Eliminating Women's Teams: A Comparative Analysis of *Favia v. Indiana University of PA* (1992), *Barrett v. West Chester University* (2003), and *Choike v. Slippery Rock University* (2006)

BARBARA OSBORNE
University of North Carolina

&

ROBIN AMMON
Slippery Rock University

INTRODUCTION

Title IX, the landmark civil rights legislation that mandates gender equality in education, celebrated its 35th anniversary in 2007. This legislation has been instrumental in opening doors for females in math, science, and athletics, and those gains have been hard fought by those who seek to enforce the law, often in the courtroom. According to Anderson and Osborne (2008), there have been 653 published legal decisions related to Title IX. More than a quarter (29%) of the decisions address sports issues, and more than half of those decisions (57%) address equity issues in intercollegiate athletics.

The media has given significant attention to the "fairness" issue of Title IX. This focus has not generally been about whether female athletes are treated fairly, but rather whether the enforcement of Title IX is fair to male participants. Rather than create additional opportunities for women to compete in intercollegiate athletics, some college and university athletics administrators have chosen to eliminate men's teams. To comply with Title IX, these actions have been taken in order to reach an equivalent proportionality ratio between male to female athletes and the male to female ratio in the institutions general student body. When male athletes from these teams have sued claiming sex discrimination, the courts have very clearly held that cutting men's sports does not violate the Constitution or Title IX (*Chalenor v. University of North Dakota,* 2000; *Neal v. California State University,* 1999; *Harper v. Board of Refents,* 1999; *Boulahanis v. Board of Regents,* 1999). Recently, some schools such as James Madison University

have eliminated both women's and men's teams, ironically claiming that the decision was made because of Title IX. The very detailed decision in *Cohen v. Brown University* (1993) was the first opinion addressing this issue from an appellate court. Consistent decisions in the Tenth Circuit in *Roberts v. Colorado State* (1993) and the Third Circuit in *Favia v. Indiana University of Pennsylvania* (1992) indicate that the law regarding the elimination of women's athletics teams is very well settled. Women's teams cannot be eliminated unless the school is able to show that they effectively accommodate the interests and abilities of the underrepresented sex. There have only been three other published decisions on this issue—the 2003 case of *Barrett v. West Chester University of Pennsylvania, Choike v. Slippery Rock* in 2006, and most recently, *Mansourian v. Board of Regents* in 2007.

Ironically, half of the schools that have litigated this issue are situated in the Third Circuit, all three are members of a 14 school state university system, and all three compete in the Pennsylvania State Athletics Conference (PSAC). Indiana University of Pennsylvania (IUP) is the largest of the three institutions with 11,223 full time undergraduate students. West Chester University (WCU) is next with 9,696 students, and Slippery Rock University (SRU) has an undergraduate student body of 7088 students. All three institutions compete at the NCAA Division II level. As such they are representative of many colleges and universities across the United States.

This article will examine the specific issues addressed in these three Third Circuit cases: *Favia v. Indiana University of Pennsylvania, Barrett v. West Chester University of Pennsylvania* and *Choike v. Slippery Rock University.* First, the applicable law related to Title IX of the Education Amendments of 1972, the 1975 Regulations, the 1979 Policy Interpretation, and additional clarifications in 1996, 2003, and 2005 will be presented. Next, the unique elements of each case will be described. Finally, the cases will be compared in application of the legal theory, and recommendations will be made to assist other colleges and universities in complying with Title IX and avoiding costly litigation.

THE LAW

Few would argue that Title IX has assisted female athletes in achieving more opportunities to participate in athletics programs and equitable treatment as athletes. However, change has occurred very slowly, motivated by administrative complaints and private lawsuits rather than the voluntary compliance of the athletics programs. Title IX simply states: "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), 2007). The law applies to all educational institutions that receive federal funding, and applies to every program within the institution (20 U.S.C. §1687, 2007). Although Title IX became effective as law in 1972, it was not until the Department of Health, Education, and Welfare (now the U.S. Department of Education) promulgated regulations in 1975 that colleges and universities had notice as to what would be required to comply with the law.

The 1975 Regulations focus on equity in two areas: athletics scholarships and any interscholastic, intercollegiate, club or intramural athletics activities. The athletics scholarships provision requires that reasonable opportunities for members of each sex exist in proportion to the number of students of each sex participating in intercollegiate athletics (34. C.F.R. 106.37(c)(1), 2007). Whether equal opportunity is provided is determined by considering many factors, including:

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

1. the provision of equipment and supplies;
2. scheduling of games and practice time;
3. travel and per diem allowance
4. opportunity to receive coaching and academic tutoring;
5. assignment and compensation of coaches and tutors;
6. provision of locker rooms, practice and competitive facilities;
7. provision of medical and training facilities and services;
8. provision of housing, dining facilities, and services;
9. publicity (34 C.F.R. 106.41(c)).

The Regulations state that funding does not have to be equal for male and female teams in order to comply with the legislation, but that the failure to provide necessary funds for teams of one sex may be considered (34 C.F.R. 106.41(c)). Further, all institutions that sponsor intercollegiate athletics teams were to fully comply with the legislation within three years (34 C.F.R. 106.41(d), 2007). According to the Regulations, all three of the schools involved in these lawsuits should have voluntarily been in compliance since 1978.

Colleges and universities were given additional guidance on Title IX compliance in December, 1979, through a Policy Interpretation (44 Fed. Reg. 71,413 et seq., 1979). Although the Policy Interpretation does not carry the legal weight of the Regulations, it does provide substantive legal guidance on the obligations imposed by Title IX for the courts as well as athletics

administrators (*Favia*, 1992, p. 584). The purpose of the Policy Interpretation was to clarify the meaning of equal opportunity in intercollegiate athletics and explain the standards that the Department of Education uses in assessing compliance. The Policy Interpretation looks at three specific areas of the intercollegiate athletics program: 1) athletics related financial assistance; 2) benefits, opportunities, and treatment of participants of each sex; and 3) effective accommodation of the interests and abilities of both sexes (Policy Interpretation, 1979). An athletics program should not have policies that are discriminatory in language or effect, nor should there be substantial or unjustified disparities in the opportunities and benefits afforded to both sexes in the program as a whole. Although the athletics program as a whole is evaluated, disparities in treatment, benefits, and opportunities in a particular area may be substantial enough to indicate non-compliance with Title IX (Policy Interpretation).

The requirements for athletics related financial assistance and the laundry list of program benefits, opportunities, and treatment are fairly easy to comprehend. However, considerable debate has ensued regarding proof of compliance in meeting the interests and abilities of the student body. Non-discriminatory methods must be used in determining the athletics interests and abilities of students. Selection of sports offered, the opportunity for competition and the level of competition available are also to be considered. Additionally, this section of the Policy Interpretation introduces a "three part test" which allows three different ways for an institution to prove that they are providing nondiscriminatory opportunities for student-athletes:

1. whether participation levels for men and women in intercollegiate athletics is substantially proportionate to the respective enrollments
2. whether there has been a history and continuing practice of program expansion which is demonstrably responsive to the interest and abilities of the underrepresented sex; or
3. whether it can be demonstrated that the interest and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program (Policy Interpretation, 1979).

Over the next 15 years, considerable emphasis was placed on the three-part test relative to Title IX compliance. In January of 1996, the Office for Civil Rights issued "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (Clarification) in response to numerous requests for information regarding Title IX compliance standards. The Clarification focused solely on the three part test assessing whether an institution provides

non-discriminatory participation opportunities for men and women. The Clarification explains that the three-part test is one of the factors to be considered in determining whether an institution effectively accommodates the athletics interests and abilities of the student body as required by the 1975 Regulations (U.S. Department of Education, 1996)

"Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance" (Further Clarification) was issued in 2003, again in response to requests for additional information on enforcement standards. The Further Clarification was based on recommendations made by the Secretary's Commission on Opportunities in Athletics who had studied the standards for measuring equal opportunity under Title IX for almost a year. The Further Clarification focused on five areas: 1) that schools take advantage of the flexibility of the three-part test, not consider proportionality as a "safe harbor", and use any of the three avenues to show that they are providing equal participation opportunities; 2) that elimination of teams is a disfavored practice because it reduces opportunities rather than enhance them; 3) that OCR will work with schools to assist them in achieving Title IX compliance, which will be aggressively enforced including implementing sanctions; 4) that private funding of athletics teams through sponsorship is allowed but does not change a school's compliance with all Title IX requirements; and 5) that OCR will ensure that Title IX enforcement is applied consistently across the country (U.S. Department of Education, 2003).

A third clarification was issued in 2005 to further assist colleges and university athletics programs in understanding whether they are in compliance with part three of the three-part test. The "Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test – Part Three" (Additional Clarification) includes a User's Guide to Student Interest Surveys Under Title IX which provides a Model Survey to measure student interest. The Model Survey was created based on analysis of 52 survey instruments that had been used in 132 OCR complaint cases. The Additional Clarification creates a presumption that an institution is in compliance under part three of the three part test unless a sport or sports exist for the underrepresented sex that meets all three of the following conditions: there is sufficient student interest to sustain a varsity team in the sport; there is ability to sufficiently sustain a varsity team in the sport; and intercollegiate competition reasonably exists within the college or university's normal competitive region (U.S. Department of Education, 2005). Factors to consider for each of these three conditions are described and use of the Model Survey to assess these three component areas is encouraged. Although the focus of the Additional Clarification is on part three of the three-part test, OCR reinforces that all three parts of the three-part

test are independently sufficient to prove that a program effectively accommodates the interests and abilities of the student body.

THE CASES

These three cases are representative of the types of struggles that colleges and universities have in complying with Title IX. The cases span the history of Title IX, with *Favia* (1992) being one of the first cases to litigate relative to cutting women's teams and *Choike* (2006) being one of the most recent. As NCAA Division II institutions, these schools represent the middle of the intercollegiate athletics competitive spectrum. They are also very representative of the average size college or university in the United States, and as such have typical issues to deal with such as budget restrictions.

Favia v. Indiana University of Pennsylvania (1992/1993)

In 1991, the athletics department at Indiana University of Pennsylvania (IUP) sponsored 18 varsity teams – nine male and nine female (*Favia*, 1992). During this time frame, state and federal educational appropriations were reduced, and the athletics department was directed to reduce their budget by $350,000 (*Favia*). The IUP athletics director, seemingly conscious of Title IX, decided to cut costs by eliminating programs. In an effort to keep an even number of men's and women's teams, the men's soccer, men's tennis, women's gymnastics and women's field hockey teams were cut.

Although the number of athletic teams seemed gender balanced with seven male and seven female sports, the choice of teams eliminated had a big impact on opportunities provided for female athletes. As depicted in Table 1, prior to the cuts, 503 athletes participated in IUP's athletics program– 313 males and 190 females (*Favia v. Indiana University of Pennsylvania*, 1993). Men comprised 62.3 percent of the athletes, while women comprised 37.7 percent. However, IUP's undergraduate student population was 55.6% female and 44.4% male at that time. After the elimination of the four teams, IUP had a total of 397 athletes—248 men and 149 women. Men now represented 63.5% of the athletes, while women comprised only 36.5%, a net decrease of 1.2% for female athletes. The financial savings represented by the elimination of these four teams also disproportionately impacted the women's athletics program. Cutting women's gymnastics and field hockey saved $110,000 whereas cutting men's soccer and tennis saved only $35,000.

TABLE 1. IMPACT OF ELIMINATING TEAMS ON IUP ATHLETICS OPPORTUNITIES

	Men	Women
Prior to cuts	313 (62.3%)	190 (37.7%)
After cuts	248 (63.5%)	149 (36.5%)
Impact	-65 (+1.2%)	-41 (-1.2%)
Financial impact	-$35,000	-$110,000

Four members of the discontinued gymnastics and field hockey teams filed a class action lawsuit against IUP, Dr. Lawrence Pettit (University president), and Frank Cignetti (Director of Athletics) for gender discrimination under Title IX of the Education Amendments of 1972 as well as the equal protection clause of the Fourteenth Amendment (*Favia*, 1992). The female student-athletes claimed that "IUP fostered disparities in athletic participation opportunities on the basis of gender by providing disparate levels of support to male and female athletes and by allocating athletic scholarships in a gender discriminatory way" (*Favia*, p. 579). The plaintiffs sought a preliminary injunction to have the gymnastics and field hockey teams reinstated and to prohibit IUP from eliminating other women's teams (*Favia*).

Favia was a case of first impression as it was the first Title IX case litigated examining the elimination of women's teams. A preliminary hearing was conducted which lasted three days. Based on the testimony of witnesses and evidence provided, the court found there were numerous inequities between the men's and women's athletics programs at IUP (*Favia*, 1992, p. 583). In addition to the disproportionate number of opportunities to participate previously described, the court noted that there were additional inequities in programming benefits as well (*Favia*, p. 585).

The facts indicated a history of discrimination against female athletes pertaining to finances, scholarships, and benefits. In operational costs, for every $8 spent on men's sports, only $2.75 was spent on the women. Scholarships for football and men's basketball were higher than any of the other teams, and male athletes were awarded $246,755 (79%) of the scholarship funds, while women were awarded only $67,423 (21%). Additionally, the men's athletics facilities were generally in better condition than the women's facilities, particularly when comparing the baseball and softball fields. Furthermore, men's athletics events were advertised and

promoted, including a raffle for a free semester of tuition drawn during half-time at a men's basketball game.

The facts established during trial also showed other inequities in the men's and women's programs. The top two administrative positions in the department of athletics were held by men. Male coaches of men's athletics teams, as well as other male members of the staff, received country club memberships and complimentary use of automobiles, while no female coaches or staff received these perquisites. Additionally, there was no female representation on the committee that evaluated the IUP athletics program, and no women were present at the Athletic Policy Committee meeting that voted to eliminate the four teams.

Athletic Director Cignetti testified at the hearing about a lack of interest and declining participation in women's gymnastics and field hockey (*Favia*, 1992). There was no factual basis for the athletics director's conclusion, since neither student interest surveys nor local, regional, or national trends supported his opinion (*Favia*, p. 580-581). Moreover, evidence was provided that Cignetti had eliminated another women's team early in his tenure.

In November 1992, the District Court for the Western District of Pennsylvania granted the plaintiffs' request for a preliminary injunction (*Favia*, 1992) The preliminary injunction reinstated the women's gymnastics and field hockey programs as varsity sports with the same resources and funding they enjoyed before the cuts were instituted, and provided coaching staff, uniforms, equipment, facilities, publicity, travel opportunities, funding and other incidentals as previously provided during the 91-92 academic year (*Favia*). The Court consolidated the trial on the merits with the preliminary hearing, and ordered the preliminary injunction to become a permanent injunction (p. 580).

IUP appealed to the District Court to modify the preliminary injunction. The school asked to replace the women's gymnastics team with a varsity women's soccer team, instead of reinstating the women's gymnastics program as ordered (*Favia*, 1993). The District Court denied the motion to modify the preliminary injunction, and IUP appealed to the Third Circuit (*Favia*).

The Third Circuit affirmed the District Court's ruling which stated that "a motion to modify a preliminary injunction is meant only to relieve inequities that arise after the original order" (*Favia,* 1993, p. 338). A modification of a preliminary injunction would be appropriate if the moving party, in this case IUP, was able to prove that circumstances made the continuation of the preliminary injunction inequitable. IUP argued that substituting women's soccer for women's gymnastics would bring the university closer to the goal of achieving Title IX compliance as women's participation would increase from

159 female student-athletes (38.9%) to 188 female student-athletes (43.02%) (*Favia*, 1993, p. 336).

Although *Favia* was a case of first impression in the Third Circuit, the First Circuit around the same time addressed a similar situation in *Cohen* (1993). Because IUP's proposed substitution of women's soccer for women's gymnastics did not put the university in compliance with Title IX, the Third Circuit quoted the *Cohen* decision: "in absence of continuing program expansion, schools must either provide athletic opportunities in proportion to gender composition of the student body or fully accommodate interested athletes among the under-represented sex" (*Favia*, 1993, p. 344). The Third Circuit agreed that elevating women's soccer to varsity status instead of gymnastics would bring IUP closer to Title IX compliance, but keeping gymnastics while also elevating women's soccer would bring the university even closer (*Favia*, p. 344). Ultimately, the order of the District Court was affirmed (p. 344). IUP was not allowed to substitute a women's soccer team for the gymnastics team, and was required to maintain the varsity status and funding for the gymnastics and field hockey programs.

Barrett v. West Chester University of Pennsylvania of the State System of Higher Education (2003/2006).

Barrett (2003) was in many ways *Favia* revisited a decade later. The university sponsored a broad based athletics program with 22 varsity teams, 10 men's and 12 women's, competing at the NCAA Division II level. However, in 1995 the WCU athletics department was in chaos as the university had just hired its eighth athletics director in eight years, Edward Matejkovic. In addition, similar to all other state institutions, WCU was facing budget cuts as well.

Upon being hired, Matejkovic was informed of impending Title IX issues by an administrative assistant; subsequently he formed a Sports Equity Committee in 1998 to examine these issues. Two years later, the Sports Equity Committee reported that WCU was not in compliance with Title IX's first two prongs of the effective accommodation three-part test. However, during their investigation the Sports Equity Committee conducted a survey of student interest and concluded that WCU was meeting the interests of its students, and therefore was in compliance with the third prong. Although the Sports Equity Committee believed that WCU met the effective accommodation test, they expressed frustration at the failure of WCU to address coaching inequities in the athletics program and wrote a letter to AD in 2001 that warned WCU was "in jeopardy of civil litigation. . ."

In the spring of 2001, Madeline Wing Adler, President of WCU, directed the Athletics Advisory Board to review the status of four teams: women's gymnastics, men's tennis, men's golf, and men's lacrosse. These teams were considered Tier C teams at WCU meaning that they were provided minimum levels of funding. The Athletics Advisory Board report indicated Title IX concerns existed within the athletics program and advised against dropping women's gymnastics.

The financial crisis within the state university system continued, and in February 2003, the WCU athletics department was mandated to cut approximately $95,000 - $98,000 from its budget. In spite of the Athletic Advisory Board's recommendation, Matejkovic announced that WCU would cut the women's gymnastics and men's lacrosse teams. Apparently Matejkovic was unaware of Title IX requirements or the *Favia* decision and declared on April 28, 2003, that WCU intended to add women to the men's golf program. Adding women to the men's golf team was not a result of an investigation or survey to determine if there was any interest in women's golf by the student body and there were no confirmed female golfers on the team (*Barrett*, 2003, p. *12).

Eight gymnasts from the discontinued varsity team tried to address their issues in-house with a letter to President Adler that went unanswered. On May 3, 2003, James Barrett, a parent of one of the gymnasts, filed a complaint with the U.S. Department of Education Office of Civil Rights (OCR) (*Barrett*, 2003). He withdrew the complaint in early July when it became apparent that the OCR was not progressing in an expeditious fashion. The eight gymnasts then contacted an attorney with Trial Lawyers for Equal Justice. In order to avoid litigation the attorney asked for a meeting with university officials, but WCU failed to respond by the requested deadline. On September 3, 2003 the gymnasts' lawyer filed a complaint claiming unequal treatment and ineffective accommodation under Title IX, specifically the second and third parts of the 1975 Regulations (*Barrett*).

The plaintiffs moved for a preliminary injunction and the Eastern District Court of Pennsylvania held a four day hearing on the merits. The gymnasts made two claims of unequal treatment in coaching support and recruiting (*Barrett*, 2003). Evidence indicated there were fewer coaches available for women teams since the men's teams had 21 assistant coaches and the women's teams only had 14. Similarly, head coaches of women's teams were paid less than head coaches of men's teams, and assistant coaches of men's teams earned almost three times the amount of assistant coaches of women's teams. Additionally, WCU spent only 38% of the recruiting budget on women's teams.

The parties stipulated that WCU did not meet the proportionality requirement of the three-part test (*Barrett,* 2003, p. *21). The WCU student body was 39.2% male and 60.8% female in 2002-03, while the athletics population was 55.4% male and 44.6% female, a disparity of 16.2%. After eliminating men's lacrosse and women's gymnastics WCU's efforts were rewarded with the reduction of the proportion disparity to 13%.

TABLE 2. IMPACT OF ELIMINATING TEAMS ON WCU ATHLETICS OPPORTUNITIES

	Men	Women
Student population	3,420 (39.2%)	5,305 (60.8%)
Athletes Prior to cuts	294 (55.4%)	237 (44.6%)
After cuts	271 (53.56%)	235 (46.44%)

WCU stipulated that they did not meet the proportionality requirement, but claimed that setting up the Sports Equity Committee showed a history of continuing program expansion which proved compliance with Title IX under the second part of the three-part test (*Barrett*, 2003, p. *22). Although WCU was commended for setting up the committee, the court did not reward the institution for failing to heed the warnings and suggestions of that committee. The Sports Equity Committee had concluded in their 2000 report to the Director of Athletics that WCU did not have continuing program expansion for women. The report was completed more than three years before the gymnasts filed their Title IX lawsuit, and indicated that while the newest female team at WCU was added in 1992, the second most recent addition dated back to 1979. The court referred to the *Cohen* (1992) decision to conclude that adding one women's team in 13 years did not show a "continuing practice of expansion" (*Barrett*, p. *24). WCU also asserted that improvements in the program areas of coaching, space and equipment showed program expansion, but the court noted that the 1979 Policy Interpretation links program expansion with participation opportunities and not the quality of the opportunities. Likewise, WCU's claim that it was entitled to drop the gymnastics program because dropping both women's gymnastics and men's lacrosse brought them closer to achieving proportionality was not persuasive. The court cited the Tenth Circuit decision in *Roberts* (1993), explaining that "the word 'expansion' cannot be twisted to mean that schools can comply by cutting men's and women's sports programs to achieve a better proportionality ratio" (*Barrett*, 2003, p. *32).

To prove compliance with Title IX under the third part of the three-part test, WCU claimed that the 1999 Sports Equity Committee survey of student interest indicated that the current program effectively accommodated the interests and abilities of the student body. The court found that the survey was flawed as it did not follow recommended NCAA guidelines, had a minimal response rate of 39% when the NCAA recommended a 60% response rate, and was administered prior to cutting the gymnastics team (*Barrett*, 2003, p. *29). In addition, the fact that a viable women's gymnastics team existed, and the athletes on the team were still enrolled at WCU and training as gymnasts, demonstrated that there was student interest that was not satisfied (*Barrett*, p. *25-26). Finally, WCU's argument that gymnastics was not a viable sport because the NCAA did not have a Division II gymnastics national championship and the current athletes did not have a realistic chance of qualifying for the D1 meet was similarly unpersuasive (p. *28).

The *Barrett* court relied heavily on the *Favia* case in determining that plans for a future women's golf team could not substitute for the participation opportunities lost by women's gymnastics. The court reiterated the belief that a promise of a team cannot replace an actual team (*Barrett*, 2003, p. *30). In addition, there was minimal evidence that any female students at WCU had expressed interest in women's golf, and no information existed about the ability of those women who expressed an interest (*Barrett*). WCU's promise of women's golf was even weaker than IUP's promise of a women's soccer team – a commitment to adding women to the men's golf team was hardly a promise of a women's team. The court noted that keeping gymnastics and adding women's golf would help WCU progress toward satisfying the proportionality part (p. *30), just as the court in *Favia* encouraged IUP to keep gymnastics and add soccer.

A preliminary injunction was issued as the court found that the plaintiffs' showed they were likely to win on the merits, and they would suffer irreparable harm if the preliminary injunction was not granted as the team had already lost three recruits and a former participant when it was eliminated (*Barrett*, 2003, p. *46). The court ordered WCU to reinstate women's gymnastics, provide a coaching staff and funding equal to or greater than was provided during the previous school year, and provide facilities and equipment necessary to train and compete as an intercollegiate team (*Barrett*, p. *51). Following the court's order on November 12, 2003, the parties settled, providing that the preliminary injunction would become permanent and that the claims not related to the elimination of the gymnastics team would be dismissed without prejudice (*Barrett v. West Chester University of Pennsylvania,* 2006, p. *4-5).

WCU created an interesting twist in this case by appealing on the issue of costs and fees (*Barrett,* 2006). The plaintiffs asked for $207,609.50 in attorney's fees and costs of $12,477.82 for a total of $220,087.32, but WCU only wanted to pay $81,858. The District Court for the Eastern District of Pennsylvania considered the public nature and financial circumstances of the University, emphasizing that they needed to be particularly careful because the award affected the public treasury (*Barrett,* p. *7). A twelve-step formula previously implemented in *Johnson v. Georgia Highway Express, Inc.* (1974) was applied to determine a reasonable fee and the court came up with a total of $162, 891.70 (p. *42). Explaining that the case was public interest litigation, the attorneys became involved as a public service, and the fees would be paid by the taxpayers of Pennsylvania, the court then reduced that amount by 15% because WCU was a state institution facing a budget crisis (p. *59). Ironically, in 2001, the Sports Equity Committee warned WCU of the potential for costly litigation, yet after the settlement Pennsylvania taxpayers were out $148,472.59 when the budget for the gymnastics team was only $30,000 to begin with.

Choike v. Slippery Rock University of Pennsylvania (2006)

Choike (2006) is the most interesting of the three cases, particularly because of the precedent within the Third Circuit and the previous experiences of the IUP and WCU athletics programs. Perhaps because of the lawsuits at the other conference member institutions, Slippery Rock University (SRU) was conscious of Title IX compliance and hired an outside consultant, Alden and Associates, to conduct a Title IX evaluation in 2000. The consultant found a 15% difference between female students and female athletes and informed SRU that a 15% disparity would not satisfy the substantial proportionality prong of the effective accommodation test. Next, the consultant advised SRU that, because they had not added a women's varsity team since 1993, they would not likely be able to prove a history of continuing program expansion to satisfy the second prong. Finally, the consultant predicted that SRU would not be found compliant with the third prong as no formal procedure was available for students to document their interests and abilities. In conclusion, the consultant strongly recommended that SRU add another women's sport. SRU chose not to act on the consultant's recommendations.

On November 8, 2005, an internal audit of the athletics department conducted by SRU reported that they were not in compliance with Title IX. The disparity in treatment based on gender had actually increased during the

2001 – 2005 time frame with respect to coaching and recruiting of student athletes. However, an internal auditor concluded that SRU was effectively accommodating the interests and abilities of its student body because of a 2004 sports interest survey conducted by the athletics department.

The state of Pennsylvania's economic woes had continued, and in 2005 the Board of Governor's of the Pennsylvania State System announced revenue shortfalls. Rather than reduce funding and resources for all 23 athletics teams, SRU President Robert Smith determined that eliminating teams would be the preferred solution to the budget crisis. Intending to make an objective and factual decision regarding which teams to eliminate, President Smith developed criteria and a spreadsheet to assess and rank the 23 varsity athletics teams. The assessment criteria included the costs and revenues for each team, the competitiveness of the team, student-athlete academic performance, quality of coaching staff, and condition of facilities. Although the University Athletics Council recommended that SRU take gender equity and Title IX compliance into consideration before choosing which teams to eliminate, President Smith refused to consider that criteria.

The measurement of student-athlete academic performance proved to be facially discriminatory (*Choike,* 2006, p. 10, n2). President Smith's academic performance criteria were measured by comparing the team grade point average (GPA) to the average GPA of the student body. Women's teams were compared with the GPA of the average female student, and men's teams were compared with the GPA of the average male student, rather than just comparing the team GPA to the average student GPA regardless of gender. Because female students at SRU had a higher GPA than male students, it was more difficult for women's teams to earn a higher score and ranking than men's teams on these criteria. Setting a higher threshold for women than men to retain their teams was discriminatory on its face, which the President seemed to understand when he stated "for a woman's team, they would have to have a higher GPA than the men to be graded exceptional in this grid" (*Choike,* p. 10).

On January 30, 2006, SRU announced that eight sports (five male and three female) would be eliminated as a result of "budgetary constraints" at SRU (*Choike*, 2006, p. 3). The affected teams were men's and women's swimming, men's and women's water polo, women's field hockey, men's golf, men's wrestling, and men's tennis. SRU administrators knew that they were not in compliance with Title IX when they made the decision to cut women's teams and in March 2006 created a plan of "roster management" to remedy the Title IX concerns. Roster management was to be achieved by reducing the availability of roster spots for each men's team and increasing the availability

of roster spots for each women's team. In order to successfully reach proportionality, men's team rosters would be reduced from 271 to 240, and women's rosters would have to increase from 235 to 288. These figures included reinstating field hockey, as well as creating a new women's lacrosse team. Although similar previous attempts to limit and expand rosters had failed at SRU, the university insisted on roster management as the means to achieve Title IX compliance.

On May 9, 2006, twelve athletes, on behalf of themselves and a class of all present and future Slippery Rock female students, and James Yeamans, the coach of the women's water polo and swim teams, filed a two count complaint against SRU, the President, and the Director of Athletics (Complaint, 2006). The first count alleged that SRU failed to meet any of the three options of the effective accommodation test, and therefore did not fully and effectively accommodate the interests and abilities of its female students (Complaint, p. 10). The second count alleged that SRU failed to equitably treat athletes with respect to coaching and training, equipment and supplies, publicity, promotional material and events, transportation, uniforms, playing fields, locker rooms and other facilities (p. 10). On May 11, 2006, the plaintiffs filed for a preliminary injunction seeking reinstatement of the women's field hockey, swimming and water polo teams (*Choike*, 2006). Sometime between this date and the hearing, SRU reinstated the field hockey team.

In 2005-06, the undergraduate population at SRU was 6,883—54.3% women and 45.7% men. The number of student-athletes competing at SRU in that same year was 513: 310 men and 203 women for a disparity of 14.73% (U.S. Department of Education, n.d.). By cutting three women's teams and five men's teams, SRU was even further away from achieving proportionality, with proposed participation of 224 men and 139 women, a 16% disparity. Reinstating field hockey assisted in improving the disparity to 12.64%, but did not achieve proportionality.

TABLE 3. IMPACT OF ELIMINATING TEAMS ON SRU ATHLETICS OPPORTUNITIES

	Men	Women
Student population	3,140 (45.7%)	3,731 (54.3%)
Prior to cuts	310 (60.43%)	203 (39.57%)
After cuts	224 (61.71%)	139 (38.29%)
Reinstating field hockey	224 (58.34%)	160 (41.66%)

At the hearing on the motion for preliminary injunction the U.S. District Court for the Western District of Pennsylvania focused heavily on whether SRU's "selection of sports. . .effectively accommodates the interests and abilities of members of both sexes" (*Choike*, 2006, p. 18). The court found that the roster management plan was not likely to achieve proportionality, particularly because roster limits in the past had failed, and that empty roster spots on women's teams do not increase opportunity (*Choike*, p. 21-22). For these reasons the court declared the roster management plan was not meaningful, and held that until the additional roster positions were actually filled, SRU did not meet the substantial proportionality requirement (p. 22). However, the court left the door open to modify its order if SRU was able to prove that the roster management approach was actually successful (p. 28).

Whether SRU was ignorant of IUP's failed promise of women's soccer and WCU's failed offer to add women's golf or just ignoring the precedent, SRU testified they were planning to add another women's team, lacrosse. Consistent with the previous cases, the court was not influenced nor impressed by the promise. Without a single woman indicating interest in lacrosse, no club team expressing any interest in advancing to varsity status, nor evidence of hiring a coach, funding scholarships, or recruiting, the court found the promise of a lacrosse program was irrelevant (*Choike*, 2006. p. 22-23). Referring to facts that SRU had not increased recruiting budgets nor scholarships for women's sports, actions that might have increased the actual participation of women in athletics, the court determined that the second and third prongs of the effective accommodation test were not met either (*Choike*, p. 23). Furthermore, SRU failed to comply with the second part of the three-part test because the school had not added a women's varsity team in over a decade (p. 23-24). The school failed to comply with the third part simply as a result of cutting viable women's teams (p. 24). Noting that SRU had chosen to spend taxpayers' dollars in a way that disproportionately benefited male student-athletes for the past 25 years, the court ruled in favor of the plaintiffs request for a preliminary injunction because promoting compliance with Title IX best served the public interest (p. 27).

On July 21, 2006, the preliminary injunction was granted, and SRU was ordered to reinstate women's varsity swimming and women's varsity water polo with funding, staffing and all other benefits they were entitled to as intercollegiate varsity teams (*Choike*, 2006). In December of 2006, the parties submitted a joint motion for preliminary approval of partial settlement. They were referred to mediation and reached a settlement, the terms of which were not disclosed (*Choike*).

The settlement did not end the legal battles at SRU as the Women's Law Project (WLP) filed a motion on October 26, 2007, in the U.S. District Court for the Western District of Pennsylvania asking the court to reopen the *Choike* case to enforce two portions of the court-approved settlement (Memorandum of Law, 2007, p. 1-2). The original settlement stated that Slippery Rock agreed to retain the women's swimming and water polo teams as varsity sports, along with all staff and facility benefits, for one year after SRU achieved Title IX compliance (Memorandum of Law, 2007). Compliance was defined in the settlement as being within two percentage points of Title IX's proportionality requirement. Quarterly reports were supplied to the plaintiffs by SRU. After reviewing two sets of reports, the WLP contended SRU was not in compliance for the 2006-2007 school year and sent their calculations to the defendant. According to the WLP calculations, SRU was 4.3 percent away from compliance (or 2.3 percent above the accepted two percentage points). Under the terms of the settlement, this was not an acceptable percentage of proportionality, and therefore SRU would be prohibited from eliminating the women's swimming and water polo teams in the 2008-2009 academic year as planned and announced by SRU (Memorandum of Law).

The Memorandum of Law in Support of Motion to Open Litigation and to Enforce Settlement Agreement also requested that the court require SRU allocate an additional $99,593.28 to the women's athletic budget (2007, p. 2). The original settlement required SRU to allocate funding equal to the percentage difference by which they were noncompliant times the athletics department annual operating budget if SRU was not within two percentage points of Title IX's proportionality requirement by June 6, 2007 (Memorandum of Law, 2007). As the annual athletics operating budget at SRU was $4,330,173.10, the formula would multiply that figure by .23 for a total increase of $99,593.98 (Memorandum of Law).

On November 8, 2007, SRU filed a response which disputed the plaintiff's motion to open litigation and enforce the settlement agreement (Defendant's Response, 2007). SRU made three distinct arguments in response to the plaintiffs' motion. First, SRU felt the Motion was premature as the steps outlined in previous mediation had not been followed by the WLP before the motion was filed (p. 2). Second, SRU disputed that the athletics department was not within an acceptable proportionality range because the WLP erred by failing to include the members of the women's swimming and water polo teams in their proportionality calculation (p. 4). Third, SRU responded that the methodology used by the WLP to define a participant was inaccurate (p. 10).

The motion was denied on January 7, 2008 as Chief US District Judge Ambrose agreed with SRU that the members of the women's swimming and water polo teams should be included in the calculation of proportionality (Memorandum Opinion and Order, 2008, p. 2). Although the judge agreed that plaintiffs' motion was timely, she found no wording in the settlement agreement to support the WLP methodology for calculation. Once the appropriate number of athletes from the women's swimming and water polo teams were factored into the equation, Judge Ambrose determined there was a 1.2% differential in favor of the males which was certainly within the 2% required in the settlement agreement (Memorandum Opinion and Order, p. 5). At present, it does not appear that the WLP will appeal.

DISCUSSION

All three of these cases complain of program inequities related to the 1975 Regulations. In *Favia* (1992), the athletes complain of inequitable proportion of athletics scholarships, disparate proportion of opportunities, and disparate levels of support. Although the complaint addresses these issues specifically, the court only focused on the effective accommodation test related to participation opportunities (*Favia*). In contrast, the court in the *Barrett* (2003) case examined the equal treatment complaint relative to coaching support and recruiting funding. In doing so, the court referred to the 1975 Regulations and the ten factors considered in determining equal opportunity. The court acknowledged that on the surface, WCU offered more women's teams than men's teams, but substantial inequities existed as to the quality of those opportunities (*Barrett*, p. 19-20). There were fewer head and assistant coaches for women's teams, and compensation for coaches of women's teams as a percentage of total salaries was only 40%. Although recruiting was not listed as a factor in the 1975 Regulations, the court recognized that this was not intended to be an exclusive list, and referred to the 1979 Policy Interpretation which identified recruiting as a target area (p. 20). The *Barrett* court rationalized that an institution that recruits potential student-athletes for its men's teams must ensure that women's team have substantially equal opportunities to recruit (p. 20). Similarly, in the *Choike* case the court addressed the equal treatment issues related to more opportunities for males, better opportunities in coaching, training, equipment and supplies, publicity, promotional materials and events, transportation, uniforms, playing fields, locker rooms, and other facilities (*Choike*, 2006).

Although scholarships and equal treatment of athletes are critically important in determining whether an institution truly provides equal

opportunities for its student-athletes, the courts from *Cohen* through *Choike* have chosen to focus on effective accommodation and the three-part test. This analysis is much less complicated than analyzing inequities in every category of the laundry list. So it is not surprising that the primary focus of the legal rationale in all three of these cases is whether the institution effectively accommodates the interests and abilities of the student body.

Plaintiffs have the burden of proving that the school has failed to meet the proportionality prong (*Cohen,* 1993). This burden was easily satisfied in the *Barrett* case as the parties stipulated that WCU did not meet the proportionality prong (*Barrett*, 2003, p. 17). In *Favia* (1992), females represented 37.77% of the athletes at IUP, while they constituted the majority of undergraduates at 55.61%—a disparity of 17.44%. Although equal numbers of men's and women's teams were to be cut, female athletes opportunities became even more limited, dropping to 36.51% of athletics participation opportunities. In *Choike* (2007), the court concluded that the SRU athletics program had never been in compliance with the proportionality requirement in any academic year from 1972 to the present (p. 20). The university's proposed roster management plan to achieve compliance was not persuasive. The court responded: "Having a plan to ameliorate inequities is not the same as having ameliorated them" (*Choike*, p. 20). Additionally, the court expressed no confidence in the plan because roster limitations for men's teams in the past had never been enforced (p. 12-13). Likewise, the "opportunities" provided by increasing the women's rosters were perceived as artificial because they were not based on the needs or wants of female athletes and there was no proof that there would actually be female athletes interested in filling those spots as none of the women's teams had cut rosters in the past (p. 15).

Once the plaintiff has established that the institution did not satisfy the proportionality prong, the burden of proof then shifts to the institution to prove compliance under the second or third prongs (*Favia*, 1992, p. 584). The second prong requires that an institution show a history and continuing practice of program expansion for the underrepresented sex (Policy Interpretation, 1979). In *Favia*, the court recognized that IUP had some expansion of women's sports prior to 1991, but dropping women's teams in 1992 indicated regression rather than expansion. The court also noted that the cuts were not "responsive to the needs, interests, and abilities of women students" (*Favia*, 1993, p. 385). Instead of ending the analysis there, the court also explained that the opportunities for female athletes were still significantly limited, as evidenced by inequitable spending – only $2.75 was spent on women for each $8 spent on men (*Favia*). IUP also failed to meet the

proportional scholarship requirement of the 1975 Regulations providing female athletes with only 21.46% of scholarship funding although they comprised 37.77% of the student-athletes (*Favia,* 1992, p. 582).

While it is fairly easy to understand that dropping teams is never program expansion, the schools in these cases also offered to substitute new women's programs for the teams that were dropped. In *Favia* (1993), IUP promised to elevate the women's club soccer program to varsity status in the future. However, the court refused to accept the substitution, explaining "you can't replace programs with promises" (p. 385). Unwilling to let this issue rest, IUP appealed, and the appellate court affirmed the decision of the lower court (*Favia*, 1993). The roster for the women's soccer team would be larger than the gymnastics team roster, which would have helped bring IUP closer to achieving proportionality. However, the court did not allow the school to substitute women's soccer for women's gymnastics (*Favia*, 1992, p. 15). The explanation involved simple mathematics: even with both gymnastics and soccer, IUP would still not achieve proportionality to be in compliance with the first part of the three part test.

In the *Barrett* (2003) case, WCU attempted a truly unique definition of program expansion in claiming that creating a Sport Equity committee satisfied the second prong. It seems that the court was barely able to pass the straight face test when explaining that it failed to see how the formation of a committee 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" when that same committee concluded WCU did not have continuing program expansion for women (*Barrett*, 2003 p. 23). WCU had not added a program in 10 years, and the second most recent addition was 13 years before that. Adding a team every decade or so is not continuing expansion, a decision supported by the *Cohen* (1992) decision. WCU also tried to defend "expansion" by citing improvements in coaching, space, and equipment for women's teams (*Barrett*, 2003). The OCR Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (U.S. Department of Education, 1996) is quite clear that program expansion is linked with numbers of opportunities and not the quality of those opportunities. Perhaps WCU learned from the *Favia* case and did not try to argue that a future women's golf team was expansion, but interestingly offered that as an example of meeting interests and abilities instead. Unfortunately SRU did not heed the lessons of the previous cases, as they tried to argue elevation of club lacrosse to varsity status as satisfying the second prong although SRU had not added a women's program since 1993. The court again

dismissed the future elevation of a club team as too speculative (*Choike*, 2006).

Likewise, cutting men's teams to achieve Title IX proportionality does not show a history of program expansion. The *Barrett* court specifically addressed this issue of reducing the number of men's teams to improve proportionality numbers and cited *Roberts* (1993), concluding that the concept of expanding opportunities for the underrepresented sex cannot be twisted mathematically to include making cuts in men's and women's programs (*Barrett*, 2003). The 1996 Guidance is clear in indicating the types of institutional action that would be considered a history of continuing program expansion:

- Adding intercollegiate teams
- Upgrading club teams to intercollegiate status
- Increasing the numbers of participants on current teams
- Affirmative responses to requests by students to add or elevate sports (U.S. Department of Education, 1996).

OCR will not find a history and continuing practice of program expansion when an institution has increased the proportional participation by reducing opportunities for the overrepresented sex (U.S. Department of Education). OCR is looking for good faith in actual program expansion, not reduction of opportunities for men.

The third prong of the Effective Accommodation test may be the most difficult for an institution to prove: the current program meets the interests and abilities of the student body. According to the 1996 Guidance, OCR will examine whether there is unmet interest in a particular sport, sufficient ability to sustain a team in a particular sport, and a reasonable expectation of competition in a particular sport (U.S. Department of Education, 1996). If all three conditions are present, the institution is not fully and effectively accommodating the needs of the underrepresented sex (U.S. Department of Education).

The 1996 Guidance discusses the use of surveys to determine the athletic interests and abilities of the underrepresented sex. These include student questionnaires or open forums that reach a wide spectrum of students (U.S. Department of Education, 1996). On March 17, 2005 (too late for IUP and WCU, but not too late for SRU), the Office for Civil Rights of the U.S. Department of Education issued a Dear Colleague letter to provide additional clarification to colleges and universities regarding compliance with the third prong of the Effective Accommodation test (U.S. Department of Education,

2005). This Additional Clarification was issued with a User's Guide for a web-based prototype survey called the Model Survey.

Cutting current teams almost always violates the third prong. In *Favia* (1992), the court explains that IUP's decision to eliminate teams was not the result of a lack of interest or ability (p. 585). The teams were viable and competitive, and the athletes on those teams demonstrated an interest and commitment when they were eliminated. Although field hockey did not have a competitive record, the court acknowledged that this lack of performance on the playing field was likely due to the negative effect of insufficient funding, scholarships, and staff rather than a lack of interest or poor ability (*Favia*, p. 585).

WCU argued in the *Barrett* (2003) case that the female student body was satisfied with the current opportunities offered. The university attempted the same failed justification that had been made in the *Favia* case: elimination of the women's gymnastics team was justified because the NCAA did not have a DII gymnastics championship program. The court logically cited the *Favia* case in rejecting this argument, as alternative national championships were available and the gymnasts proved conclusively an interest, ability and willingness to compete (*Barrett*, p.28). Alternatively, WCU argued that the student survey conducted in 1999 proved students were satisfied with the present offerings. However, the court explained that the low response rate made the survey results suspect (p. 28). More important, the survey was taken prior to cutting the gymnastics team, therefore it could not prove that WCU was currently meeting the interests and abilities of the student body.

WCU also tried to use the promise of a future women's golf team as proof that the program satisfied the interests and abilities of the student body (*Barrett*, 2003). With steadfast consistency, the court pointed out that WCU failed to present evidence of any interest in women's golf by a single student, therefore it was insufficient to show that adding women's golf would have helped WCU meet the requirements of this prong. The court ultimately agreed with the conclusion of the *Cohen I* case that a school can't meet the interests and abilities of its student body while lacking proportionality and reducing the number of participation opportunities for women (*Barrett*, p. 31).

In the *Choike* case, the court simply explained that SRU did not satisfy the third prong when the school eliminated two viable women's teams and the student body was demanding reinstatement, clearly indicating ability and interest (*Choike*, 2006, p. 24).

Did the university administration deliberately intend to discriminate against female athletes at these institutions? Probably not. The fundamental reality at the core of all three cases is the lack of funding due to budget

restrictions. Although the courts are sympathetic about budget crises, they are uniformly clear a that lack of funding is not an acceptable excuse for discrimination under Title IX. In *Haffer v. Temple University*, the court states that "financial concerns alone cannot justify gender discrimination" (*Haffer*, 1987, p. 530). The *Cohen* decision also articulated this mandate: "Title IX does not purport to override financial necessity. Yet, the pruning of athletic budgets cannot take place solely in comptroller's offices, isolated from the legislating and regulatory imperatives that Title IX imposes" (*Cohen*, 1993 p. 905).

In the *Favia* (1993) case, the court recognized that IUP saved $100,000 by substituting women's soccer for women's gymnastics (p. 343). This savings actually decreased the overall percentage of athletics expenditures IUP provided for women's athletics, which could be viewed as moving farther from the goals of Title IX (*Favia*, p. 343). IUP's promise to spend that $100,000 on women's sports (essentially reallocating the funds to the remaining teams) was not enough to create equity in benefits and opportunities for female athletes.

In the *Barrett* (2003) case, the court recognized the financial concerns of the athletics department and the university, but referred to WCU's own budget plan to reallocate gymnastics funding to make other teams more competitive as a viable solution (p. 49). Obviously, reallocation of funds did not save money in the face of budget cuts, but the court encouraged the school to find additional funding sources rather than reduce program opportunities (*Barrett*, p. 49-50).

All three schools in these cases had prior notice they were not in compliance: athletics administrators at IUP had complained of inequities, WCU had a Sports Equity Committee report, and SRU had findings from an outside consultant. In spite of this, none of these schools chose to follow the examples provided by OCR in the 1975 Regulations, the 1979 Policy Interpretation, and the 1996, 2003 and 2005 Clarifications, in order to achieve compliance. The abundance of resources such as those previously named as well as NCAA Title IX Seminars, and guides created by the Women's Sports Foundation and National Women's Law Center make it readily apparent that ignorance of the law is not an excuse.

All three of these schools chose novel approaches to fashion their own "compliance" a point that also illustrates the failure of Title IX as self-regulating legislation. Only filing complaints has improved the compliance situation, but even reinstating the women's teams in these cases did not bring the schools into compliance. A look at the most recent Equity in Athletics Disclosure Act reports filed with the U.S. Department of Education shows that WCU has since added women's rugby as a varsity sport giving them eight

men's sports and 12 women's sports for a total of 20 varsity sports (Gisondi, 2007). The current head count at WCU includes 238 male athletes and 255 female athletes participating on varsity teams (U.S. Department of Education, n.d.). The raw numbers bring WCU to a seemingly respectable comparison of male to female athletes with 48% men and 52% women – until these numbers are compared to the general student population which is dominated by women at 62%. Although IUP has the largest undergraduate student population, they offer the fewest sports (15) and fewest athletics participation opportunities. Their proportionality is nine percent off with 54% male athletes and 46% female athletes compared to 45% male students and 55% female students. Although exact proportionality is not required under the first part of the three-part test, the examples of "substantial proportionality" provided in the 1996 Clarification only allow for one or two percentage points disparity.

SRU offers the broadest based program with 21 teams, 11 women's teams and 10 men's teams (U.S. Department of Education, n.d.). The smallest of the three campuses, the undergraduate population is 46% male and 54% female. The situation at SRU remains in flux as the school plans to eliminate women's swimming and water polo as varsity teams in 2008-2009 According to the data analyzed by the court in the recent motions filed to prevent SRU from eliminating women's swimming and water polo in 2008-2009, it appears that SRU's roster management plan did bring the program to proportionality in just one year (Memorandum Opinion and Order, 2008). Whether roster management can sustain proportionality in the 2007-2008 academic year and beyond when the women's swimming and water polo teams have been eliminated remains to be seen.

CONCLUSION

Although Title IX was enacted more than 35 years ago, colleges and university athletics programs continue to fail to meet the requirements of the legislation. Even in these three cases, currently only one institution is seemingly in compliance with Title IX. Two lessons can be learned from the analysis of these cases.

First, planning to add women's teams in the future does not meet the legal standard for having a history of continuing program expansion. Institutions have been dragging their heels for 35 years and making promises for the future merely maintains the status quo of inequity. Likewise, the promise of a new program cannot satisfy the third prong unless it can be proven that there is student demand (interest) for the program, demonstrated ability for viable competition, and coaching, funding, and other support are in place.

Second, although many schools are suffering from economic crises as budgets continue to escalate and funding sources are cut or remain static, a lack of funding is not a legal excuse for non-compliance. The courts recognize that schools have given budget priority to men's sports throughout the history of intercollegiate athletics and refuse to perpetuate discrimination by allowing those institutions to save money by cutting women's teams. Reallocation of available funds and searching for additional revenues are preferred alternatives that satisfy both the letter and spirit of Title IX.

In closing, enforcement of Title IX should be the responsibility of athletics administrators and university officials, not the female participants. Female participants should not have to file complaints with OCR or initiate lawsuits in order for athletics programs to pay attention to the law. Schools need to conduct independent audits of the athletics program to determine whether the school meets the requirements of the 1975 Regulations, and not just the effective accommodation part. When audits identify inequities, the leadership within the athletics department and institution need to step up to the plate and right the wrongs. Similarly, the Office for Civil Rights needs to redirect its priorities and conduct more independent investigations to provide impetus for institutions to comply. Men's athletics have reaped the benefits of favoritism from the beginning of intercollegiate athletics, it is time for educational institutions as well as the government to embrace the spirit of Title IX and level the playing field.

ABOUT THE AUTHORS

BARBARA OSBORNE is an Associate Professor in Exercise and Sport Science, and an Adjunct Professor in Law at the University of North Carolina at Chapel Hill. She earned her B.A. in Communications from the University of Wisconsin-Parkside, M.Ed. in Sport Management from Boston University, and J.D. from Boston College Law School. Professor Osborne is licensed to practice in North Carolina and Massachusetts. Prior to her academic appointment at UNC, she worked for 14 years as an athletics administrator in intercollegiate athletics. She has also had experience as a coach, public relations coordinator, television sports commentator, publisher and sports information director. Professor Osborne was honored by the University of North Carolina Alumni Association with the Edward Kidder Graham Outstanding Faculty Award in 2005. Her contributions as an administrator in women's sports were recognized by the Massachusetts Association of Intercollegiate Athletics for Women Jeanne Rowlands Award for Outstanding Achievement in Women's Sports, and her personal athletics accomplishments

landed her in the Kenosha (Wisconsin) Sports Hall of Fame. She is Co-chair of the Sports and Entertainment Law Section of the North Carolina State Bar, a member of the ABA's Forum on the Sports and Entertainment Industries, the Sports Lawyers Association, the Sport and Recreation Law Association, and the North American Society for Sport Management.

ROBIN AMMON. Dr. Ammon is a full Professor and the Chair of the Department of Sport Management at Slippery Rock University in Slippery Rock, Pennsylvania. He graduated with an EdD in Sport Administration from the University of Northern Colorado and his areas of research include: legal liabilities in sport, risk management in sport and athletics, and management and marketing components for special events. Dr. Ammon has written extensively with over a dozen articles in refereed journals, nine chapters in Sport Management books, and two textbooks. He has presented over 50 times at local, regional, national and international conferences on a variety of topics including facility legal, security and crowd management issues. Dr. Ammon was elected as the 17th President of the North American Society for Sport Management (NASSM).

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