sup>50</sup> If a remedial scheme "directly protects the interests of the disproportionately burdened gender, it passes constitutional muster."<sup>51</sup>

Proportionality would actually protect the interests of the disproportionately burdened gender to a greater extent than do current regulations. Absent a fundamental revision of the analysis used by the courts in the few cases directly addressing the constitutionality of schools complying with Title IX through proportionality, a proportionality mandate would not violate the Equal Protection Clause.

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48. See *Boulahanis*, 198 F.3d 633; *Kelley*, 35 F.3d 265; *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154 (D.N.D. 2000); *Cohen II*, 101 F.3d 155.

49. *Kelley*, 35 F.3d at 272.

50. *Cohen I*, 991 F.2d at 901 (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (noting that Congress need not make specific findings of discrimination to grant race-conscious relief); *Califano v. Webster*, 430 U.S. 313, 317, (1977) (upholding social security wage law that benefited women in part because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women.")).

51. *Kelley*, 35 F.3d at 272.

## ADDITIONAL BENEFITS OF THE PROPORTIONALITY TEST

The proportionality test offers procedural benefits beyond those directly related to equality in participation. The determination of compliance with the accommodations of interests test would be distilled down to simple number crunching. Using a proportionality test creates a bright line rule. Ideally, such a clear rule would prompt schools into full compliance with Title IX because the threat of losing litigation would be obvious. In cases where schools continue not to offer equal opportunity for girls, the proportionality test would significantly reduce the fact finding required of federal district courts adjudicating these cases. A court need undertake significant fact finding only if a school meets the proportionality test but is alleged not to meet any of the other nine factors listed in 34 C.F.R. § 106.41(c)(2) through (10).

Additionally, the proportionality test would free school administrators from a regulatory burden of determining student interests to satisfy Title IX. Of course, a school administration would remain under student and parental pressure to accommodate student interests. However, schools could fall back on proportionality as a crutch when certain factions call for undue increases in boys' sports. So long as the nine other factors are met,<sup>52</sup> the school's only discretion would be which boys' and girls' sports they use to fill the proportional number of opportunities.

Finally, the proportionality test would motivate those desiring increases in boys' sports to likewise encourage increases in girls' participation to prevent violation of the test. Having the boys' coaches (and the boys on those coaches' teams) encourage girls to participate on the school's teams may further speed the breakdown of harmful gender stereotypes. By allowing schools to claim that they fully and "effectively accommodate[s] the interests and abilities of members of both sexes,"<sup>53</sup> as a means of compliance, we do not create incentives for schools to break down stereotypes.

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52. Meeting the requirements of the other nine factors is a process that, in theory, is no more than the relatively easy equal division of available resources. However, in reality these requirements may indicate a significant number of Title IX violations even in cases where schools meet proportionality.

53. *Kelly*, 35 F.3d at 268 (quoting 34 C.F.R. § 106.41(c)(1)).

### CONCLUSION

Society gains tremendously when girls participate in extracurricular athletics during high school. Moreover, sex inequality in college athletics can, in part, be traced back to a lack of encouragement and opportunity for female athletes in high school. Accordingly, Title IX and its regulations should be interpreted so as to compel high schools to satisfy the proportionality test.