Stop the Bleeding:
Title IX and the Disappearance of
Men’s Collegiate Athletic Teams

ABSTRACT

Title IX, originally conceived to protect women from gender
discrimination, has had the unfortunate and unintended effect of
significantly reducing opportunities for male athletes to compete in
their sports at the collegiate level. The various Department of
Education opinion letters interpreting Title IX and its regulations
provide three routes by which universities can comply with Title IX's
requirement of equal opportunities for women to participate in
collegiate athletics, one of which is proportionality between the
percentage of athletic opportunities for women as compared to the
percentage of women in the general population of the school. Circuit
courts’ current interpretation of Title IX and its progeny has led schools
to believe that proportionality is the only safe path for avoiding
liability under Title IX, even if it means eliminating men’s teams. As a
result, certain men’s sports, such as gymnastics, have virtually
disappeared at the collegiate level.

In recent years, male athletes, faced with the elimination of
their sports to achieve Title IX compliance, have brought lawsuits
attempts to reverse this trend. However, these lawsuits have been
universally unsuccessful in the circuit courts, leaving the odds of the
reinstatement of teams or even the maintenance of current teams bleak.
Furthermore, the Supreme Court has thus far refused to address this
issue.

This Note begins by examining the text of Title IX, its
implementing regulations, and subsequent opinion letters interpreting
the regulations. It then analyzes circuit court responses to lawsuits by
male athletes challenging Title IX or decisions made in attempt to
comply with it. It also examines a pending Title IX challenge with the
potential to avoid some of the downfalls of prior lawsuits. Finally, the
Note argues that the Supreme Court should grant certiorari to address
this issue and conclude that attempting to comply with Title IX by
eliminating or capping the rosters of men’s teams is actually a
violation of the statute.
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June 23, 2008, marked the thirty-sixth anniversary of the passage of Title IX of the Education Amendments of 1972 (Title IX), which prohibits gender discrimination by programs or activities receiving federal education funding. On the same day, the College Sports Council, an organization dedicated largely to Title IX reform, and the Independent Women’s Forum, a nonpartisan research and educational institution, began circulating a petition to Congress calling for “common sense reforms to Title IX enforcement.” The petition asserts that reform is needed because “[m]en’s collegiate athletic teams are being eliminated and rosters are being capped at an alarming rate in order to comply with the ‘proportionality’ enforcement prong” of the 1979 Policy Interpretation implementing Title IX. Within six months of its circulation, the petition garnered more than six thousand signatures.

Among the signatories to the petition is 1984 Olympic gymnastics gold medalist Peter Vidmar. Prior to his success at the

6. Id.
7. Id.
Olympics, Vidmar was a star collegiate gymnast at the University of California, Los Angeles (UCLA), which eliminated its men’s gymnastics program in 1994.\(^9\) While the university officially cited budget concerns as the reason for the elimination of the team, athletes and observers suspect that the real culprit was the need to comply with Title IX.\(^10\) Indeed, UCLA added a women’s soccer program the same year it decided to drop the men’s gymnastics team, lending support to the theory that the decision was not entirely financially motivated.\(^11\)

Since the passage of Title IX in 1972 and the implementation of the 1979 Policy Interpretation,\(^12\) the number of National Collegiate Athletic Associate (NCAA) men’s gymnastics teams has declined dramatically, from 107 in the early 1980s\(^13\) to just seventeen in 2008-2009.\(^14\) Bob Colarossi, the president of USA Gymnastics from 1998 to 2005,\(^15\) has referred to the steady elimination of men’s collegiate gymnastics teams as “one of the unintended consequences of Title IX.”\(^16\) Ron Galimore, the current USA Gymnastics vice president of events, as well as a 1980 Olympian and former collegiate gymnast,\(^17\) has lamented that “[w]hat we’re really focusing on is to stop the bleeding, keep the programs we have and see if there will be any review of Title IX.”\(^18\) Galimore has also stated, “I don’t think the intention of Title IX was to eliminate sports for some and provide sports for others, but there has been a knee-jerk reaction.”\(^19\)

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16. Litsky, supra note 9.
18. Litsky, supra note 9.
19. Id.
The apparent link between Title IX and the elimination of men’s collegiate athletic teams is not alleged to be a byproduct of either the text of the statute or the initial implementing regulation promulgated by the Department of Health, Education, and Welfare (HEW), now the Department of Education (DOE). Instead, the provision that is most frequently cited as the driving force behind the decision to eliminate men’s programs is the first prong of the 1979 Policy Interpretation issued by HEW. The Policy Interpretation provides three means of assessing compliance with Title IX and its implementing regulation, the first of which is “[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments...” The move toward compliance with this provision of the Policy Interpretation means a university must either add women’s programs or drop men’s programs until the number of athletic opportunities for each gender is in accord with the general population of the school. Adding women’s programs “often require[s] a lot of money,” which may leave eliminating or capping the rosters of men’s teams as the only viable means for compliance under this provision. For example, Michigan State University, which has chosen to comply through proportionality and has dropped men’s fencing, lacrosse, and gymnastics to achieve it, has stated that its athletic department that is “in the red” and does not have the money to expand program offerings.

The Policy Interpretation also names two other tests for compliance: a showing of continuing program expansion for the sex underrepresented in athletic participation, or a showing that the “interests and abilities” of the underrepresented sex have been “effectively and fully accommodated.” While schools could theoretically attempt to meet one of these two means of compliance,

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21. See, e.g., id. at 519-20; Fresno State Bulldogs, Background Fact Sheet, http://gobulldogs.cstv.com/genrel/061506aah.html (citing Title IX among the factors that led to the elimination of the men’s wrestling team and explaining that wrestling has a large roster and no equivalent sport for women, thus impeding the school’s attempt to equate women’s athletic participation with the 60/40 female-to-male ratio of the student body).
22. A Policy Interpretation, supra note 12.
23. Litsky, supra note 9.
24. The Battle Over Title IX, supra note 13.
“[s]chools simply do not view [these means] as viable options.” As Allison Kasic, former director of The R. Gaull Silberman Center for Collegiate Studies at the Independent Women’s Forum, explains, “With so many interest groups out there itching to sue schools over Title IX, proportionality is the only measure that provides quantitative proof of compliance.” Furthermore, in addition to the subjective nature of these tests, a showing of continuing “program expansion” for the underrepresented sex requires the costly addition of teams. As Michigan State’s senior associate athletic director put it in explaining why the university has not complied with Title IX by adding women’s programs, “We’re in preservation mode right now, not expansion mode.”

In recent years, individual athletes as well as organizations of athletes, coaches, and fans have brought lawsuits against universities and the DOE in response to universities’ decisions to eliminate programs. In pursuing the ultimate goal of reinstatement of an eliminated team, plaintiffs have tried various legal strategies, including challenging the university’s decision as a violation of Title IX and the Equal Protection Clause of the Fourteenth Amendment and challenging the 1979 Policy Interpretation and other enforcement mechanisms as violating Title IX, Equal Protection, and the Administrative Procedures Act (APA). These challenges have been uniformly unsuccessful in the circuits that have addressed them.

Because it has denied all of the petitions for certiorari arising out of these cases, the Supreme Court has yet to directly confront this issue. Most recently, the Supreme Court denied certiorari in National Wrestling Coaches Association v. Department of Education, a case in which the lower courts found that the plaintiffs lacked

28. Id.
29. Rexrode, supra note 25.
30. Id.
34. Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ. (Nat’l Wrestling Coaches I), 263 F. Supp. 2d 82, 95 (D.D.C. 2003) (stating that no challenges to Title IX have been successful).
36. 128 S. Ct. 129.
standing to challenge Title IX enforcement mechanisms because the elimination of programs by individual universities is not an injury redressable by the DOE. In 2008, an organization called Equity in Athletics, Inc. (EIA) brought a similar lawsuit in the Fourth Circuit, which had not yet addressed the issue, against both the DOE and James Madison University (JMU). The plaintiffs failed to obtain a preliminary injunction against the university, which would have barred it from eliminating seven men’s and three women’s sports teams. The plaintiffs filed a petition for certiorari challenging the denial of the preliminary injunction, which the Supreme Court denied. However, as the petition dealt only with the injunction, it remains to be seen whether this lawsuit will ultimately be successful on the merits in the Fourth Circuit or, if not, whether the Supreme Court will choose to grant certiorari on an appeal on the merits. If the Supreme Court eventually decides to review this case, it may be the perfect opportunity for the Court to clarify Title IX and its progeny in a manner that alleviates Title IX’s unintended negative repercussions on men’s collegiate athletic teams.

This Note analyzes the possibility of a legal challenge that would lead to the reform of the current Title IX enforcement mechanisms, and thus, reduce the pressure on universities to eliminate men’s programs to ensure compliance. Part I examines the Title IX statute and the initial regulation implementing it, as well as the controversial 1979 Policy Interpretation and the subsequent 1996 and 2005 Clarifications. Part II.A analyzes the decisions of several circuits on challenges to a university’s decision to eliminate a men’s sports program in attempt to comply with the proportionality prong of the 1979 Policy Interpretation. Part II.B discusses the pending lawsuit against JMU, which uses a novel approach to challenge Title IX enforcement. Part II.C argues that the Supreme Court should resolve this issue by holding that it is impermissible under Title IX for universities to comply with the 1979 Policy Interpretation by capping

38. Equity in Athletics, 291 F. App’x at 519.
39. Id.
41. But see Equity in Athletics, 291 F. App’x at 523-24 (citing Kelley v. Bd. of Trs. (Kelley II), 35 F.3d 265, 272 (7th Cir. 1994)) (noting that the precedent “raise[s] a serious doubt about whether EIA will be successful on the merits of its claims against JMU that JMU violated Title IX or the Constitution in using gender to select which athletic programs to cut”).
or eliminating teams unless such action would be financially necessary in the absence of the need to comply with Title IX. Part III explains how this proposed solution would be consistent with the plain meaning of Title IX and would permit the majority of the subsequent clarifications to remain in place.

I. BACKGROUND: TITLE IX AND ITS PROGENY

Title IX, as passed in 1972 and codified at 20 U.S.C. § 1681, provides 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.” While the statute specifically precludes a finding of discrimination based solely on the percentage of individuals of one sex participating in a particular activity as compared to the percentage of individuals of that sex in the general population, the statute does authorize the consideration of such gender imbalances as a factor in Title IX adjudication. Thus, while a gender disparity in participation in athletic activities as compared to the proportion of men and women in a particular student body is not per se evidence of discrimination, it may still be used as evidence against a university in a hearing or proceeding alleging noncompliance with Title IX.

Title IX contains a provision for administrative agency enforcement, codified at 20 U.S.C. § 1682. This provision “authorize[s] and direct[s]” each agency providing financial assistance to education programs to “issu[e] rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute.” The provision states that “[t]he ultimate sanction for noncompliance is termination of federal funds or denial of future grants.” The Supreme Court has recognized a private right of action to enforce Title IX, and these private lawsuits have contributed significantly to Title IX enforcement.

44. See id.
47. Bell, 456 U.S. at 514-15.
49. Id. (quoting GEN. ACCOUNTING OFFICE, GENDER EQUITY: MEN’S AND WOMEN’S PARTICIPATION IN HIGHER EDUCATION 5 (2000)).
In 1974, Congress passed the Education Amendments of 1974, which directed the Secretary of HEW (now DOE) to promulgate regulations to implement Title IX. In 1975, HEW, acting pursuant to its authority under § 1682, issued regulations relating to several areas of education, including athletics. These regulations (the “1975 Regulations”), which remain in effect today, provide that no person may, on the basis of gender, be excluded from participation in or otherwise discriminated against in any type of athletic activity offered by a school. They also set forth a non-exhaustive list of factors that may be considered in determining whether equal athletic opportunities have been provided, including provision of equipment, scheduling of games and practices, travel funding, compensation of coaches, provision of facilities, and publicity. Another factor that may be considered is the effective accommodation of the “interests and abilities of members of both sexes,” which is echoed by prong three of the 1979 Policy Interpretation.

In 1979, HEW finalized a policy interpretation to “provide further guidance on what constitutes compliance with the law.” The stated purpose of the 1979 Policy Interpretation is to respond to a high volume of complaints of discrimination and questions from universities regarding compliance received by HEW following the passage of the 1975 Regulations. This prompted HEW to further clarify the 1975 Regulations and to provide a framework for the resolution of complaints. The Policy Interpretation expands upon each of the factors identified in the 1975 Regulations, listing numerous indicia of compliance for each. It also creates a “three-part test” to assess compliance, the third prong of which is considered

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50. Id.
51. Bell, 456 U.S. at 515-16.
52. See Equity in Athletics, Inc. v. U.S. Dep’t of Educ., 291 F. App’x 517, 519 n.2 (4th Cir. 2008) (explaining that these regulations were originally codified at 45 C.F.R. § 86.41 and were recodified in 1979 at 34 C.F.R. § 106.41).
54. 34 C.F.R. § 106.41(a) (2007).
55. Id. § 106.41(c).
56. Id.
57. A Policy Interpretation, supra note 12.
60. Id. at 71,413.
61. Id. at 71,415-18.
to be the most controversial aspect of the Policy Interpretation. The test states:

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

To comply with Title IX, schools need only meet one of the three prongs of the test. However, the first prong, commonly referred to as the "proportionality prong," is often perceived by schools to be the "path of least resistance." As Allison Kasic points out, the second and third prongs are subjective and thus leave schools open to liability.

In June of 1995, 142 members of Congress wrote to the DOE expressing concern that schools were complying with the proportionality prong by eliminating men's teams as opposed to increasing the number of teams available to women. In response, the DOE issued a proposed letter of clarification and circulated it for public comment about whether or not the clarification adequately addressed areas of confusion. After receiving comments, the DOE issued the 1996 Clarification, which "provides specific factors that guide an analysis of each part of the three-part test." While the DOE acknowledged that it had received significant criticism of the 1979 Policy Interpretation, it declined to make any actual changes, stating that "it would not be appropriate" to revise it.

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63. A Policy Interpretation, supra note 12.
65. Id. at 441.
66. Kasic, supra note 27.
68. Id.
69. Id. at 92-93.
70. Id. at 92.
A letter from the DOE accompanying the 1996 Clarification refers to the proportionality prong as a “safe harbor” for Title IX compliance. The letter also explicitly states that “[a]n institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test.” However, the letter goes on to state that schools are not required to cap or eliminate men’s teams to comply with Title IX. It also reminds schools that cutting or capping teams will not contribute to compliance with prongs two or three of the 1979 Policy Interpretation and further affirms that “each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored.” The letter concludes, “Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.”

In 2002, several issues, including the elimination of men’s programs in attempt to comply with Title IX, prompted the Secretary of Education to form the Commission on Opportunity in Athletics to study Title IX. In response to the study, the DOE issued a “Further Clarification” of Title IX compliance in July of 2003. While the 2003 Clarification once again declined to alter the three-part test, it does state that the elimination of teams to comply with Title IX is “a disfavored practice.”

In March of 2005, the DOE issued an additional clarification to provide further guidance to schools attempting to comply through the third prong of the 1979 Policy Interpretation. A letter sent by the DOE as part of this Clarification states that the purpose of the Clarification is that “some institutions may be uncertain about the factors” the Office of the Civil Rights (OCR), the branch of the DOE
that enforces Title IX, “considers under part three, and they may mistakenly believe that part three offers less than a completely safe harbor.” The letter further states that, “[i]n essence, each part of the three-part test is a safe harbor.”

Under the 2005 Clarification, a school will be found to be in compliance with prong three of the 1979 Policy Interpretation, despite the underrepresentation of one sex in intercollegiate athletic opportunities, unless “all three of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport; and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school’s normal competitive region.” The letter suggests a web-based survey, administered to all current students or to all students of the underrepresented gender, as a means of gauging student interest. If the survey shows insufficient interest to support an additional team, it creates a presumption of compliance with prong three. By delineating objective standards for compliance under prong three, the 2005 Clarification has the potential to alleviate universities’ concerns that they may open themselves to liability by attempting to comply with Title IX through a means other than proportionality.

Despite this potential, the 2005 Clarification may have only a limited impact on reducing the pressure to comply through proportionality, as illustrated by a survey of athletic directors conducted in July and August of 2005. When asked if they planned to use the proposed survey as their primary method of Title IX compliance, 48 percent of athletic directors responded, “no,” and an additional 12 percent responded, “probably not.” At least two athletic directors expressed concern that the survey would not stand up in court. Furthermore, the survey showed that there was not much conversion: many of the athletic directors who said they would use the proposed survey were already attempting to comply under

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80. Id.
81. Id.
82. Id.
83. Id.
84. Id.
85. See Kasic, supra note 27.
86. Weight, supra note 76, at 47.
87. Id. at 49.
88. Id. at 50. See also Biediger v. Quinnipiac Univ., 616 F. Supp. 2d 277, 297-98 (D. Conn. 2009) (granting a preliminary injunction to female athletes alleging a lack of Title IX compliance after concluding that the university had not achieved “substantial proportionality,” lending support to the notion that anything other than proportionality may not insulate schools from liability under Title IX).
prong three.\textsuperscript{89} Thus, it seems unlikely that the 2005 Clarification will significantly reduce the number of schools complying through the proportionality prong of the 1979 Policy Interpretation.

The impact of the 2005 Clarification on universities' decisions regarding Title IX compliance may also be significantly tempered by the negative reaction of the NCAA to the Clarification.\textsuperscript{90} The NCAA, a voluntary unincorporated organization composed of more than a thousand public and private four-year colleges and universities,\textsuperscript{91} plays a paramount role in the regulation of collegiate athletics, including adopting and promulgating standards and regulations and sponsoring and conducting national tournaments.\textsuperscript{92} It is generally recognized that membership in the NCAA is necessary for the operation of a "fully-rounded intercollegiate athletic program."\textsuperscript{93} Thus, the NCAA has significant control over universities participating in collegiate athletics. In a press release issued immediately following the Clarification, the NCAA urged its members to ignore the Clarification.\textsuperscript{94} In announcing the NCAA's disapproval of the 2005 Clarification, then-NCAA President Myles Brand criticized the survey suggested by the Clarification as an inadequate measure of women's interest in participating in athletics.\textsuperscript{95} In addition, the NCAA executive committee adopted a resolution calling on the DOE to rescind the 2005 Clarification.\textsuperscript{96} Due to the crucial role of the NCAA in collegiate athletics, its refusal to accept the 2005 Clarification will likely lessen or nullify the impact of the Clarification on universities' decisions as to how to comply with Title IX.\textsuperscript{97}

Under courts' current interpretations of Title IX and subsequent policy clarifications, male athletes have little protection against universities' decisions to comply with Title IX by eliminating

\textsuperscript{89} Id.
\textsuperscript{90} Id. at 44.
\textsuperscript{91} Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F.3d 107, 110 (3d Cir. 1999).
\textsuperscript{93} Bd. of Regents v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982).
\textsuperscript{94} Weight, supra note 76, at 44.
\textsuperscript{97} See, e.g., Press Release, James Madison Univ., JMU Enacts Proportionality Plan to Comply with Title IX (Sept. 29, 2006), available at http://web.jmu.edu/mediarel/PR-thisRelease.asp?AutoID=846 (citing the need to comply with Title IX as the driving force for the 2006 elimination of men's athletic teams, providing support for the theory that universities will continue to see proportionality as the only viable means of compliance following the 2005 Clarification).
or capping teams. Thus, it seems likely that cuts to men’s programs will continue. In fact, Brand recently said, “My expectation is that over the next year or two we are going to see more [cuts of men’s teams] and so I am trying, frankly, to pre-empt the argument against Title IX... and dissuade universities from going public with this approach.”

II. CHALLENGES TO TITLE IX BY MALE ATHLETES

Since the passage of Title IX, lawsuits have challenged the statute, its regulations, and the 1979 Policy Interpretation in almost every circuit of the United States Courts of Appeals. In earlier cases, such challenges were raised as defenses by universities in response to lawsuits brought by female athletes, as the underrepresented gender, alleging noncompliance with Title IX. More recently, though, these challenges have been raised by male athletes alleging that the 1979 Policy Interpretation and subsequent clarifications violate their rights under Title IX, the Constitution, and the APA. Other lawsuits brought by male athletes have challenged Title IX enforcement mechanisms more indirectly by alleging that actions taken by universities under the guise of Title IX compliance in fact amount to impermissible discrimination under Title IX and the Equal Protection Clause. These challenges have been categorically unsuccessful in appellate courts and the Supreme Court has thus far refused to grant certiorari on this issue.

As Part II.A will discuss, the lawsuits brought by male athletes have been unsuccessful for several reasons, including problems with standing, deference to a university’s allocation of its resources, and deference to the DOE’s interpretations of Title IX and subsequent

98. See Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ. (Nat’l Wrestling Coaches I), 263 F. Supp. 2d 82, 95 (D.D.C. 2003) (discussing various failed attempts at challenging either Title IX and its progeny or the decision of a university to eliminate a team in attempt to comply with Title IX); see also Weight, supra note 76, at 49 (noting athletic directors’ concern that compliance with Title IX through a means other than proportionality would not stand up in court).


101. Id. at 95.

102. Id. at 97.

103. Id. at 96.

104. Id. at 94-95.

105. See supra note 35.


107. Kelley v. Bd. of Trs. (Kelley II), 35 F.3d 265, 269 (7th Cir. 1994).
regulations. Part II.B will discuss a pending Title IX lawsuit, Equity in Athletics, Inc. v. U.S. Department of Education, that may avoid some of these problems by challenging a university’s decision to eliminate programs on the sole stated basis of Title IX compliance. Part II.C will assert that the Supreme Court should accept this case or a similar case to resolve this issue.

A. Circuit Court Response to Title IX Challenges by Male Athletes

In 1995, in *Kelley v. Board of Trustees, University of Illinois*, the Seventh Circuit rejected a Title IX challenge brought by a group of male swimmers contesting the decision of the University of Illinois to eliminate its men’s swimming program. The plaintiffs alleged that the university violated Title IX by dropping the men’s swimming program while retaining the women’s program. The Seventh Circuit noted that the decision to terminate the men’s team was made against the backdrop of a $600,000 athletic budget deficit. The court stated, “While the University’s decision to reduce its athletic offerings was motivated by budget considerations, other considerations—including the need to comply with Title IX—influenced the selection of particular programs to be terminated.”

The court also noted that, had the university decided to cut the women’s swimming team as well, it would have been vulnerable to a finding of a Title IX violation because “[f]emale participation would have continued to be substantially disproportionate to female enrollment, and women with a demonstrated interest in an intercollegiate athletic activity and demonstrated ability to compete at the intercollegiate level would be left without an opportunity to participate in their sport.” Thus, the court held that, given that the university’s budget constraints required the termination of the men’s program, it was reasonable for the university to choose to maintain its women’s program in order to comply with Title IX and the 1979 Policy Interpretation.

The plaintiffs in *Kelley* also alleged that the 1979 Policy Interpretation perverts the Title IX statute, which prohibits discrimination on the basis of gender. However, the court noted:

108. See, e.g., id. at 272.
110. Id. at 269-70.
111. Id. at 269.
112. Id.
113. Id. at 269-70.
114. Id. at 270.
115. Id.
that gender balancing under the proportionality prong is only one means of compliance with Title IX, and thus, universities are not technically forced to eliminate men’s teams to comply.\textsuperscript{116} The court concluded that, since the 1979 Policy Interpretation was a reasonable interpretation by the DOE of its own regulation, the court was required to defer to it.\textsuperscript{117} The Seventh Circuit also rejected the plaintiffs’ Fourteenth Amendment challenges to the 1979 Policy Interpretation, and thus, affirmed the district court’s grant of summary judgment.\textsuperscript{118} The plaintiffs subsequently petitioned for certiorari, but the petition was rejected.\textsuperscript{119}

In 2002, the Eighth Circuit confronted a similar challenge under Title IX to a university’s decision to eliminate a men’s program in \textit{Chalenor v. University of North Dakota}.\textsuperscript{120} The plaintiffs were once again unsuccessful: the Eighth Circuit affirmed the district court’s grant of summary judgment to the University of North Dakota.\textsuperscript{121} The lawsuit challenged the university’s decision to eliminate its wrestling program as unlawful sex discrimination under Title IX, because the sole reason for the cut was to equalize rates of participation and resource allocation by sex.\textsuperscript{122} Like the University of Illinois in \textit{Kelley}, the University of North Dakota contended that the team was eliminated for budgetary reasons, in this case, the governor’s request for a five percent budget contraction.\textsuperscript{123} The plaintiffs countered that a private donor had offered to fund the wrestling program, and thus, the university could have eliminated its funding to comply with budget constraints without eliminating the program.\textsuperscript{124} However, the court rejected this contention for two reasons: first, the private donor had not made clear in his affidavit how much he was willing to pay to fund the program or for how long; and second, in the case of a public university, funding from private sources essentially becomes public money and is therefore subject to the constraints of Title IX in its distribution.\textsuperscript{125} The court thus characterized the elimination of the wrestling team as an attempt “to improve gender balance in the context of a budgetary contraction.”\textsuperscript{126} The court further stated, “This

\begin{enumerate}
\item[116.] \textit{Id.} at 271.
\item[117.] \textit{Id.}
\item[118.] \textit{Id.} at 272-73.
\item[120.] 291 F.3d 1042 (8th Cir. 2002).
\item[121.] \textit{Id.}
\item[122.] \textit{Id.} at 1043.
\item[123.] \textit{Id.} at 1044.
\item[124.] \textit{Id.} at 1048.
\item[125.] \textit{Id.}
\item[126.] \textit{Id.} at 1047-48.
\end{enumerate}
case, like the cases from other circuits and all cases involving distribution of university funds, involves budget constraints."\textsuperscript{127} Thus, \textit{Chalenor}, like \textit{Kelley}, upheld the university’s decision to eliminate a team to comply with Title IX in the context of evidence of a budget shortfall that required the elimination of programs.

The \textit{Chalenor} court, like the \textit{Kelley} court, also concluded that the Policy Interpretation was entitled to at least some degree of deference.\textsuperscript{128} The plaintiffs pointed out that documents such as interpretations in opinion letters are not entitled to “substantial deference.”\textsuperscript{129} While the court did not reject this argument, it nonetheless found that opinion letters are “‘entitled to respect’... to the extent that these interpretations have the ‘power to persuade.’”\textsuperscript{130} The court further found that it was required to give deference to a reasonable interpretation by an agency of its own regulation in the case of an ambiguous regulation.\textsuperscript{131} Because the court found the phrases in the 1975 Regulations—”equal athletic opportunity for members of both sexes” and “effectively accommodate the interests and abilities of members of both sexes”—to be written at a high level of abstraction, it determined that controlling deference was due.\textsuperscript{132}

In 2003, in \textit{National Wrestling Coaches Association v. Department of Education}, a group of male wrestlers brought a Title IX challenge in the U.S. District Court for the District of Columbia, seeking a declaratory judgment and injunctive relief to enjoin the DOE from enforcing Title IX in a manner that leads institutions to cut or cap the rosters of men’s athletic teams.\textsuperscript{133} The plaintiffs, in response to the elimination of several university wrestling programs,\textsuperscript{134} challenged the 1979 Policy Interpretation and 1996 Clarification as violations of equal protection under the Fifth Amendment and the DOE’s rulemaking authority under Title IX.\textsuperscript{135} The odds were against them from the start: the court noted that at least eight circuits had previously struck down challenges to Title IX and its subsequent regulations and interpretations on various grounds.\textsuperscript{136} The district court dismissed the complaint, finding that

\begin{itemize}
  \item 127. \textit{Id.} at 1048.
  \item 128. \textit{Id.} at 1047.
  \item 129. \textit{Id.} at 1046.
  \item 130. \textit{Id.} (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)).
  \item 131. \textit{Id.}
  \item 132. \textit{Id.} at 1046-47.
  \item 133. \textit{Nat’l Wrestling Coaches I}, 263 F. Supp. 2d at 85.
  \item 134. \textit{Id.} at 97-98.
  \item 135. \textit{Id.} at 85.
  \item 136. \textit{Id.} at 94-95.
\end{itemize}
the plaintiffs did not meet the requirements for standing. The court held that the plaintiffs had not adequately pleaded causation because they did not show that the three-part test represented a "substantial factor" in the decision-making of third parties, the individual universities. Further addressing the standing requirement, the court held that the plaintiffs had not sufficiently pleaded redressability because they did not show a sufficient likelihood that the universities would reinstate the eliminated teams.

The D.C. Circuit affirmed the dismissal on the same grounds but added that, even if the plaintiffs had standing, the availability of a private action against the universities was an "adequate remedy." Thus, it remains unclear how the D.C. Circuit would respond to a lawsuit challenging the individual institutions directly. In fact, in affirming the dismissal, the D.C. Circuit suggested that the plaintiffs pursue their claims in this manner, and the plaintiffs have stated that they may attempt to do so.

B. A Pending Title IX Challenge

In September of 2006, James Madison University (JMU) announced that it was cutting ten sports teams, seven men’s and three women’s, in order to comply with Title IX though the proportionality prong of the 1979 Policy Interpretation. The press release stated, “The proportionality requirements of Title IX mandate that collegiate athletics programs mirror each school’s undergraduate population in terms of gender. As of the fall semester 2006, JMU’s proportions place it fundamentally out of compliance with federal law.” The lack of compliance resulted from the fact that JMU’s student body was 61% female and 39% male while its participation in athletics was roughly 51% female and 49% male. JMU did not elaborate on why it was unable to comply with Title IX through the second or third prongs, but it did state, through the press release, that “[it had] explored every avenue in search of an alternative to this action... this plan is our

137. Id. at 111.
138. Id.
139. Id. at 112.
140. Nat'l Wrestling Coaches Ass'n v. Dep't of Educ. (Nat'l Wrestling Coaches II), 366 F.3d 930, 945 (D.C. Cir. 2004); Nat'l Wrestling Coaches Ass’n, 366 F.3d at 945.
141. Burrick, supra note 37.
143. Id.
144. Id.
most viable alternative for reaching compliance with Title IX.”

Unlike the cases discussed above, the school did not claim that budgetary constraints caused the cuts and announced that the money generated by the cuts would be channeled into funding other sports.

Following the decision to eliminate the teams, a group of coaches, athletes, and parents formed Equity in Athletics, Incorporated (EIA), a not-for-profit organization, to fight the proposed cuts. EIA filed suit against JMU in the Fourth Circuit on March 17, 2007, alleging that the three-prong test of the 1979 Policy Interpretation was a violation of Title IX, the Constitution, and the APA. At the time the lawsuit was filed, the Fourth Circuit had yet to confront a lawsuit challenging the permissibility of the elimination of teams in order to comply with Title IX.

The plaintiffs first sought a preliminary injunction to prevent the university from eliminating the teams, which the district court denied. As part of its analysis, the court considered, among other factors, the likelihood of the plaintiffs’ succeeding on the merits of their claim. The court cited numerous sources of authority for the general proposition that “[e]very court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) or by decreasing athletic opportunities for the overrepresented gender (men in this case).” However, the court may have overstated the precedent: several of the cases cited by the court arose as challenges by a university to the 1979 Policy Interpretation in response to lawsuits brought by female students alleging noncompliance and other cases dealt with circumstances in which institutions were “financially strapped.” Still, while the court concluded, based on

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145. Id.
146. Id.; see also Steve Nearman, Title IX Enforcement Hits James Madison Hard, WASH. TIMES, Oct. 28, 2006, at C12 (quoting College Sports Council President Jim McCarthy, stating “track teams have been among the most hurt in college sports. Among the most teams cut. . . . And the budget is minuscule. It’s not budgetary reasons; it’s to comply with the proportionality of the gender quotas”), available at http://www.washingtontimes.com/news/2006/oct/28/20061028-115416-7089r/.
148. Id.
150. Id. at 99.
151. Id. at 101 (citing Neal v. Bd. of Trs., 198 F.3d 763, 769-70 (9th Cir. 1999)).
152. Id. (citing, for example, Cohen v. Brown Univ. (Cohen I), 991 F.2d 888 (1st Cir. 1993)).
153. Id. (citing Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993)) (“We recognize that in times of economic hardship, few schools will be able to satisfy Title IX’s effective accommodation requirement by continuing to expand their women’s athletics programs.”)
this authority and in balancing the potential harm against the potential for success on the merits, that a preliminary injunction was not justified, the court went out of its way to state that it was not unsympathetic to the plight of the members of the athletic programs that were chosen for elimination by JMU's Board of Visitors. These students are innocent victims of Title IX's benevolent attempt to remedy the effects of past discrimination against women, and JMU's efforts to comply with Title IX.

In affirming the denial of the preliminary injunction, the Fourth Circuit similarly concluded that the plaintiffs had failed to demonstrate the requisite “clear showing of a likelihood of success.” The court pointed out that “[c]ourts have consistently rejected EIA's underlying claim that equal opportunity under [the regulation implementing Title IX] should be tied to expressed interest rather than actual participation.” However, all of the cases cited by the court were decided prior to the 2005 Clarification, which specifically recognizes interest of the students as a requisite for a finding of noncompliance under the third prong of the 1979 Policy Interpretation. In fact, the President of the College Sports Council, Jim McCarthy, stated in response to JMU’s decision to eliminate the teams, “Last year, the [DOE] issued new guidelines – survey the students and find out what sports they want to do. When they enroll in the fall, answer questions about participating and the school would take those results. . . . We are asking the DOE to strengthen that guideline.” Thus, it remains to be seen what impact, if any, a decision on the merits of the case would have on courts’ interpretation of compliance under the 1979 Policy Interpretation.

C. The Role of the Supreme Court

The plaintiffs in Equity in Athletics, Inc. v. United States Department of Education petitioned for certiorari in November of 2008 for review of the denial of the preliminary injunction, which the

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154. Id. at 99.
155. Id. at 112.
157. Id. at 523 (citing Boulahanis v. Bd. of Regents, 198 F.3d 633, 638-39 (7th Cir. 1999); Neal v. Bd. of Trs., 198 F.3d 763, 767 (9th Cir. 1999); Cohen v. Brown Univ. (Cohen II), 101 F.3d 155, 174 (1st Cir. 1996)).
158. Letter from James F. Manning, supra note 79.
159. Nearman, supra note 146.
Supreme Court denied in March of 2009.\textsuperscript{161} However, it is likely that the plaintiffs will petition for certiorari on the merits should they lose on the merits in the Fourth Circuit. This case, or a similar case, would be an excellent opportunity for the Supreme Court to review the current decisions regarding compliance with Title IX, particularly in light of the 2005 Clarification.

\textbf{III. PROPORTIONALITY AS A TITLE IX VIOLATION}

The Supreme Court should grant certiorari in a case addressing this issue and conclude that it is impermissible under Title IX for a university to comply under the proportionality prong of the 1979 Policy Interpretation by eliminating or capping teams when budgetary constraints would not require such action in the absence of a need to comply with Title IX. Title IX specifically states 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.”\textsuperscript{162} The plain language of the statute indicates that eliminating or capping the roster of a men’s (or women’s) program when there is sufficient funding and interest to sustain the program is impermissible when done solely on the basis of gender balancing.

The Supreme Court could hold that such use of the first prong is actually a Title IX violation. The first suggestion that schools can comply with Title IX by eliminating programs is found in the 1996 Clarification, which states that “[a]n institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test.”\textsuperscript{163} However, the 1996 Clarification goes on to state that Title IX is intended to provide institutions with flexibility to comply with the statute in a nondiscriminatory manner."\textsuperscript{164} It also emphasizes that universities are not required to eliminate or cap teams in order to comply with Title IX.\textsuperscript{165} Thus, it seems permissible to argue under the 1996 Clarification that eliminating programs to comply with the 1979 Policy Interpretation is, in fact, discriminatory under the Title IX statute when other, nondiscriminatory means of compliance exist.

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\textsuperscript{161.} Equity in Athletics, Inc. v. Dep’t of Educ., 129 S. Ct. 1613 (2009).
\textsuperscript{164.} Letter from Norma V. Cantú, supra note 71 (emphasis added).
\textsuperscript{165.} Nat’l Wrestling Coaches Ass’n I, 263 F. Supp. 2d at 93.
\end{flushleft}
Alternatively, the Supreme Court could reach the same conclusion by holding the 1996 Clarification to be an invalid interpretation of Title IX and the 1975 Regulations. In Christensen v. Harris County, the Supreme Court held that opinion letters, such as the 1996 Clarification, are not entitled to substantial deference. Instead, the Court held that such letters are merely entitled to “respect,” but only when the underlying regulation is ambiguous. In Chalenor, the Eighth Circuit deferred to the 1979 Policy Interpretation based on a finding that the 1975 Regulations are ambiguous. However, the provision the court quoted to support its finding of ambiguity describes factors to be considered in determining if a university is providing equal opportunity for participation. The regulation clearly states that “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics.” Contrary to the conclusion of the Eighth Circuit, this seems to be a clear statement that a student may not be excluded from athletic participation on the basis of gender. Thus, the Supreme Court could find, as it did in Christenson, that the regulation is unambiguous and, as a result, that deference to a subsequent opinion letter is unwarranted. The Court could then easily conclude that the cutting or capping of men’s teams as a means to comply with the 1979 Policy Interpretation and Title IX, when other, nondiscriminatory means of compliance are available, is impermissible.

In providing guidance to schools attempting to comply under prong three, the 2005 Clarification lends support to the theory that choosing to eliminate or cap a men’s team is actually a Title IX violation, given that other, nondiscriminatory means of compliance with almost always be available. Under the 2005 Clarification, a university is presumed to be in compliance with prong three unless all of the following conditions are met: “(1) unmet interest sufficient to sustain a varsity team in the sport(s), (2) sufficient ability to sustain an intercollegiate team in the sport, and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the

167. Id. at 587-88.
168. Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046-47 (8th Cir. 2002).
169. 34 C.F.R. § 106.41(c) (2007).
170. Id. § 106.41(a).
171. Christensen, 529 U.S. at 588.
172. See text accompanying note 170 (stating that the 1975 Regulations prohibit discrimination on the basis of gender).
school’s normal competitive region.” Thus, a school that was not in compliance with the proportionality requirement of prong one and could not afford to expand athletic opportunities for women under prong two- and was not required by budgetary constraints to eliminate programs- could still easily comply with the 1979 Policy Interpretation under prong three. The school could either (1) disseminate surveys to demonstrate that the interests of women in participating in athletics are met or (2) demonstrate that it does not “have the ability” to sustain a varsity team in a sport for which there is interest. Thus, under the 2005 Clarification, it seems that a school would never be required to eliminate teams to comply with Title IX, absent a circumstance in which budget constraints independently required cuts. Therefore, a decision to do so could be found to be patently discriminatory under Title IX.

Construing Title IX to prohibit elimination of teams of an underrepresented sex, when not otherwise required by budgetary constraints, would not necessarily prohibit the elimination or capping of a team in a manner that maintains proportionality when a university can prove that it is financially required to cut or cap a team even without the need to comply with Title IX. This accords with both Kelley and Chalenor, where the universities presented evidence that the elimination of a team was financially required and that a men’s team was cut instead of a women’s team in order to maintain proportionality. The reason for allowing a budget exception is that such a situation clearly prevents a school from complying under prong two—since it would not be possible to expand programs for the underrepresented gender—and possibly also prong three, depending on the OCR or a court’s construction of “sufficient ability to sustain an intercollegiate team” in the 2005 Clarification. In this circumstance, a university may be concerned about opening itself to Title IX liability if it eliminated a women’s team, creating a catch-22 of compliance. Thus, the Supreme Court should find that a university can consider proportionality under prong one in choosing which teams to eliminate or cap if—and only if—it can present evidence sufficient to prove that such action is financially necessary independent of Title IX compliance.

173. Letter from James F. Manning, supra note 79.
174. See id.
175. Chalenor v. Univ. of N.D., 291 F.3d 1042, 1044 (8th Cir. 2002); Kelley v. Bd. of Trs. (Kelley II), 35 F.3d 265, 269 (7th Cir. 1994).
176. A Policy Interpretation, supra note 12.
177. Letter from James F. Manning, supra note 79.
Such a decision by the Supreme Court would be consistent with the plain meaning and intent of the statute and implementing regulation. The Court could leave the 1996 Clarification in place by finding that cutting or capping a team when other alternatives for compliance exist is not a permissible “nondiscriminatory manner” of complying with Title IX. Alternatively, the Court could find that the 1996 Clarification is not entitled to deference and that its acceptance of the cutting or capping of teams of the overrepresented gender as a means of compliance with Title IX is impermissible under the statute and implementing regulation.

Any such holding by the Supreme Court would likely generate significant pressure on universities to end the practice of eliminating or capping men’s teams in the name of Title IX compliance. It would also make it possible for men’s teams to bring successful actions under Title IX in response to a decision to eliminate or cap a team. As a result, it would help eliminate the gender-based discrepancies that Title IX was passed to combat. Thus, the Supreme Court should grant certiorari on this issue and hold that a decision by a university to cut or cap an athletic team for the sole purpose of gender balancing, in the absence of independent budgetary constraints, is impermissible under Title IX.

IV. CONCLUSION

Proponents of Title IX and the current framework have recognized the negative impact of the current enforcement mechanisms on men’s sports. The former president of the NCAA, Myles Brand, recently predicted that that cuts to men’s teams will continue as a result of Title IX. In deciding how to comply with Title IX, athletic directors have also noted these cuts as an unfortunate consequence. Nonetheless, the NCAA and athletic departments continue to make decisions to eliminate programs. Thus, it is clear that statements by the DOE, such as the 2005 Clarification, which provides further flexibility in Title IX compliance, and the 2003 Clarification, which discourages universities from complying with Title IX through the elimination of teams, have been

178. See Letter from Norma V. Cantú, supra note 71.
179. Brady, supra note 99.
180. For example, Shelley Appelbaum, senior associate athletic director at Michigan State has stated, “I’m not naïve, I know men’s Olympic sports have had a tough time recently.” Rexrode, supra note 25.
181. Letter from James F. Manning, supra note 79.
182. Letter from Gerald Reynolds, supra note 77.
ineffective. The Supreme Court must intervene to give effect to the stated regulatory intention.

If the Supreme Court declines to address this issue, the DOE itself could solve the problem of the unintended consequences of Title IX for men’s athletics by revisiting its clarifications. Indeed, the 1996 Clarification itself was a response to pressure on the DOE to revise the Policy Interpretation, in the form of a letter written by members of Congress encouraging the DOE to revisit the issue.183 Thus, it is possible that continuing political pressure could ultimately force the DOE to independently decide to change its position on Title IX enforcement. The current petition to revise Title IX184 could prompt Congress to once again appeal to the DOE to revise its interpretation of Title IX and the implementing regulation.

In fact, the DOE has recently shown sensitivity to the impact of its policy interpretations on men’s collegiate athletics, as illustrated by the 2003 and 2005 Clarifications. With this in mind, the climate may be right to appeal once again to the DOE and to urge it to make a stronger statement, perhaps even by repealing the 1996 Clarification. This would have the same impact as adjudication by the Supreme Court in creating substantial pressure on universities to comply with Title IX through means other than the elimination or capping of programs. It would also make successful action by men’s athletic teams under Title IX possible. Thus, action by either the Supreme Court or the DOE on this issue could ultimately save certain men’s collegiate sports, such as gymnastics, from a gradual, Title IX-induced extinction.

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183. Id. at 92.


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