

Summer 2003

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Recommended Citation

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Wrestling With the Effects of Title IX: Is It Time To Adopt New Measures of Compliance for University Athletic Programs?

*Chalenor v. University of North Dakota*¹

I. INTRODUCTION

The Court of Appeals for the Eighth Circuit, following the Department of Education's policy interpretation and other circuit courts of appeals, held that the University of North Dakota did not violate the men's wrestling team members' and recruits' rights under Title IX² when it eliminated the men's varsity wrestling program.³ The circuit courts of appeals outside the Eighth Circuit had held that eliminating an athletic program of an over-represented gender to make athletic opportunities between genders substantially proportionate was a satisfactory means of compliance with Title IX. The Eighth Circuit Court of Appeals reviewed these holdings in developing its opinion. This Note examines how Title IX compliance can be achieved in the context of athletic opportunities in universities and other educational institutions that receive federal financial support. It also looks at how the goals of Title IX could be more efficiently achieved by revising the policy interpretations that give guidance for complying with the statute.

II. FACTS AND HOLDING

Eric Chalenor, Brady Flatten, Chad Lorenson, and Mike Schuster were members or recruits of the men's wrestling team at the University of North Dakota.⁴ On May 7, 1998, the university's Intercollegiate Athletic Committee reported that, in order to comply with Governor Edward Schafer's request for an overall budget reduction, \$95,000 needed to be cut from the university's athletic budget.⁵ As a result of this report, the Committee voted to eliminate the men's wrestling program.⁶ Eliminating the men's wrestling program saved the university \$49,000.⁷

1. *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002).

2. *Id.* at 1050.

3. *Id.*

4. *Id.* at 1042-43.

5. *Id.* at 1044.

6. *Id.*

7. *Id.*

In April 1995, prior to the elimination of the wrestling team, the university issued its "Final Gender Equity in Athletics Report."⁸ The goal of the report was to increase female participation in athletics and reduce the disparity of athletic participation between men and women.⁹ No changes to men's athletic programs were recommended by the report, but it did recommend the addition of three women's sports.¹⁰ Women's golf was to be added to the athletic program in 1995, and women's tennis and soccer were to be added in 1997 and 1999, respectively.¹¹ Although not necessitated by the report, the Committee voted to eliminate the men's wrestling program on May 29, 1998.¹²

Subsequently, Chalenor, Flatten, Lorenson, and Schuster filed suit against the university for a violation of their rights under Title IX.¹³ The university moved for summary judgment on the grounds that "equalizing athletic opportunities for men and women does not violate Title IX."¹⁴ The District Court for the District of North Dakota granted summary judgment in favor of the university.¹⁵ On appeal, the members and recruits argued that the elimination of the men's wrestling program was a "clear example of sex discrimination which Title IX explicitly forbids."¹⁶ The university countered that due to the budget contraction, allowing men to receive a disproportionate amount of the athletic budget would have discriminated against women.¹⁷ The team members and recruits then claimed that concerns about the budget were not a factor in the decision to eliminate the wrestling program, because a private donor had offered to fund the program.¹⁸

In analyzing Title IX in the context of athletic opportunities, the district court looked to a regulation supplied by the Department of Health and Human Services and the Department of Education.¹⁹ This regulation provided that a recipient of federal financial support, which operates or sponsors intercollegiate athletic programs, "shall provide *equal athletic opportunit[ies]* for members of both sexes."²⁰ The regulation set out three standards, one of which must be met in order to comply with Title IX.²¹ The first standard is "[w]hether intercollegiate level participation opportunities for male and female students are

8. *Id.* at 1044.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1043.

14. Chalenor v. Univ. of N.D., 142 F. Supp. 2d 1154, 1156 (D.N.D. 2000), *aff'd*, 291 F.3d 1042 (8th Cir. 2002).

15. Chalenor, 291 F.3d at 1043.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 1045.

20. *Id.*

21. *Id.*

provided in numbers substantially proportionate to their respective enrollments.”²² The second standard for Title IX compliance is: “[w]here 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.”²³ The third standard is:

[w]here 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.²⁴

The Department of Education subsequently issued a clarification to the regulation, which stated that “an institution can choose which part of the test it plans to meet,”²⁵ and that choosing to eliminate or cap teams was a way of complying with the standards.²⁶ The court held that the policy interpretation given to the regulation was reasonable and controlling deference should be given to it.²⁷

The members and recruits argued that budget concerns were not a reason for eliminating the wrestling program.²⁸ They claimed that the availability of outside private funding would have allowed the university to eliminate its funding of the men’s wrestling program without eliminating the entire program.²⁹ The court held, however, that a public university cannot “avoid its legal obligations by substituting funds from private sources for funds from tax revenues,”³⁰ reiterating the district court’s holding that the availability of outside funding cannot be used as a defense for providing disproportionate athletic opportunities in violation of Title IX.³¹ Therefore, the claim that budgetary concerns were not involved in the decision made by the university was deemed to be without merit.³²

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1046.

26. *Id.*

27. *Id.* at 1047.

28. *Id.* at 1048.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

The court of appeals held that controlling deference was owed to the Department of Education's policy interpretation of Title IX regulations.³³ The university was not required to show that it had not already met required accommodations before pursuing gender proportionality in athletics and that the alleged availability of outside private funding did not render elimination of the men's wrestling program discriminatory under Title IX.³⁴

III. LEGAL BACKGROUND

According to its primary sponsor, Senator Birch Bayh, Title IX was enacted in 1972 with the hope of providing American women with "something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work."³⁵ Title IX prohibits any person, on the basis of sex, from being excluded from participation in, being denied the benefits of, or being subjected to discrimination "under any education program or activity receiving Federal financial assistance."³⁶ Educational programs and activities include colleges, universities and other postsecondary institutions.³⁷ However, intercollegiate athletics were not explicitly addressed by Title IX.³⁸

The Department of Education, the agency in charge of implementing Title IX, drafted a regulation that addressed discrimination in intercollegiate athletics.³⁹ The regulation stated that "[n]o person [could], on the basis of sex, be excluded from participation in, be denied benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient" of federal financial support.⁴⁰ The Secretary of Health, Education and Welfare also promulgated regulations in 1975 that included provisions specifically for athletics.⁴¹ These regulation stayed in effect until 1984, when the "Supreme Court radically altered the contemporary reading of Title IX."⁴²

33. *Id.* at 1046-47.

34. *Id.* at 1048.

35. *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154, 1159 (D.N.D. 2000), *aff'd*, 291 F.3d 1042 (8th Cir. 2002) (internal citation omitted).

36. 20 U.S.C. § 1681(a) (2000).

37. 20 U.S.C. § 1687(2)(A) (2000).

38. *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993) ("Cohen I"), *aff'd in part & rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

39. *Chalenor*, 142 F. Supp. 2d at 1156.

40. 34 C.F.R. § 106.41(a) (2002).

41. *Cohen I*, 991 F.2d at 893.

42. *Id.* at 894.

In *Grove City College v. Bell*,⁴³ the Court held that Title IX was “program-specific” and therefore only applied to areas of the university that actually received federal financial funds.⁴⁴ Few athletic departments actually receive federal financial funds directly.⁴⁵ Therefore, the Court’s holding placed collegiate athletic programs beyond the reach of Title IX. However, Congress quickly reacted to the Supreme Court’s decision in *Grove City College*.⁴⁶ Congress, by passing the Civil Rights Restoration Act of 1987, re-instituted an industry wide application of Title IX, which placed collegiate athletic programs back within the grasp of the statute.⁴⁷ Ten factors were enunciated to be analyzed in determining whether a school had provided equal opportunities for men and women.⁴⁸ These factors were:

- (1) [w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) [t]he provision of equipment and supplies;
- (3) [s]cheduling of games and practice times;
- (4) [t]ravel and per diem allowance;
- (5) [o]ppportunity to receive coaching and academic tutoring;
- (6) [a]ssignment and compensation of coaches and tutors;
- (7) [p]rovision of locker rooms, practice and competitive facilities;
- (8) [p]rovision of medical and training facilities and services;
- (9) [p]rovision of housing and dining facilities and services;
- (10) [p]ublicity.⁴⁹

The statutory language of Title IX “sketches wide policy lines, leaving the details to regulating agencies.”⁵⁰ Due to the filing of over 100 discrimination complaints involving violations of Title IX by college and university athletic programs in the three years following the initial issue of the regulation, the Department of Education promulgated a policy interpretation in the hopes of encouraging self-policing and eliminating complaints.⁵¹ The policy interpretation established three benchmarks in order to assess whether a college or university’s athletic program is in compliance with Title IX,⁵² one of which must be met in order to comply with the statute.⁵³

43. 465 U.S. 555 (1984).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Kelley v. Bd. of Trs.*, 35 F.3d 265, 268 (7th Cir. 1994).

49. 34 C.F.R. § 106.41(c) (2002).

50. *Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (“Cohen I”), *aff’d in part & rev’d in part*, 101 F.3d 155 (1st Cir. 1996).

51. *Id.* at 896.

52. *Id.* at 897.

53. *Id.*

The first benchmark for effectively accommodating the interests and abilities of members of both sexes and thus complying with Title IX deals with “[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.”⁵⁴ This first benchmark is considered to be a “safe harbor” for colleges and universities “that have distributed athletic opportunities in numbers ‘substantially proportionate’ to the gender composition of their student bodies.”⁵⁵

In the case of *Cohen v. Brown University*, the Court of Appeals for the First Circuit drew an important line for determining what is “substantially proportionate to their respective enrollment.”⁵⁶ In *Cohen*, Brown University, which was experiencing financial difficulty, eliminated women’s volleyball, women’s gymnastics, men’s golf, and men’s water polo from its varsity athletic roster.⁵⁷ Eliminating the women’s varsity sports would have saved the university \$62,028, while eliminating the men’s varsity sports would have saved the university only \$15,795.⁵⁸ After announcement of the elimination of the programs, members of the women’s volleyball and gymnastics teams brought suit against the university for violation of Title IX.⁵⁹ The female members argued that the violation occurred because of the university’s decision to “devalue the two women’s programs without first making sufficient reductions in men’s activities or, in the alternative, adding other women’s teams to compensate for the loss.”⁶⁰ Brown University, on the other hand, argued that under the Department of Education’s policy interpretation, colleges and universities should be able to comply with Title IX by providing athletic opportunities that were substantially proportionate to the comparative levels of interest of each sex.⁶¹

The court disagreed with Brown University.⁶² Had it agreed with Brown University’s argument that women are less interested in sports than men, the court stated that it would have been ignoring the “fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women’s interests and abilities.”⁶³

The *Cohen* court also addressed the means by which a college or university can satisfy the first benchmark, thereby coming into compliance with Title IX. An institution can create gender parity in its athletic program by adding and

54. *Id.*

55. *Id.* at 897.

56. *Id.*

57. *Id.* at 892.

58. *See id.*

59. *Id.*

60. *Id.* at 893.

61. *Id.* at 899.

62. *Id.*

63. *Cohen v. Brown Univ.*, 101 F.3d 155, 178-79 (1st Cir. 1996) (“Cohen II”).

upgrading teams for the underrepresented gender.⁶⁴ However, during times in which there are budgetary concerns for an athletic program, adding and upgrading teams may not be feasible. Therefore, the court stated that a college or university can comply with the first benchmark by subtracting and downgrading teams, thereby “reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender.”⁶⁵ In fact, every court that has addressed the issue has held that a college or university can bring itself into compliance with Title IX by increasing opportunities for the underrepresented gender or by decreasing athletic opportunities for the overrepresented gender.⁶⁶ “If a university wishes to comply with Title IX by leveling down programs instead of ratcheting them up . . . Title IX is not offended.”⁶⁷

The Court of Appeals for the Seventh Circuit dealt with the issue of providing opportunities that were “substantially proportionate” in a case regarding the elimination of a men’s swimming program.⁶⁸ In *Kelley v. Board of Trustees*, the University of Illinois, confronted with a large budget deficit, decided to eliminate the men’s swimming program.⁶⁹ The university, however, elected not to eliminate the women’s swimming program.⁷⁰ The court stated that not eliminating the women’s program was extremely prudent, because “[t]he percentage of women involved in intercollegiate athletics [was] substantially lower than the percentage of women enrolled at the school.”⁷¹ Because the presence of men’s programs would be more than substantially proportionate to the undergraduate enrollment of men, even after the men’s swimming program was eliminated, the court held that the university could eliminate the program without violating Title IX.⁷² The court went on to state that “if the percentage of student-athletes of a particular sex is substantially proportionate to the percentage of students of that sex in the general student population, the athletic interests of that sex are presumed to have been accommodated.”⁷³ The members of the men’s swimming team also argued that the substantial proportionality benchmark, contained in the Department of Education’s policy interpretation, “establishes a gender-based quota system,” which they alleged was contrary to the mandates of Title IX.⁷⁴ The court held that the policy does not require

64. *Cohen I*, 991 F.2d at 898 n.15.

65. *Id.*

66. *Neal v. Bd. of Trs.*, 198 F.3d 763, 769-70 (9th Cir. 1999).

67. *Id.* at 770.

68. *Kelley v. Bd. of Trs.*, 35 F.3d 265, 269 (7th Cir. 1994).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 270.

73. *Id.*

74. *Id.* at 271.

statistical balancing.⁷⁵ Rather, if a school achieves the statistical balance, the policy interpretation creates a presumption that the school is in compliance with Title IX.⁷⁶

Questions still remain as to what ratio of athletic opportunity compared to enrollment of a specific gender is considered substantially proportionate. The Court of Appeals for the Tenth Circuit addressed this issue in *Roberts v. Colorado State Board of Agriculture*.⁷⁷ In *Roberts*, members of the women's fast-pitch softball team sued Colorado State University for a Title IX violation for eliminating the softball program.⁷⁸ The university maintained that it was not in violation of Title IX.⁷⁹ The court of appeals agreed with the district court opinion that the university did not have substantial proportionality between athletic participation and undergraduate enrollment.⁸⁰ In reviewing statistical data, the district court found that, following the termination of the women's fast-pitch softball program, "the disparity between enrollment and athletic participation for women at CSU [was] 10.5%."⁸¹ The court of appeals, concurring with the district court, held that a 10.5 percent disparity "between female athletic participation and female undergraduate enrollment is not substantially proportionate," and, therefore, the elimination of the program was a violation of Title IX.⁸²

While the court in *Roberts* held that a 10.5 percent disparity did not constitute a substantially proportionate level of athletic participation to undergraduate enrollment, there is not a bright line rule that can be used to determine what ratio is or is not substantially proportionate.⁸³ Title IX compliance investigators have been instructed by the Office of Civil Rights that "there is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation."⁸⁴

The second benchmark for complying with Title IX looks to "[w]here 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."⁸⁵ This benchmark sets out how a college or university can be in compliance with Title IX without proportionality

75. *Id.*

76. *Id.*

77. *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993).

78. *Id.* at 826.

79. *Id.* at 827.

80. *Id.* at 829-30.

81. *Id.* at 829.

82. *Id.* at 830.

83. *Id.* at 829.

84. *Id.* at 829-30.

85. *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) ("Cohen I"), *aff'd in part & rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

between athletic opportunities and gender enrollment.⁸⁶ “So long as a university is continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender, and persists in this approach as interest and ability levels in its student body and secondary feeder schools rise, benchmark two is satisfied.”⁸⁷

The third benchmark for determining whether a intercollegiate athletic program is in compliance with Title IX is:

[w]here 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.⁸⁸

The Tenth Circuit Court of Appeals addressed this benchmark in *Roberts*. The university stated that it was required to accommodate women only to the extent that it accommodated men, and because the women’s softball program was eliminated along with men’s baseball program, the plaintiffs should not be allowed to complain.⁸⁹ The court held that the university did not meet the high standard set by the third benchmark.⁹⁰ The benchmark requires full and effective accommodation.⁹¹ If the statistically underrepresented gender has sufficient interest and ability among its members, and that interest is not satisfied by the existing programs, then the college or university necessarily fails to satisfy the third benchmark for complying with Title IX.⁹²

IV. INSTANT DECISION

The plaintiffs originally filed their complaint against the University of North Dakota in the United States District Court for the District of North Dakota.⁹³ In the complaint, the athletes alleged that the university violated Title IX when it “eliminated the male varsity wrestling program in order to attain proportionality between the gender composition of the student body.”⁹⁴ The University of North Dakota responded by arguing that it eliminated the men’s varsity wrestling

86. *Id.*

87. *Id.*

88. *Id.*

89. *Roberts*, 998 F.2d at 831.

90. *Id.*

91. *Id.*

92. *Id.* at 831-32.

93. *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1043 (8th Cir. 2002).

94. *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154, 1155 (D.N.D. 2000), *aff’d*, 291 F.3d 1042 (8th Cir. 2002).

program in order to attain gender equity.⁹⁵ The university further argued that equalizing athletic opportunities for men and women does not violate Title IX and that it was entitled to a grant of summary judgment based on the facts of the case.⁹⁶ The athletes contended that summary judgment was inappropriate because there was a material issue of fact as to the university's actual motivation for eliminating the wrestling program.⁹⁷ The district court disagreed with the athletes and granted summary judgment in favor of the university.⁹⁸

In addressing the members' first complaint, that the university eliminated the wrestling program "in order to attain proportionality between the gender composition of the student body," the court stated that achieving proportionality with student body gender composition is one of three methods of compliance with Title IX.⁹⁹ The court looked to Department of Health, Education and Welfare policy interpretation in order to establish that the university had effectively accommodated the interests of both its male and female students.¹⁰⁰

The policy set out three benchmarks for determining whether an institution has complied with Title IX.¹⁰¹ Of these three benchmarks, an institution must meet one in order to comply with Title IX.¹⁰² The first benchmark is the least stringent and looks at "[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."¹⁰³ Because the Eighth Circuit had not yet addressed this issue, the court looked to other circuits.¹⁰⁴ In a similar case, the Seventh Circuit Court of Appeals held that a university, which eliminated the men's swimming program and was primarily motivated by budget concerns, did not violate Title IX because after eliminating the program, "men's participation in athletics was more than substantially proportionate to their presence within the student body."¹⁰⁵

In the instant case, the members were not able to show that by eliminating the men's wrestling program, men had now become underrepresented in the university's athletic program.¹⁰⁶ The university was able to show that, even with the elimination of the men's wrestling program, men were still substantially overrepresented in athletics at the university.¹⁰⁷ In 1999-2000, one year after the elimination of the men's wrestling program, men still represented sixty-four

95. *Id.* at 1156.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1156-57.

100. *Id.* at 1157.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (discussing *Kelley v. Bd. of Trs.*, 35 F.3d 265, 269-70 (7th Cir. 1994)).

106. *Id.* at 1158.

107. *Id.*

percent of the athletes in the athletic program, while only comprising fifty-one percent of the undergraduates enrolled at the university.¹⁰⁸ Recruiting expenses for men constituted seventy-nine percent of the recruiting budget while athletic related financial aid to men represented sixty-eight percent of that budget.¹⁰⁹ Therefore, the court held that there was no basis for a claim of a violation of Title IX by the university for eliminating the men's varsity wrestling program.¹¹⁰

The athletes attempted to raise a material issue of fact as to the university of North Dakota's motivation for eliminating the wrestling program.¹¹¹ They stated that the availability of outside funding to the wrestling program cast doubt on the university's motivation in eliminating the program.¹¹² A donor, Dan Sampson, stated that he would cover "shortfalls in allocation to the program by [the university]."¹¹³ However, he never stated how much funding he would provide or how long his funding would continue.¹¹⁴ The court concluded that the availability of outside funding had no bearing on the analysis of the case.¹¹⁵ Title IX is an important reason why a "university would choose to eliminate an athletic program, notwithstanding the potential for outside funding."¹¹⁶ The court stated that it was conceivable that a university could violate Title IX by accepting outside funding, which would lead to more than substantially proportionate athletic opportunities to one gender.¹¹⁷ The court wrote that "it is not clear that 'outside funding' is a defense to a university which provides more than substantially proportionate athletic opportunity to one gender in violation of Title IX,"¹¹⁸ and that it "believes that 'outside funding' is not and should not be such a defense."¹¹⁹

The athletes subsequently appealed the grant of summary judgment in favor of the university to the Court of Appeals for the Eighth Circuit. The athletes' appeal centered around four claims of error by the trial court. The first claim on appeal was that the trial court erred in granting substantial deference to the agency's interpretation of its own regulation.¹²⁰ The university argued that it relied on the Department of Education's policy interpretation, clarification memorandum, and a transmittal letter in determining that the elimination of the men's wrestling program was not a violation of Title IX, but was actually an

108. *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1044 (8th Cir. 2002).

109. *Id.*

110. *Chalenor*, 142 F. Supp. 2d at 1158.

111. *Chalenor*, 291 F.3d at 1044.

112. *Id.*

113. *Id.* at 1048.

114. *Id.*

115. *Id.*

116. *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154, 1158 (D.N.D. 2000), *aff'd*, 291 F.3d 1042 (8th Cir. 2002).

117. *Id.*

118. *Id.* at 1159.

119. *Id.*

120. *Chalenor*, 291 F.3d at 1046.

action to bring the university in compliance with Title IX.¹²¹ Therefore, the Department of Education's interpretation of its own regulations, the university argued, was entitled to substantial deference.¹²²

The Eighth Circuit Court of Appeals held that although substantial deference is not due to the Department of Education's interpretations, clarification memorandums, and transmittal letter, these interpretations and documents still have the "power to persuade."¹²³ It further held that if the Department's regulation is ambiguous, then deference must be given to the agency's interpretation of the regulation.¹²⁴ According to the court, since the Department's policy interpretation was "a reasonable and considered interpretation of the regulation," then it was due controlling deference.¹²⁵

The athletes next claimed that even if the Department of Education's policy interpretation was entitled to deference, the university failed to establish that it was required to engage in gender balancing.¹²⁶ They further claimed that there were two other benchmarks for complying with Title IX that the university could have elected to meet and that the university failed to show that it had not already complied with either of the other two benchmarks.¹²⁷ The court stated that the university never contended that gender proportionality was required.¹²⁸ The university's position, which according to the court was a correct position, was that gender proportionality was permissible and was relevant in determining whether an institution was in compliance with Title IX.¹²⁹

Third, the athletes alleged that the budgetary issues claimed by the university as the reason for eliminating the men's wrestling program were non-existent and were used to disguise the university's "true discriminatory motive."¹³⁰ The athletes stated that outside funding for the wrestling program was available and that the university could have eliminated their funding of the program without eliminating the entire men's wrestling program.¹³¹ They further stated that since they believed that budgetary constraints were not a factor in the decision making process of the university, their situation was distinguished from case law in other circuits that held that a university can comply with Title IX by limiting athletic opportunities for men only.¹³² The Court of Appeals for the Eighth Circuit held that the athletes' arguments were without merit and that their

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1047 (internal quotations omitted).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1048.

131. *Id.*

132. *Id.*

case, like those from other circuits, involved budgetary issues.¹³³ The court stated that there were several problems with the plaintiffs' argument, but the most important problem dealt with "substituting funds from private sources for funds from tax revenues."¹³⁴ The court of appeals agreed with the district court's statement that "outside funding is not a defense for 'a university which provides more than substantially proportionate athletic opportunity to one gender in violation of Title IX.'"¹³⁵

The athletes' final contention on appeal was that Chief Judge Webb should have been disqualified from hearing the case because of a "major conflict of interest," which the athletes believed affected their right to a "fair and impartial hearing."¹³⁶ Chief Judge Webb was a graduate of the University of North Dakota and a financial contributor to the university.¹³⁷ The court held that the athletes' contentions regarding the judge were immaterial, and that there were no contentions or facts stated that showed the judge had a specific or particular interest in the wrestling program.¹³⁸ Therefore, there was no reasonable basis for questioning the judge's impartiality.¹³⁹

V. COMMENT

Males have had an "enormous head start" over females in acquiring athletic resources.¹⁴⁰ Since its inception in 1972, Title IX has made giant strides to cure this head start and bring athletic opportunities for women to a level more on par with the opportunities that men receive. Title IX's effects have reached beyond the levels of intercollegiate athletics and into the realm of professional athletics. Professional women's basketball, soccer, and softball leagues now exist. Over 90,000 people packed the Rose Bowl in Pasadena, California, to watch the finals of the women's soccer World Cup in 1999.¹⁴¹ Many, if not almost all, of these opportunities for women would never have been available if Title IX had not have been enacted.

In *Chalenor*, the Court of Appeals for the Eighth Circuit followed precedent set in other circuits in concluding that the University of North Dakota did not violate Title IX by eliminating its men's varsity wrestling program.¹⁴² The court followed Department of Education policy interpretations when it decided that eliminating a men's athletic program was a satisfactory means of achieving the first standard for compliance with Title IX by providing "equal athletic

133. *Id.*

134. *Id.*

135. *Id.* (quoting *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154, 1159 (D.N.D. 2000), *aff'd*, 291 F.3d 1042 (8th Cir. 2002)).

136. *Id.* at 1049.

137. *Id.*

138. *Id.* at 1049-50.

139. *Id.*

140. *Neal v. Bd. of Trs.*, 198 F.3d 763, 767 (9th Cir. 1999).

141. Gary Davidson, *U.S. Wins the World Cup in Shootout*, SOCCERTIMES, July 10, 1999, available at <http://www.soccertimes.com/worldcup/1999/games/jul10.htm>.

142. *Chalenor*, 291 F.3d at 1049.

opportunities.”¹⁴³

Since the enactment of Title IX, over 170 wrestling programs, eighty men’s tennis teams, seventy men’s gymnastics teams, and forty-five men’s track teams have been eliminated from intercollegiate athletic programs.¹⁴⁴ Those eliminations alone rid men of over 80,000 positions in varsity athletic programs.¹⁴⁵ If an institution chooses to meet the first standard of Title IX compliance, it will be required to provide athletic opportunities that are substantially proportionate to each gender’s undergraduate enrollment.¹⁴⁶

Many opponents of this first standard argue that athletic opportunities should coincide with a gender’s interest in participating in athletics.¹⁴⁷ Courts have held that this would go against the goal of remedying the stereotypes of women and athletics.¹⁴⁸ However, an institution can comply with the third standard of Title IX by showing that it “demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.”¹⁴⁹ The gauge used by opponents of the first standard for measuring athletic interest is quite different than the gauge and measurement of athletic interest under the third standard.

Opponents of the first standard want the percentage of the undergraduate interest of the underrepresented gender to equal the percentage of athletic opportunities available to the underrepresented gender. The third standard, however, deals with satisfying all interests of the underrepresented gender. The *Cohen* court has read the third standard to require a “relatively simple assessment of whether there is unmet need in the underrepresented gender that rises to a level sufficient to warrant a new team or the upgrading of an existing team.”¹⁵⁰ The court states that student plaintiffs, as well as universities, would be required to assess the interest levels for men and women.¹⁵¹ What factors are included in level of interest? Does that mean that if the person wants to join a team, then the institution is not meeting the level of interest of that gender’s population? Is it even possible to accurately measure an undergraduate population’s interest in participating in an athletic program? The Department of Education’s policy interpretation is vague in regards to all three standards, but there has been at least some case law elaboration upon the first standard. Why would an institution risk not knowing whether it was complying with the third standard, when it could knowingly comply with the “safe harbor”¹⁵² of the first standard?

143. *Id.* at 1045-46.

144. Jonah Goldberg, *The Trouble with Title IX*, THE WASHINGTON TIMES, May 10, 2002.

145. *Id.*

146. *Cohen v. Brown Univ.*, 991 F.2d 888, 899 (1st Cir. 1993) (“*Cohen I*”), *aff’d in part & rev’d in part*, 101 F.3d 155 (1st Cir. 1996).

147. *Id.*

148. *Neal v. Bd. of Trs.*, 198 F.3d 763, 768-69 (9th Cir. 1999).

149. *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1045 (8th Cir. 2002).

150. *Cohen I*, 991 F.2d at 900.

151. *Id.*

152. *Id.* at 897.

If, at its inception in 1972, Title IX allowed the number of athletic opportunities to coincide with percentage of the underrepresented gender who were interested in participating, it is very unlikely that women's athletic participation would have accelerated at the rate in which it has over the past thirty years. The percentage of women participating in college athletics has increased five-fold since Title IX was enacted.¹⁵³ A time has now come, though, at some institutions where women's participation in intercollegiate athletics has almost equaled or surpassed their undergraduate enrollment.¹⁵⁴ Is it possible that the goals of Title IX can be achieved without eliminating men's programs? Could it also be possible that men and women, as in almost every facet of life, do not have the same interest levels in the same subjects? That cannot be known unless the Department of Education looks to whether analyzing Title IX compliance can be achieved by looking at a gender's interest and unless it establishes guidelines for determining that interest. It is possible that the goals of Title IX can be achieved more efficiently if the law is evaluated and revised.

Title IX has done great things by increasing women's participation in athletics at all levels, from high school, to college, to professional athletics. Yet, it has also helped to significantly reduce or eliminate men's participation in certain sports at all levels, as it did with the wrestling program at the University of North Dakota. This may result from the vague wording of the 1979 Department of Education policy interpretation. By reviewing this policy interpretation and reviewing the goals of Title IX in the area of intercollegiate athletics, it may be possible to expand and encourage the participation of women in athletics without eliminating men's athletic programs in order to obtain compliance.

VI. CONCLUSION

The holding in *Chalenor* follows the holding of similar cases in sister circuits. Without revising the current Department of Education policy interpretation on compliance with Title IX, troubling consequences for both men's and women's sports could continue to grow. Participation by women in sports has drastically increased since the passage of Title IX. However, this has not come without severe cuts in a select group of men's sports, including wrestling. The way in which the Department of Education has interpreted Title IX has and will lead to funds designated for women's sports going to areas that

153. Michael Dobie, *Title IX Comes of Age*, June 23, 2002, <http://www.newsday.com>.

154. The Chronicle of Higher Education Facts & Figures, *Participation: Proportion of Female Students on Athletic Teams* (1999) (on file with author). Georgia Institute of Technology, of the Atlantic Coast Conference, has a female undergraduate proportion of twenty-eight percent and a twenty-eight percent proportion of athletic opportunities for women. The United States Air Force Academy, formerly of the Western Athletic Conference and now a member of the Mountain West Conference, has a female undergraduate proportion of sixteen percent and a twenty-six percent proportion of athletic opportunities for women.

do not need the funds, just so a university can appear as if it is in compliance with Title IX. For example, a university may decide to form a women's rowing team, not because of an interest in rowing, but rather to have thirty more women participate in sports. Without the interest for rowing, the money could be much better spent in improving facilities or equipment for women's sports. However, the use of the funds to make these improvements would not be taken into account in determining whether a university complies with the substantial proportionality prong of Title IX. The Department of Education policy interpretation on Title IX will continue to prevent universities from using their funds for athletics in the most efficient way. Therefore, a revision of the Department of Education policy interpretation is needed.

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