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Leveling the Playing Field: Sex Equality in Athletics

Meghan M. Gavin

Code Sections Affected

Education Code §§ 66271.6, 66271.8 (new), 230, 66271.7 (amended).
AB 833 (Steinberg); 2003 STAT Ch 660.

“[W]hen doors are opened to women and girls, they will rush through.”¹

I. INTRODUCTION

Signed into law by President Nixon over thirty years ago, Title IX of the Educational Amendments of 1972 mandates equality in athletics at educational institutions receiving federal financial assistance.² Since the passage of Title IX, women and girls across the nation have benefited from increased opportunities to play sports, receive scholarships, and obtain other important advantages that flow from participation in athletics.³ The impact of the legislation is staggering: although fewer than 294,000 girls competed in high school sports prior to the enactment of Title IX, today at least 2.8 million girls participate in school-sponsored athletic programs.⁴ In addition, opportunities for women to participate in intercollegiate athletics have risen dramatically, increasing from fewer than 32,000 participants in 1972 to 163,000 participants today.⁵

Although credited with the tremendous increase in women's athletics, Title IX has been criticized by female and male athletes alike.⁶ Women's sports advocates assert that discrimination persists despite Title IX's equality mandate.⁷ Similarly, the California Legislature asserts that male athletes are offered more opportunities to participate in sports, as well as greater encouragement and assistance from educational institutions.⁸ In contrast, male sports enthusiasts

1. CAL. EDUC. CODE § 66271.6(h) (enacted by Chapter 660).

2. 20 U.S.C.A. § 1681(a) (West 2000).

3. See U.S. Department of Education, Charter-Secretary's Commission on Opportunity in Athletics, at <http://www.ed.gov/about/bdscomm/list/athletics/charter.html> (last visited Apr. 4, 2004) (copy on file with the *McGeorge Law Review*) (discussing the purpose of the Secretary of Education's Commission on Opportunity in Athletics).

4. CAL. EDUC. CODE § 66271.6(f) (enacted by Chapter 660).

5. *Id.*

6. See *infra* Part IV.

7. CAL. EDUC. CODE § 66271.6(j) (enacted by Chapter 660) (noting that women comprise 53% of the student body at Division I colleges but “only receive 41% of the opportunities to play sports, 36% of the athletic operating budgets, and 32% of the money to recruit new athletes”).

8. See *id.* § 66271.6(l). Section 66271.6(1) states:

These inequalities include, but are not limited to, all of the following:

- (1) Participation rates for women and girls.
- (2) Number of sports offered.
- (3) Number of levels of teams.

claim that Title IX's enforcement mechanisms have created a de facto quota system, thereby violating the Equal Protection Clause.⁹ Studies demonstrate that educational institutions commonly reduce the number of men's sports programs in order to achieve equal male and female athletic opportunities.¹⁰ Confronted with the growing controversy, the U.S. Department of Education formed a fifteen member panel, the Commission on Opportunity in Athletics, to consider changes in Title IX's gender equity provisions.¹¹ Concerned that potential changes might adversely affect women's opportunities in athletics, Assembly Member Steinberg, along with several other members of the California Assembly and Senate, introduced AB 833 in order to retain the original protections of Title IX.¹²

II. LEGAL BACKGROUND

In 2002, the Commission on Opportunity in Athletics ("Commission") undertook an extensive review of Title IX, focusing primarily on the standards used to determine the availability of equal opportunities in athletics.¹³ After receiving input from expert panels as well as the general public, the Commission issued a report entitled "Open to All: Title IX at Thirty."¹⁴ The report consisted of

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- (4) Encouragement by spirit and band groups.
 - (5) Facilities.
 - (6) Locker rooms.
 - (7) Scheduling of games and practice times.
 - (8) Level of financial support by the district, school, booster club or clubs, and outside sponsors.
 - (9) Treatment of coaches.
 - (10) Opportunities to receive coaching and academic tutors.
 - (11) Travel and per diem allowance.
 - (12) Medical and training facilities and services.
 - (13) Housing and dining facilities and services.
 - (14) Scholarship money.
 - (15) Publicity.

Id.; see also Susan Swartz, "You Go" Girl May Become "You Went," SANTA ROSA PRESS DEMOCRAT, Feb. 11, 2003, at D1 (observing that girls often practice in the old gym, receive the boy's hand-me-down equipment, practice at the least desirable times, and are forced to buy their own uniforms while boys receive theirs for free).

9. See *infra* Part IV.B.

10. See Thomas S. Evans, *Title IX and Intercollegiate Athletics: A Primer on Current Legal Issues*, 5 KAN. J.L. & PUB. POL'Y 55, 60 (1996) (discussing the NCAA study that shows some men's sports have been eliminated).

11. See Notice of Establishment of the Secretary of Education Commission on Opportunity in Athletics, 67 Fed. Reg. 45,961 (July 5, 2002) [hereinafter Notice of Establishment] (discussing the purpose of the Secretary's Commission on Opportunity in Athletics).

12. See CAL. EDUC. CODE § 230(d) (amended by Chapter 660) (requiring public elementary and secondary schools to comply with the three-part test of Title IX as interpreted of January 1, 2003); *Id.* § 66271.8(f)-(g) (enacted by Chapter 660) (requiring public post secondary schools to comply with the three-part test of Title IX as interpreted on January 1, 2003).

13. See Notice of Establishment, *supra* note 11 (announcing the establishment and purpose of the Secretary of Education's Commission on Opportunity in Athletics).

14. See U.S. Department of Education, Paige Issues Statement Regarding Final Report of Commission on Opportunity in Athletics, Feb. 26, 2003, at <http://www.ed.gov/PressRelease/02-2003/02262003a.html>

twenty-one recommendations, fifteen of which were unanimously agreed to by the commissioners.¹⁵ Although the Secretary of Education announced he would consider adopting only the unanimous recommendations, two commissioners dissented from the final report arguing that the recommendations were the result of a flawed procedure.¹⁶ The dissenting commissioners issued a “minority report,” asserting that several of the unanimous recommendations could pose major threats to athletic opportunities for women and girls by weakening existing Title IX protections.¹⁷ Concerned with the future of Title IX, a national coalition of organizations launched an educational campaign committed to maintaining current Title IX policies.¹⁸

In July 2003, the U.S. Department of Education announced that it would not substantially alter Title IX regulations.¹⁹ Instead, the Department chose to clarify the existing rules and to emphasize that “men’s teams should not be eliminated for the sake of Title IX equality.”²⁰ Women’s sports advocates hailed the announcement as a victory and thus the speculation ended . . . as to whether the Department of Education would weaken existing athletic equality protections.²¹ Although the urgent need for AB 833 appeared diminished, the California Legislature nonetheless enacted Chapter 660 in order to mitigate the effects of future changes to Title IX.²²

A. Existing Federal Law: Title IX

Title IX of the Education Amendments of 1972 provides that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²³ In 1979, the U.S.

[hereinafter Paige Statement] (copy on file with the *McGeorge Law Review*) (discussing the findings of the Commission on Opportunity in Athletics).

15. See *id.* (noting that the Department intends to move forward on the unanimous recommendations).

16. See *Minority Views on the Report of the Commission on Opportunity in Athletics* 18-20, Feb. 26, 2003, at www.savetitleix.com/minorityreport.pdf [hereinafter *Minority Report*] (copy on file with the *McGeorge Law Review*) (arguing that the procedure was flawed due to the Commission’s failure to focus on critical issues, complete evidence and expert testimony, a lack of representation of important constituencies, and insufficient time for Commissioners to review the report).

17. See *id.* at 12-18 (stating that the Commission’s recommendations could weaken Title IX by allowing educational institutions to comply with Title IX even if they fail to offer equal athletic opportunities to women and by allowing the Secretary of Education to consider changes to methods of Title IX compliance).

18. See *Save Title IX, About this Campaign*, at <http://www.savetitleix.com/coalition.html> (last visited June 17, 2003) (copy on file with the *McGeorge Law Review*) (listing supporting organizations).

19. Associated Press, *Title IX to Remain Virtually Unchanged Enforcement Rules to Be Clarified*, SAN DIEGO UNION-TRIBUNE, July 12, 2003, at A1 (referencing letter from Gerald A. Reynolds, Assistant Secretary of Education for Civil Rights, to Colleges and High Schools).

20. *Id.*

21. *Id.*

22. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 833, at 10 (Aug. 19, 2003).

23. 20 U.S.C.A. § 1681(a) (West 2000).

Department of Education issued the Title IX Policy Interpretation in order to provide a framework for compliance with Title IX's athletic program requirements.²⁴ The regulations fall into three categories: (1) equality of athletic financial assistance; (2) equality in other athletic benefits and opportunities, such as equipment, practice time, locker rooms, publicity, etc.; and (3) effective accommodation of student interests and abilities.²⁵

The effective accommodation provision requires institutions to select sports and levels of competition that effectively accommodate the interests and abilities of students of both sexes.²⁶ To comply with this requirement, an educational institution must meet at least one of the three criteria described in the Policy Interpretation²⁷ and later clarified by the U.S. Department of Education in 1996²⁸ and in 2003.²⁹ Known as the "three-part test," the educational institution must demonstrate one of the following: (1) substantial proportionality; (2) continuing program expansion; or (3) full accommodation.³⁰ To satisfy the first prong, an educational institution must demonstrate that intercollegiate participation opportunities for male and female students are substantially proportionate to their respective enrollments.³¹ If participation rates are not substantially proportionate, the second prong is satisfied if the institution can show both a history and continuing practice of program expansion that is responsive to the interests and abilities of the underrepresented sex.³² Lastly, if an institution cannot demonstrate compliance with the first two prongs, the third prong requires the institution to prove that the present athletic program fully and effectively accommodates the interests and abilities of the underrepresented sex.³³

B. Existing California Law

Although Title IX requires gender equality in athletics nationwide, the California Education Code regulates athletic participation at California elementary and high schools, community colleges, and state universities as well. California's Sex

24. Title IX of the Education Amendments of 1972; The Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

25. *Id.* at 71,414.

26. *Id.*

27. *Id.* at 71,418.

28. U.S. Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test, (Jan. 16, 1996), at <http://www.ed.gov/offices/OCR/docs/clarific.html> [hereinafter The Clarification] (copy on file with the *McGeorge Law Review*).

29. U.S. Department of Education, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003), at www.ed.gov/offices/OCR/title9guidanceFinal.html (copy on file with the *McGeorge Law Review*).

30. *Id.*

31. Title IX of the Education Amendments of 1972; The Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,418.

32. *Id.*

33. *Id.*

Equity in Education Act requires public elementary and secondary schools to offer equal participation opportunities to both male and female students in physical education activities.³⁴ If a school fails to provide equal opportunity, it cannot receive public funding.³⁵ Existing provisions of the Education Code also require community colleges to offer equal participation opportunities to male and female students in physical education activities and college athletics.³⁶ Community colleges must apportion public funds for athletics equitably, allowing for the differing costs of the various athletic programs.³⁷ Like public elementary and secondary schools, if the community college fails to provide equal opportunity to both sexes, it cannot receive public funding.³⁸ In addition, California State Universities must provide opportunities for participation in athletics on “as nearly an equal basis to male and female students as is practicable.”³⁹ Furthermore, existing law requires California State Universities to provide comparable incentives and encouragements to female and male athletes.⁴⁰

III. CHAPTER 660

Chapter 660 requires public elementary, secondary, and post-secondary educational institutions to effectively accommodate the athletic interests and abilities of both sexes.⁴¹ To demonstrate equal opportunities under state law, Chapter 660 requires educational institutions to comply with the three-part test established by Title IX: substantial proportionality, continuing program expansion, or full accommodation.⁴²

In addition, Chapter 660 requires all public post-secondary institutions to offer equal opportunities to both male and female students for participation in school-sponsored athletic programs.⁴³ The educational institutions must apportion funds available for athletics equitably between the sexes, allowing for the differing costs of various athletic programs.⁴⁴ If the institution’s athletic programs do not provide equal opportunities to both male and female athletes, the programs cannot receive public funding.⁴⁵ To determine if an educational

34. CAL. EDUC. CODE § 221.5(e) (West 2002) (requiring participation in a particular physical education activity or sport, if required by students of one sex, to be available to students of each sex).

35. *Id.* § 221.7(a)-(b).

36. *Id.* § 66271.7(e)-(f) (West Supp. 2003).

37. *Id.* § 66271.7(g).

38. *Id.*

39. *Id.* § 89240 (West 2002).

40. *Id.*

41. *Id.* § 230(d) (amended by Chapter 660) (governing public elementary and secondary institutions); *id.* § 66271.8(c) (enacted by Chapter 660) (governing public post secondary educational institutions).

42. *Id.* § 230(d)(1)-(3) (amended by Chapter 660) (governing public elementary and secondary institutions); *id.* § 66271.8(c)(1)-(3) (enacted by Chapter 660) (governing public post secondary educational institutions).

43. *Id.* § 66271.8(a) (enacted by Chapter 660).

44. *Id.* § 66271.8(b).

45. *Id.*

institution has provided equal opportunities, Chapter 660 establishes a non-exclusive list of considerations.⁴⁶

IV. ANALYSIS OF CHAPTER 660

Chapter 660 codified Title IX's three-part test to provide a mechanism for determining whether educational institutions are providing equal opportunities to male and female students in athletics.⁴⁷ By adopting the three-part test, California intended to protect the gains women and girls have achieved under the federal legislation.⁴⁸

Although Chapter 660 declares that all three parts have been used successfully by educational institutions,⁴⁹ state and national controversy has surrounded the implementation of the test.⁵⁰ In California, concerns over the interpretation of the three-part test have developed due to the vagueness of the statutory language.⁵¹ In addition, while the California Legislature has asserted that the three-part test does not require "mirror image men's and women's sport programs,"⁵² critics assert that the test creates a de facto quota system.⁵³ However,

46. *Id.* Section 66271.8(b) states:

The factors considered when determining whether an educational institution has provided equivalent opportunity include, but are not limited to, all of the following:

- (1) Whether the selection of sports and levels of competition offered effectively accommodate the athletic interests and abilities of members of both sexes.
- (2) The provision of equipment and supplies.
- (3) Scheduling of games and practice times.
- (4) Selection of the season for a sport.
- (5) Location of games and practices.
- (6) Compensation for coaches.
- (7) Travel arrangements.
- (8) Per diem.
- (9) Locker rooms.
- (10) Practice and competitive facilities.
- (11) Medical services.
- (12) Housing facilities.
- (13) Dining facilities.
- (14) Scholarships.
- (15) Publicity.

Id.

47. See SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 833, at 2 (July 2, 2003) (stating that Chapter 660 "establishes standards, almost identical to those currently in federal law, to determine if educational institutions are offering male and female students equal opportunities for participation in athletics").

48. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 833, at 2 (Apr. 23, 2003).

49. CAL. EDUC. CODE § 66271.6(i) (enacted by Chapter 660).

50. See *infra* Part IV.A-C. (discussing objections to the implementation of Title IX).

51. ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF AB 833, at 4 (Apr. 22, 2003).

52. CAL. EDUC. CODE § 66271.6(i) (enacted by Chapter 660).

the lawfulness of the test has been affirmed by every federal appellate court to consider the issue, including the Ninth Circuit.⁵⁴

A. *Federal Interpretation of the Three-Part Test Offers California Guidance*

Although some California legislators are concerned whether educational institutions are able to effectively interpret the three-part test,⁵⁵ a report issued by the U.S. Department of Education in 1996 (“Clarification”) may offer California schools guidance.⁵⁶ The Clarification provides general guidelines for adherence to the three-part test and is intended to provide schools with the flexibility and autonomy needed to structure individualized athletic programs.⁵⁷

Even though the first prong seemingly requires an equal ratio of athletic participation by each sex and student enrollment, the Clarification recognized that in some circumstances it would be unreasonable to achieve exact proportionality.⁵⁸ Consequently, in order to satisfy the first prong of the three-part test, an educational institution need only demonstrate substantial proportionality.⁵⁹ Therefore, compliance requires a case-by-case analysis of an educational institution’s individual circumstances, examining such factors as the size of the school’s student body and athletic program.⁶⁰ In addition, when the number of opportunities needed to achieve proportionality are not sufficient to sustain a viable team, a school may satisfy the substantial proportionality test nonetheless.⁶¹

The second prong, continuing program expansion, examines an educational institution’s remedial efforts to provide equal athletic opportunities to both male and female students.⁶² In order to demonstrate a history of expansion, the Clarification requires an institution to demonstrate a record of adding teams,

53. See, e.g., Jennifer Lynn Botelho, *The Cohen Courts’ Reading of Title IX: Does It Really Promote a De Facto Scheme?*, 33 NEW ENG. L. REV. 743 (1999) (arguing that the Cohen court’s interpretation creates a de facto quota scheme that violates the Equal Protection Clause).

54. See, e.g., *Neal v. Bd. of Trustees of the Cal. State Univ.*, 198 F.3d 763, 769-70 (9th Cir. 1999).

55. ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF AB 833, at 4 (Apr. 22, 2003).

56. See The Clarification, *supra* note 28 (discussing the methods of compliance with the three-part test).

57. CAL. EDUC. CODE § 66271.6(i) (enacted by Chapter 660); see National Woman’s Law Center, *Equal Opportunity for Women in Athletics: A Promise Yet to Be Fulfilled*, at http://www.nwlc.org/pdf/EOforWomeninAthletics_APromiseYettobeFulfilled.pdf (last visited 6/27/03) [hereinafter *A Promise Yet to Be Fulfilled*] (copy on file with the *McGeorge Law Review*) (arguing in a report to the Commission on Opportunity in Athletics that the Department of Education should retain the three-part test).

58. See The Clarification, *supra* note 28 (discussing methods of compliance with the first prong of the three-part test).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*; see, e.g., Julia Lamber, *Intercollegiate Athletics: The Program Expansion Standard Under Title IX’s Policy Interpretation*, 12 S. CAL. REV. L. & WOMEN’S STUD. 31 (Fall 2002) (arguing that good faith and expansion of women’s athletics is the key to Title IX compliance under the continuing program expansion standard).

increasing numbers of athletic participants, and responding to requests by students for additional sports.⁶³ To demonstrate continuing program expansion, a school must show a specific policy or procedure, effectively communicated to the student body, for requesting additional athletic opportunities.⁶⁴ In addition, consideration is given to any efforts by the school to monitor students' developing interests and abilities.⁶⁵ However, an institution cannot satisfy the program expansion standard by reducing opportunities for the overrepresented sex.⁶⁶

The third prong examines whether an educational institution has fully and effectively accommodated the interests and abilities of students of the underrepresented sex.⁶⁷ While disproportionately high athletic participation rates by one sex may indicate unequal athletic opportunities, an institution can satisfy the third prong if the imbalance is not the result of discrimination.⁶⁸ In order to determine whether students are fully accommodated, the Clarification requires schools to demonstrate that there is: (1) no unmet interest for a particular sport; (2) insufficient ability to sustain a team in the sport; and (3) no expectation of a competition team in the sport.⁶⁹

Although educational institutions, the U.S. Department of Education, and the federal courts have focused primarily on the substantial proportionality prong as the method for adherence to Title IX,⁷⁰ California schools may choose any of the three prongs to demonstrate compliance with the new gender equity laws.⁷¹ In fact, a recent case study by the U.S. Department of Education revealed that while one-third of educational institutions have demonstrated equality via the substantial proportionality prong, the other two-thirds complied under the continuing program expansion or full accommodation prongs.⁷² Therefore, California educational institutions have three viable methods for compliance with Chapter 660.

63. The Clarification, *supra* note 28.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See Evans, supra* note 10 (discussing recent developments in Title IX litigation).

71. ASSEMBLY COMMITTEE ON HIGHER EDUCATION, COMMITTEE ANALYSIS OF AB 833, at 2 (Apr. 22, 2003).

72. *See A Promise Yet to Be Fulfilled, supra* note 57 (citing a nationwide study by the Department of Education that reviewed seventy-four cases between 1994-1998 and found that twenty-one schools were held in compliance under the first test).

B. *The Lawfulness of the Three-Part Test*

Although Chapter 660 states that the three-part test does not impose quotas or entail preferential treatment,⁷³ opponents claim the test creates a de facto quota system that violates the Equal Protection Clause of the Constitution.⁷⁴ Critics argue that since a higher percentage of men are interested in sports, the proportionality test decreases athletic opportunities for men while providing needless opportunities for women.⁷⁵ By allocating resources to the as-yet-unmet interests of women, while neglecting the unmet interests of men, the three-part test treats male and female athletes differently on the basis of sex.⁷⁶

However, Title IX's legislative history, indicate that the plain language of the three-part test prohibits the use of quotas, statistical balancing, or any other form of reverse discrimination.⁷⁷ Likewise, courts have consistently dismissed Equal Protection claims, reasoning that the substantial proportionality prong does not require preferential treatment or statistical balancing.⁷⁸ Rather, the test merely creates a presumption of Title IX compliance when a school achieves substantial proportionality.⁷⁹ Furthermore, because a school may also achieve compliance via the other two prongs, courts have reasoned that the three-part test as a whole does not create a quota system.⁸⁰

C. *Have Men's Sports Suffered?*

Since the enactment of Title IX and the three-part test, statistics reveal that men's opportunities to participate in sports have increased.⁸¹ For example, boy's athletic participation rates in California high schools have increased 8.2% over the past three years.⁸² Men's intercollegiate participation has risen nationwide as well, from 169,800 in 1981-82, to 208,866 in 2000-01.⁸³ Despite the rise in men's athletics, opponents argue that the three-part test forces schools to cut men's

73. CAL. EDUC. CODE § 66271.6(i) (enacted by Chapter 660).

74. See Botelho, *supra* note 53, at 778 (arguing that the three-part test, as misinterpreted by the courts, creates a quota system which violates the Equal Protection Clause of the Fourteenth Amendment).

75. See *id.* (noting that, on average, a higher percentage of men than women try out for sports).

76. Cohen v. Brown Univ., 101 F.3d 155, 195 (1st Cir. 1996) (Torruella J., dissenting).

77. David Klinker, *Why Conforming with Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J. SPORT L. 73, 84-85 (2003).

78. Kelley v. Bd. of Trs., 35 F.3d 265, 271 (7th Cir. 1994).

79. *Id.*

80. *Id.*

81. See A Promise Yet to Be Fulfilled, *supra* note 57, at 12 (reporting that both the number of male athletes as well as the number of men's teams have increased in recent years).

82. CAL. EDUC. CODE § 66271.6(g) (enacted by Chapter 660).

83. See National Woman's Law Center, Title IX and Men's "Minor Sports:" A False Conflict, at <http://www.nwlc.org/pdf/minor.may02.pdf> (last visited July 8, 2003) (copy on file with the *McGeorge Law Review*) (arguing that Title IX should not be a scapegoat for men's minor sports' problems).

lower profile teams.⁸⁴ According to the NCAA, ninety-nine schools have recently discontinued men's wrestling programs, sixty-four have eliminated men's swimming, and over one hundred have eliminated men's gymnastics.⁸⁵ While many factors may have contributed to the reduction of men's sport opportunities,⁸⁶ some feel the three-part test has "hastened the demise of many men's programs."⁸⁷

However, the three-part test does not force educational institutions to limit men's opportunities in order to achieve equality.⁸⁸ Rather, educational institutions can comply with the test by providing additional athletic opportunities for women instead of reducing the number of men's sports.⁸⁹ In fact, of the "schools that added one or more women's teams between 1992 and 2000, seventy-two percent did so without discontinuing men's or other women's teams."⁹⁰ Opponents argue that many schools cannot afford to increase women's opportunities while retaining men's sports programs at current levels.⁹¹ However, schools may be able to support additional teams by reducing the expenditures of major men's sport programs.⁹² For example, men's football and basketball teams at Division I-A colleges consume seventy-two percent of the total men's athletic budget, leaving few resources for other men's sports.⁹³ By reducing expenditures, such as hotel rooms for football players the night before home games or mahogany paneling in the coaches' offices, and decreasing the size of traveling squads, many educational institutions could afford to retain minor men's sport teams.⁹⁴

84. See *A Promise Yet to Be Fulfilled*, *supra* note 57 (stating that opponents are wrong in asserting that Title IX forces schools to cut lower profile teams).

85. See Evans, *supra* note 10, at 60 (discussing elimination of men's sports as a means of compliance with Title IX).

86. See *A Promise Yet to Be Fulfilled*, *supra* note 57, at 13 (noting the decline in male sports programs is due to several factors including lack of interest, liability considerations, poor performance, absence of competitors, etc.).

87. Evans, *supra* note 10.

88. See *A Promise Yet to Be Fulfilled*, *supra* note 57 (discussing how Title IX does not require schools to limit men's opportunities by cutting teams).

89. See Joseph D. Bower, *Title IX: Life After Cohen v. Brown*, *COLO. LAW.* 37, 41 (1998) (stating that the implication of *Cohen v. Brown* is that "[a]thletic departments are free to choose how they distribute their athletic opportunities and how they comply with Title IX"); see also Teresa M. Miguel, *Title IX and Gender Equity in Intercollegiate Athletics: Case Analyses, Legal Implications, and the Movement Toward Compliance*, 1 *SPORTS LAW. J.* 279, 301 (1994) (stating that the better way to achieve gender equity is to increase the number of female teams and athletes).

90. *A Promise Yet to Be Fulfilled*, *supra* note 57, at 12.

91. See Charles P. Beveridge, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 *U. ILL. L. REV.* 809, 812 (1996).

92. See Miguel, *supra* note 89 (suggesting methods of achieving Title IX compliance in light of recent litigation); see also National Woman's Law Center, *Debunking the Myths About Title IX and Athletics*, at http://www.nwlc.org/pdf/DebunkingTheMyths_June2002.pdf (last visited June 26, 2003) (copy on file with the *McGeorge Law Review*) (discussing how San Diego State University chose to cut the men's volleyball team in order to address its two million dollar budget deficit instead of reducing the five million dollar football budget).

93. *A Promise Yet to Be Fulfilled*, *supra* note 57, at 15.

94. *Id.*

D. *Is Equality Necessary?*

Opponents argue Chapter 660's three-part test requires schools to provide inflated opportunities for female athletes, thus assuming that women and girls are inherently less interested in sports than men.⁹⁵ However, courts have recognized that women's lower rate of participation in athletics is a result of their "historical lack of opportunities to participate in sports."⁹⁶ As the court explained, "[i]nterest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience."⁹⁷ Furthermore, the court noted that the extraordinary growth in women's athletics since the enactment of Title IX demonstrates that when women and girls are given the opportunity to play, they eagerly participate.⁹⁸

In addition, offering equal athletic opportunities to women and girls is essential to their physical and psychological well-being.⁹⁹ Studies demonstrate that athletic participation has greatly benefited women and girls, leading to increased academic success, improved physical and physiological health, responsible social behavior, enhanced inter-personal skills, and greater ability to attend college due to financial support through athletic scholarships.¹⁰⁰ Additional studies have demonstrated that female teenage athletes are less likely to become pregnant¹⁰¹ or to smoke cigarettes,¹⁰² and are more likely to graduate from high school.¹⁰³ In addition, women athletes experience lower occurrences of breast cancer,¹⁰⁴ graduate from college at higher rates,¹⁰⁵ and are better prepared for careers in the competitive business environment.¹⁰⁶

95. See Beveridge, *supra* note 91, at 832 (arguing that girls' lower athletic participation rates in elementary and secondary schools leave females less interested in college athletics).

96. Cohen v. Brown Univ., 101 F.3d 155, 178-79 (1st Cir. 1996).

97. *Id.* at 179.

98. *Id.*

99. See *infra* notes 101-106 and accompanying text (discussing the benefits of female participation in sports).

100. CAL. EDUC. CODE § 66271.6(e) (enacted by Chapter 660).

101. See Donna Lopiano, *Gender Equity: We Cannot Afford to Choose Between Our Sons and Our Daughters*, at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=116> (last visited July 8, 2003) (copy on file with the *McGeorge Law Review*) (stating that non-athletes had an eleven percent chance of becoming pregnant while athletes had only a five percent chance of pregnancy during teenage years).

102. See *id.* (noting that females with high participation in physical activity were significantly less likely to smoke cigarettes than those in moderate or low participation groups).

103. See *id.* (citing research that shows "girls who participate in sports are more likely to experience academic success and graduate from high school than those who do not").

104. See *id.* (indicating that "one to three hours of exercise a week over a woman's reproductive lifetime may bring a [twenty to thirty percent] reduction in the risk of breast cancer, and four or more hours of exercise a week can decrease risk to almost sixty percent).

105. See *id.* (citing a 2001 Division I NCAA study on graduation rates).

106. See *id.* (arguing that women without sports experience are disadvantaged in work environments).

V. CONCLUSION

Myles Brand, President of the National Collegiate Athletic Association, observed “[t]he irony, I am confident, has not escaped you. Why would it be that athletics—which embraces the concepts of fair play, teamwork, grace under pressure—would be one of the remaining areas of resistance to equity for men and women in higher education?”¹⁰⁷ Although Title IX has provided increased opportunities for women and girls in athletics, inequalities remain.¹⁰⁸ Advocates of gender equality in athletics assert that in light of the disparities, Title IX protections must be strengthened rather than weakened.¹⁰⁹ By codifying the three-part test, California legislators have ensured that female athletes will continue to receive equal opportunities in the future.¹¹⁰

Opponents of the three-part test argue that it creates an unconstitutional quota system, forces educational institutions to cut men’s teams, and creates inflated opportunities for female athletes.¹¹¹ However, courts have continually upheld the constitutional validity of the three-part test.¹¹² In addition, proponents note that three-part test should not serve as the scapegoat for reductions in men’s sports,¹¹³ because the three-part test does not require schools to reduce men’s athletic opportunities.¹¹⁴ Moreover, educational institutions may be able to afford existing men’s athletic programs if unnecessary expenditures are reduced.¹¹⁵ Lastly, proponents note that women are not less interested in sports.¹¹⁶ Rather, interest and ability in sports evolves as a “function of opportunity and experience.”¹¹⁷ As noted by Chapter 660, the extraordinary growth in women’s sports over the past thirty years confirms that ‘when doors are opened to women and girls, they will rush through.’¹¹⁸

107. Myles Brand, Title IX Seminar Keynote Address (Apr. 28, 2003), at www.ncaa.org/gender_equity/general_info/20030428speech.html (last visited June 17, 2003) (copy on file with the *McGeorge Law Review*).

108. See *supra* Part I (stating that discrimination persists despite the rise in athletic participation by women and girls since the enactment of Title IX).

109. See *supra* Part I (noting that discrimination still persists despite Title IX).

110. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 833, at 10 (Aug. 19, 2003).

111. See *supra* Parts IV.A-C. (discussing objections to the implementation of Title IX).

112. CAL. EDUC. CODE § 66271.6(i) (enacted by Chapter 660) (stating that the “lawfulness of the three-part test has been affirmed by every federal appellate court to consider the issue”).

113. See *supra* Part IV.C (discussing solutions to funding problems).

114. See *A Promise Yet to Be Fulfilled*, *supra* note 57, at 12 (discussing how Title IX does not require schools to limit men’s opportunities by cutting teams).

115. *Id.*

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

117. *Id.* at 179.

118. CAL. EDUC. CODE § 66271.6(h) (enacted by Chapter 660).