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Failing to Fund Fairly: Title IX Athletics Scholarships Compliance

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**FAILING TO FUND FAIRLY:
TITLE IX ATHLETICS SCHOLARSHIPS COMPLIANCE**

Barbara Osborne*

I. Introduction.....	83
II. Title IX and Athletics Scholarships	84
A. Regulations.....	85
1. Financial Aid	85
2. Athletics Regulations.....	86
B. 1979 Policy Interpretation	87
1. Scholarships.....	88
2. Equal Treatment	88
3. Equal Accommodation	89
C. U.S. Department of Education Letter to Bowling Green State University...90	
III. Current Status of NCAA Members’ Compliance with the Scholarships Regulations	90
IV. Potential Barriers to Compliance for NCAA Member Institutions	95
A. Lack of Legal Knowledge	95
B. Application of Gonyo v. Drake University	96
C. NCAA Financial Aid Bylaws	97
D. Insufficient NCAA Rules	101
E. The Title IX Compliance Formula for Financial Aid Itself.....	101
V. Equitable Recommendations for Improving Title IX and/or Title IX Compliance	102

I. INTRODUCTION

College athletics is at a critical junction in its evolution. Within the NCAA, Division I has restructured twice – first to give more power in association-wide governance to Division I,¹ then to shift the power within Division I to the autonomy conferences.² Student-athlete rights are regularly in the news and in the courts, as the foundational principle of amateurism is under

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¹ See Bill Bradshaw, Opening Remarks and Keynote Address at the 37th NACDA Convention (June 17, 2002), *available at* <http://www.nacda.com/convention/proceedings/2002/02keynote.html>.

² Michelle Brutlag Hosick, *Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure>

attack.³ Recently, the NCAA expanded its definition of an athletic scholarship to include cost of attendance⁴, but litigation is still pending claiming scholarships should only be regulated by the market.⁵ Most of the attention is focused on male student-athletes in the revenue producing sports of football and men's basketball who receive the most benefits but claim to be undercompensated.⁶ Meanwhile, female student-athletes have the same responsibilities as male student athletes – they go to classes, practice, compete, study, and lift weights – but are largely unnoticed. A total of \$2,856,102,747 in athletics scholarships was spent on student-athletes in 2014: \$1,537,611,729 to men and \$1,318,491,018 to women.⁷ Despite the enactment of Title IX of the Educational Amendments of 1972 prohibiting sex discrimination in any educational program or activity at institutions receiving federal funds, women's athletics remains underrepresented and underfunded.⁸ Failure of institutions to comply with the scholarships regulations is particularly egregious, as athletics scholarships provide access to higher education and participation in college athletics has lifelong benefits.⁹ As intercollegiate athletics continues to evolve, gender inequality should be prioritized, corrected and eliminated.

The purpose of this article is to examine the current status of Title IX compliance for NCAA Division I and Division II members with the financial aid regulations, to explain contributors to non-compliance, and to make recommendations for improving equity in awarding of athletics scholarships. First, Title IX regulations and other administrative guidance relevant to athletics scholarships are presented. The compliance status of NCAA Division I and II member institutions is then reported. Next, potential barriers to compliance, both in the Title IX regulations and the NCAA bylaws, are identified and discussed. Finally, recommendations to provide more equitable scholarships opportunities for student-athletes are proposed.

II. TITLE IX AND ATHLETICS SCHOLARSHIPS

Title IX of the Education Amendments of 1972 simply states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”¹⁰ This landmark

³ See *O'Bannon v. Nat'l Collegiate Athletics Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

⁴ THE NAT'L COLLEGIATE ATHLETIC ASS'N, DIV. I MANUAL, ARTICLE 15 (2016).

⁵ See *Jenkins v. Nat'l Collegiate Athletic Ass'n*, No. 3:14CV01678 (D.N.J. filed Mar. 17, 2014).

⁶ See *O'Bannon*, 7 F. Supp. 3d 955.

⁷ See Equity in Athletics Data Analysis, U.S. DEP'T OF EDUC. OFF. OF POSTSECONDARY EDUC., <https://ope.ed.gov/athletics/#/>.

⁸ *Id.*

⁹ See Erianne A. Weight et al., *The Value of Intercollegiate Athletics Participation from the Perspective of Former Athletes*, 17 INT'L J. SPORT MANAGEMENT 1 (2016); Peter Chalfin et al., *The Value of Intercollegiate Athletics Participation from the Perspective of Employers who Target Athletes*, 8 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 1 (2015); Erianne Weight et al., *Quantifying the Psychological Benefits of Intercollegiate Athletics Participation*, 7 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 390 (2014).

¹⁰ 20 U.S.C. § 1681.

civil rights legislation was needed to combat persistent sex discrimination in schools at all levels – from sex segregated classes in elementary schools, to mandatory sex segregated courses such as woodshop and home economics in junior high, to channeling girls into vocational classes like typing and boys into advanced science and math classes in high schools, to sex-biased admissions practices at colleges and universities.¹¹ The legislation is far-reaching as almost every educational institution, public and private, receives some type of federal funding.¹²

A. Regulations

In the three years following the enactment of Title IX, the U.S. Department of Health, Education and Welfare (“HEW”) created regulations to provide schools with a framework for gender equity in their programs and activities.¹³ The regulations extend broadly, addressing recruitment, admissions, counseling, financial assistance, athletics, sex-based harassment, treatment of pregnant and parenting students, discipline, single-sex education, employment and retaliation.¹⁴ Two sections, §106.37 Financial Aid and §106.41 Athletics, are directly relevant to this research.

1. Financial Aid

Equitable distribution of financial assistance for students is addressed in 34 C.F.R. §106.37. Educational institutions that receive federal funding cannot discriminate on the basis of sex in awarding the amount or types of funding.¹⁵ Eligibility criteria for financial aid cannot be limited for any type of assistance, nor any source of funding.¹⁶ Schools are also not allowed to assist or facilitate outside organizations, such as foundations or trusts, which discriminate on the basis of sex.¹⁷ However, sex-restricted scholarships, fellowships or other types of aid provided by legal documents such as wills are allowed as an exception as long as the overall impact is not discriminatory.¹⁸

¹¹ See LINDA JEAN CARPENTER & VIVIAN ACOSTA, *Chapter Five: Title IX in Societal and Legislative Context*, in TITLE IX (Human Kinetics, 2005).

¹² Office for Civil Rights, *Title IX and Sex Discrimination*, U.S. DEP’T EDUC. (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (“Title IX applies to institutions that receive federal financial assistance from ED, including state and local educational agencies. These agencies include approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums. Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories and possessions of the United States.”).

¹³ 34 C.F.R. § 106.41.

¹⁴ See 34 C.F.R. §§ 106.21-106.61.

¹⁵ 34 C.F.R. § 106.37(a)(1).

¹⁶ *Id.*

¹⁷ 34 C.F.R. § 106.37(a)(2).

¹⁸ 34 C.F.R. § 106.37(b)(1).

Athletics scholarships are specifically addressed as well:

(1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and §106.41.¹⁹

“In proportion” is an essential phrase in the regulation. Title IX does not require schools to provide equal numbers of athletics scholarships, nor to provide equal amounts of funding for male and female athletes.²⁰ In order to comply, athletics scholarships must be distributed proportionally based on the percentage of men and women competing in athletics.²¹

2. Athletics Regulations

Section 106.41(a) reiterates the general language of Title IX as it relates to college athletics:

No 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 offered by a recipient, and no recipient shall provide any such athletics separately on such basis.²²

Section 106.41(b) encourages institutions to maintain co-ed athletic teams, and discusses how co-ed and single-sex teams should operate in regard to try-outs. Equal opportunity, as described in the regulations, is evaluated by the director of the athletics program and is based on a list of factors:

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

(2) The provision of equipment and supplies;

¹⁹ 34 C.F.R. § 106.37(c).

²⁰ 34 C.F.R. § 106.37(c)(1)-(2).

²¹ *Id.*

²² 34 C.F.R. § 106.41(a).

- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.²³

The financial aid and athletics regulations provide notice to educational institutions of HEW's expectations for gender equity. Financial aid is a critical component of access to education, and the "laundry list" of athletics program factors directly impacts the value of the student's athletics experience. Elementary schools were expected to be in compliance within one year, high schools within two years, and colleges and universities within three years of publication of the regulations.²⁴

B. 1979 Policy Interpretation

The promise of equal opportunity in athletics yielded amazing results.²⁵ From 1972 to 1978, the number of female high school athletes grew from 300,000 to more than 2 million.²⁶ Women's participation in intercollegiate athletics doubled from 32,000 participants in 1971 to more than 64,000 participants in 1977.²⁷ Educational institutions were still unsure how to comply with the regulations, and HEW was flooded with hundreds of complaints.²⁸ In response, HEW issued a policy interpretation in 1979 specifically focused on the application of Title IX to athletics.²⁹ The Policy Interpretation clarifies the factors set out in the Regulations, and explains the standards the Office for Civil Rights utilizes to determine whether an institution is in compliance.³⁰ The Policy Interpretation was divided into three sections: scholarships, equal treatment, and

²³ 34 C.F.R. § 106.41(c)(1)-(10).

²⁴ 34 C.F.R. § 106.41(d).

²⁵ MATTHEW J. MITTEN ET AL., *SPORTS LAW: GOVERNANCE AND REGULATION* 148 (2d ed. 2016).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

³⁰ *Id.*

equal accommodation.³¹ Athletics scholarships and equal accommodation in meeting the interests and abilities of male and female students are of particular relevance to this research.

1. Scholarships

Athletics departments “must provide reasonable opportunities for such award . . . [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics.”³² Proportionality is measured by comparing the total amount of scholarship aid made available to male and female athletes relative to their participation rates.³³ The athletic aid percentage comparison must result in proportionally equal amounts for an institution to be found in compliance.³⁴ It does not require equal dollar amounts to be spent for men and women, nor does it require equal numbers of athletics scholarships for men and women.³⁵ It is interesting to note that financial aid is the only category where compliance is measured in actual dollars rather than by comparing the benefit or experience of the student-athlete.³⁶ The Policy Interpretation allows for monetary disparity for legitimate non-discriminatory reasons, such as differences for in-state and out-of-state tuition costs as long as those disparities are not the result of institutional policies or practices in recruiting that discriminate on the basis of sex.³⁷ Similarly, although this regulation is measured by total dollars awarded, discriminatory packaging of aid in ways that favor athletes of one sex over another, such as full grants for football players and the same total funding in a package that includes grants and work study for field hockey players, is also a violation of Title IX.³⁸

2. Equal Treatment

The Policy Interpretation added two additional program components to the laundry list of items to be compared to determine whether male and female student-athletes have equivalent experiences: recruiting and support services.³⁹ Each line item on the list measures the quality and quantity of spaces, items, and services provided for the men’s athletics program as a whole and compares that

³¹ *Id.*

³² 34 C.F.R. § 106.37(c)(1).

³³ *Id.*

³⁴ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415. The comparison requires use of the number of unduplicated male and female participants; while men and women are counted as participants for each sport they play, scholarships are awarded per person, so each student-athlete may only be counted once.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,417 (to be codified at 45 C.F.R. pt. 26).

with the women's program as a whole.⁴⁰ Differences attributed to legitimate, non-discriminatory reasons, such as a travel policy that bases transportation options on mileage, will be noted as are differences necessary based on the needs of any specific sport.⁴¹ The key to compliance is whether male and female athletes have the same quality of athletics experience.

3. Equal Accommodation

Measuring equity in program components is unimportant if male and female students do not have equal opportunities to participate in athletics programs. The Policy Interpretation introduced the Three-Part test which provides three different ways for institutions to show they are effectively accommodating the athletics interests and abilities of both sexes:

- (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.⁴²

This research utilizes the proportionality ratio between scholarship dollars awarded to male and female athletes and the percentage of female athletes. While the laundry list of program factors is not directly measured in this study, the principle of equal treatment in the total quality of a student-athletes experience is considered in the application of scholarship funds and in crafting recommendations. Similarly, the Three-Part Test to prove equal accommodation is not measured, but the proportionality equation provided in the first part is used to calculate actual differences in real dollars in scholarships opportunities for male and female student-athletes.

⁴⁰ *Id.*

⁴¹ *Id.* at 71,415.

⁴² *Id.* at 71,418.

C. *U.S. Department of Education Letter to Bowling Green State University*

While the Policy Interpretation provided more clarity for colleges and universities in measuring equity within their athletics programs, there was still uncertainty whether any amount of scholarships disparity could exist for an institution to comply with the financial aid regulations.⁴³ In 1998, the Office for Civil Rights (“OCR”) investigated complaints against twenty-five institutions regarding financial aid and proportionate athletics aid.⁴⁴ One institution of the twenty-five, Bowling Green State University, was found to be out of compliance because the institution had an aid-to-participation disparity greater than one percent.⁴⁵ Bowling Green reached out to the Office for Civil Rights requesting clarification on athletic financial assistance to participation ratio percentage disparities.⁴⁶ The Office for Civil Rights responded through a letter from Dr. Mary Frances O’Shea, the National Coordinator for Title IX Athletics.⁴⁷ This letter was then forwarded to all colleges and universities in the form of a Dear Colleague Letter to clarify the measurement of substantial proportionality.⁴⁸ Mandating a 1% disparity in the ratio of financial aid dollars compared with the ratio of male to female athletes as the maximum allowable by OCR unless an acceptable nondiscriminatory reason for greater disparity exists is a pivotal clarification for Title IX compliance in intercollegiate athletics.⁴⁹ This research uses the 1% standard to measure compliance with the scholarships regulations.

III. CURRENT STATUS OF NCAA MEMBERS’ COMPLIANCE WITH THE SCHOLARSHIPS REGULATIONS

Evidence of Title IX scholarships compliance was collected by downloading the scholarships data for NCAA Division I and II institutions from the U.S. Department of Education website using the Equity in Athletics Data Analysis Cutting Tool.⁵⁰ Each year, institutions sponsoring intercollegiate athletics that receive Title IV funding from their participation in federal student aid programs are mandated to provide information to the U. S. Department of Education Secretary.⁵¹ This process was mandated by the Equity in Athletics

⁴³ See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUCATION, DEAR COLLEAGUE LETTER: BOWLING GREEN STATE UNIVERSITY (July 23, 1998), <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html> (providing further guidance on Title IX requirements for athletic scholarships).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Letter from Dr. Mary Frances O’Shea, Nat’l Coordinator for Title IX Athletics, U.S. Dep’t of Educ., to Nancy S. Footer, Gen. Counsel, Bowling Green State Univ. (July 23, 1998), *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Equity in Athletics Data Analysis, U.S. DEP’T OF EDUC. OFF. OF POSTSECONDARY EDUC., <https://ope.ed.gov/athletics/#/>.

⁵¹ 34 C.F.R. § 668.47.

Disclosure Act (EADA) enacted on October 20, 1994 as a part of the Improving America's School Act of 1994 (IASA) Public Law 103-382.

Data was gathered for 664 total schools: 348 NCAA Division I and 316 Division II member institutions.⁵² Scholarships compliance was measured by comparing the proportion of scholarship dollars spent by gender to the proportion of unduplicated male and female student-athletes at each institution as required by the Title IX regulations.⁵³

Of the 644 NCAA member institutions offering athletics scholarships, only 99 schools (15.37%) were in compliance with the scholarships regulations.⁵⁴ The percentage disparity ranged from an institution overfunding male student-athletes by 14.97 to an institution overfunding female student-athletes by 34.25%!⁵⁵ Almost a quarter of the institutions (n=142, 22.05%) were not in compliance by overfunding male student-athletes, but more than 6 out of every 10 institutions (n=402, 62.42%) is providing disproportionate scholarships funding for female athletes.⁵⁶ Only 40 institutions provided more than 5% more funding for male student-athletes, while 231 institutions were above the 5% threshold in exceeding proportionality for female student-athletes.⁵⁷ Figure 1 illustrates the compliance with scholarships funding regulations for all NCAA Division I and II institutions in a scatterplot.

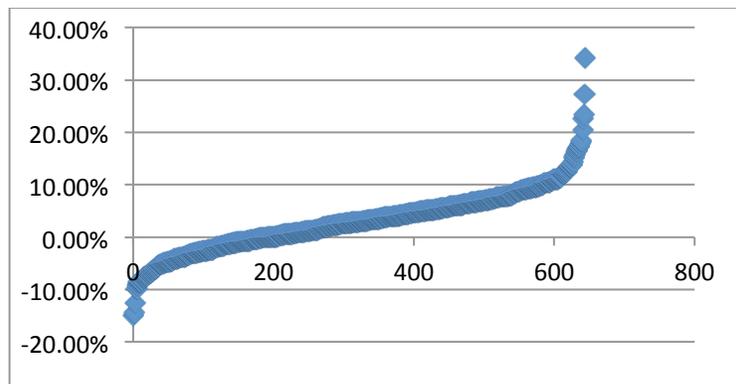


Figure 1. Total Scholarships Provided by NCAA Member Institutions (2014)

For Division I Football Bowl Subdivision (FBS) schools, only 32 schools (n=127, 25.20%) were in compliance with the scholarships regulations.⁵⁸ The percentage disparity ranged from an institution overfunding male student-athletes by 14.97% to an institution overfunding female student-athletes by 10.30%.⁵⁹ Just over half of the institutions (n=68, 53.54%) were not in compliance by overfunding male student-athletes, and only 1 in 5 institutions (n=27, 62.42%) is

⁵² Equity in Athletics Data Analysis, *supra* note 53.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

providing disproportionate scholarships funding for female athletes.⁶⁰ Figure 2 provides a scatterplot illustrating the compliance with scholarships funding for NCAA Division I FBS institutions.

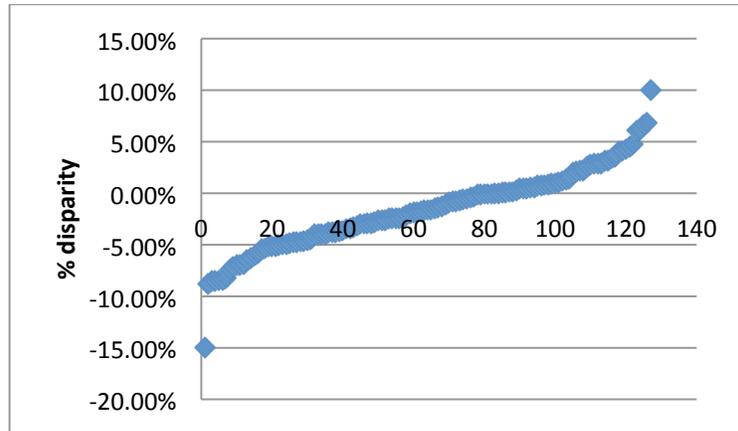


Figure 2: NCAA Division I FBS Title IX Scholarships Regulations Compliance

Of 114 Division I Football Championship Subdivision (FCS) schools, only 23 schools were in compliance with the scholarships regulations.⁶¹ The data for the eight Ivy League institutions⁶² were removed from the population, as the Ivy League members do not offer athletics scholarships to their student-athletes. The percentage disparity ranged from an institution overfunding male student-athletes by 9.72% to an institution overfunding female student-athletes by 27.33%.⁶³ Almost a quarter of the institutions (n=28, 24.56%) were not in compliance by overfunding male student-athletes, and over half (n=63, 55.26%) are providing disproportionate scholarships funding for female athletes.⁶⁴ Figure 3 provides a scatterplot illustrating the compliance with scholarships funding for NCAA Division I FCS institutions.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² The Ivy League institutions are Brown University, Columbia University, Cornell University, Dartmouth University, Harvard University, the University of Pennsylvania, Princeton University, and Yale University.

⁶³ Equity in Athletics Data Analysis, *supra* note 53.

⁶⁴ *Id.*

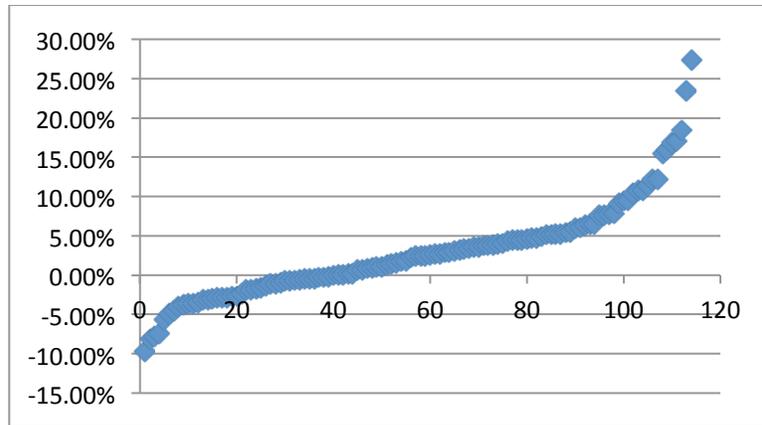


Figure 3. NCAA Division I FCS Title IX Scholarships Regulations Compliance

The remaining NCAA Division I institutions (n=97) do not sponsor football.⁶⁵ Six institutions (6.19%) were in compliance with the scholarships regulations.⁶⁶ The percentage disparity ranged from an institution overfunding male student-athletes by only 3.15% to an institution overfunding female student-athletes by 34.25%.⁶⁷ Only 5 schools (5.15%) were not in compliance by overfunding male student-athletes, and 86 (88.66%) are providing disproportionate scholarships funding for female athletes.⁶⁸ Figure 4 provides a scatterplot illustrating the compliance with scholarships funding for NCAA Division I institutions without football teams.

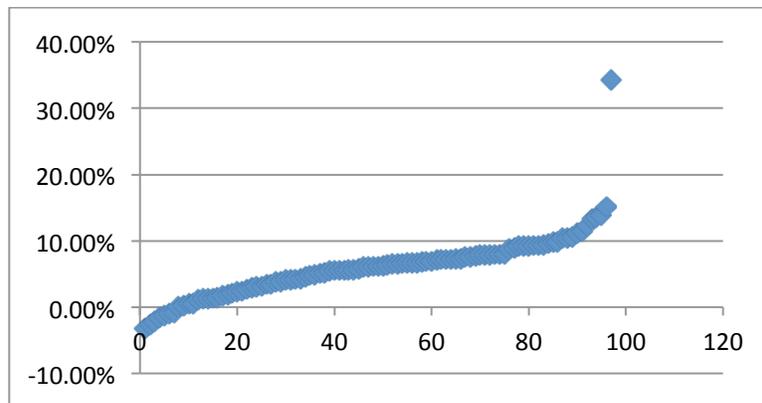


Figure 4. NCAA Division I without Football Title IX Scholarships Regulations Compliance

Of the NCAA Division II institutions sponsoring football, 20 of the 166 schools (12.05%) were in compliance with the scholarships regulations.⁶⁹ The percentage disparity ranged from an institution overfunding male student-athletes by 14.40%

⁶⁵ *Id.*
⁶⁶ *Id.*
⁶⁷ *Id.*
⁶⁸ *Id.*
⁶⁹ *Id.*

to an institution overfunding female student-athletes by 20.47%.⁷⁰ Male student-athletes were advantaged by 28 schools (16.87%), while almost three-quarters of the members (n=118, 71.08%) provided disproportionate scholarships funding for female student-athletes.⁷¹ Figure 5 illustrates NCAA Division II football institutions compliance with the scholarships regulation.

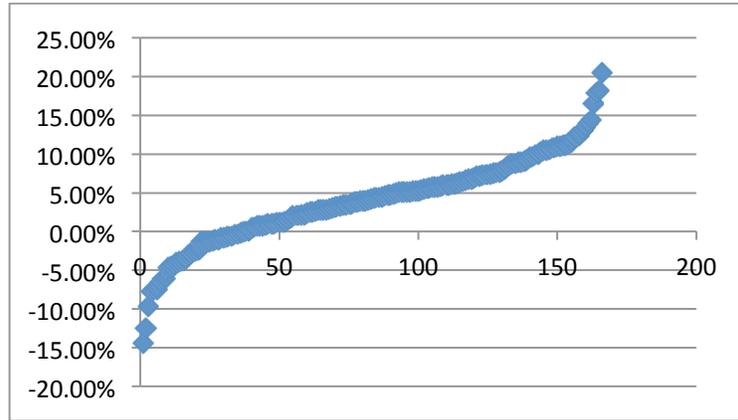


Figure 5. NCAA Division II Football Institutions Title IX Scholarships Regulations Compliance

There are 140 Division II member institutions without football programs.⁷² Only eighteen institutions (12.86%) were in compliance with the scholarships regulations. The percentage disparity ranged from an institution providing 9.14% more scholarships funding for male student-athletes to an institution providing 22.69% more scholarships funding for female student-athletes. Male student-athletes were advantaged by only fourteen schools (10%), while more than three-quarters of the institutions (n=108, 77.14%) provided disproportionate scholarships funding for female student-athletes. Figure 6 illustrates NCAA Division II without football member institutions compliance with the scholarships regulation.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

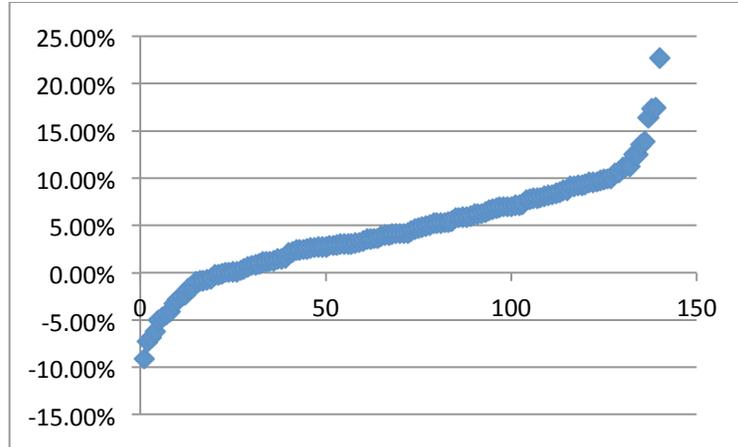


Figure 6. NCAA Division II Institutions Without Football Title IX Scholarships Regulations Compliance

It is apparent that a large number of NCAA member institutions are providing disproportionate athletics scholarship funding to female athletes. However, only Division I and Division II institutions without football are actually spending more net scholarships dollars on female student-athletes than males. Table 1 provides the total spending figures for each subcategory.

Table 1. Total Scholarships Spending for NCAA Division I and II Institutions

	Men	Women	Difference
Division I FBS	\$670,625,234	\$516,864,270	(\$153,760,964)
Division I FCS	\$330,819,931	\$265,514,226	(\$65,305,705)
Division I w/o Football	\$197,045,819	\$259,938,629	\$62,892,810
	\$1,198,490,984	\$1,042,317,125	(\$156,173,859)
Division II with football	\$218,805,148	\$143,372,578	(\$75,432,570)
Division II w/o football	\$120,315,597	\$132,801,315	\$12,485,718
	\$339,120,745	\$276,173,893	(\$62,946,852)
Grand Totals	\$1,537,611,729	\$1,318,491,018	(\$219,120,711)

IV. POTENTIAL BARRIERS TO COMPLIANCE FOR NCAA MEMBER INSTITUTIONS

A. Lack of Legal Knowledge

One potential explanation for the lack of compliance by the overwhelming majority of NCAA member institutions is simply a lack of knowledge of the law. While most individuals involved in college athletics are quite familiar with the term “Title IX,” few have more than elementary knowledge that the statute

protects against sex discrimination in athletics.⁷³ Research conducted by Weight and Staurowsky revealed a majority of NCAA college coaches do not possess basic knowledge of the application and extent of Title IX.⁷⁴ Furthermore, less than half of the study participants learned about Title IX through reliable educational mediums, while the majority attributed the media as their primary source of Title IX information.⁷⁵

Another potential explanation for lack of compliance with the scholarships regulations could be confusion regarding the standard for “substantial proportionality.” While only 99 of 664 NCAA Division I and II member institutions (15%) were in compliance with the 1% standard, another 273 institutions (41%) were within the 5% range. Given the lack of knowledge of Title IX standards previously described,⁷⁶ it may be unlikely coaches and athletics administrators are familiar with the Dear Colleague Letter issued almost twenty years ago explaining the standard to Bowling Green State University.⁷⁷ Failure to comply could be attributed to a lack of understanding in calculating the ratio of male to female student-athletes in comparison with the ratio of scholarship dollars awarded to male and female athletes. Similarly, coaches and administrators may be confusing the scholarships calculation with the proportionality calculation of the three-part test⁷⁸ and comparing the ratio of scholarship dollars to the ratio of male and female students in the undergraduate student population.

B. *Application of Gonyo v. Drake University*⁷⁹

A decision awarding summary judgment to Drake University on a reverse discrimination claim relative to scholarships compliance may provide justification for institutions that are over-awarding athletics scholarships for women. Drake University chose to discontinue wrestling because of budget cuts. The wrestlers filed a lawsuit, making the claim male athletes were being discriminated against under Title IX because female athletes were receiving disproportionately more scholarship funding, and eliminating wrestling would further exacerbate the disparity. In awarding summary judgment to the university, the district court explained the paramount goal of Title IX is to create equal opportunity to participate.⁸⁰ The university was not providing proportionate opportunities for

⁷³ See Erianne A. Weight & Ellen J. Staurowsky, *Title IX Literacy Among NCAA Administrators and Coaches: A Critical Communications Approach*, 15 INT’L J. SPORT MGMT., 257, 257–85 (2014); Ellen J. Staurowsky & Erianne A. Weight, *Title IX Literacy: What Coaches Don’t Know and Need to Find Out*, 4 J. INTERCOLLEGIATE SPORT, 190, 190–209 (2011).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ See Mary Frances O’Shea, Assistant Secretary for the Office for Civil Rights, Dear Colleague Letter: Bowling Green State University (July 23, 1998), <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

⁷⁸ See Title IX Policy Interpretation and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (proposed Dec. 11, 1979).

⁷⁹ *Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa, Mar. 10, 1995).

⁸⁰ *Id.* at 1005.

female athletes, so encouraging greater athletics participation by offering scholarships to women was consistent with the paramount goal of Title IX.⁸¹

C. NCAA Financial Aid Bylaws

The NCAA's rules regarding the awarding of athletics scholarships may contribute to the inequities observed in the data set. The practice of awarding athletics scholarships began soon after intercollegiate competition became established.⁸² Southern schools were credited with institutionalizing the practice in the 1950s to be more competitive with the Big Ten and Ivy League athletics programs.⁸³ In 1973, as the NCAA federated, scholarship limits were established by division and sport. The NCAA gave little justification for the chosen scholarship limits. Since that time, minor adjustments have been made, primarily for budget purposes.

When a school chooses to belong to the NCAA, it voluntarily agrees to follow the association's rules, which in Division I is a 40-page manual of principles and bylaws.⁸⁴ The NCAA defines "financial aid" as "funds provided to student-athletes from various sources to pay or assist in paying their cost of education at the institution."⁸⁵ Athletically-related financial aid is "awarded on any basis that is related to athletic ability, participation or achievement."⁸⁶ Student-athletes may be awarded athletics scholarships to cover the cost of tuition,⁸⁷ student fees,⁸⁸ room and board,⁸⁹ books,⁹⁰ and other expenses related to the cost of attendance.⁹¹

Historically, schools were not allowed to provide student-athletes with financial aid beyond tuition, room and board, books, and fees.⁹² Student-athletes, primarily in Division I football and men's basketball, waged a campaign in the media and the courts claiming limitations on athletics scholarships were unfair. The student-athletes argued the limitations relative to the amount of revenue

⁸¹ *Id.* at 1006.

⁸² See RONALD A. SMITH, *SPORT AND SOCIETY: PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM 1-3* (2010).

⁸³ *Id.* at 89-94.

⁸⁴ See generally NCAA OPERATING BYLAWS, *in* DIVISION I MANUAL (2016).

⁸⁵ NCAA OPERATING BYLAWS, art. 15.02, *in* DIVISION I MANUAL (Financial Aid: Definitions and Applications) (2014).

⁸⁶ *Id.* art. 15.02.4.1

⁸⁷ *Id.* art. 15.02.2 (Cost of Attendance).

⁸⁸ *Id.* art. 15.2.1 (Tuition and Fees).

⁸⁹ *Id.* art. 15.2.2 (Room and Board).

⁹⁰ NCAA OPERATING BYLAWS, *supra* note 48, art. 15.2.3 (Books) (2014).

⁹¹ *Id.* art. 15.02.2.1. The cost of attendance is an institutional calculation mandated by federal regulation which can include indirect costs of attending a college or university such as school supplies, transportation, and miscellaneous personal expenses such as toiletries, clothing, and entertainment.

⁹² *Id.* art. 15.2.1.3. Note, since 2004 student-athletes with exceptional financial need have been able to receive a Pell Grant beyond the full value of an athletics scholarship and the institutional cost of attendance. See *Id.* art. 15.1.1

generated by these programs violated the Sherman Act.⁹³ In response to growing public pressure and on-going litigation, the NCAA Division I membership voted to expand total athletics scholarships packages to include the full cost of attendance beginning in August 2015.⁹⁴ The Ninth Circuit in *O'Bannon v. NCAA* ultimately decided the NCAA's former scholarships limits in Division I were a violation of the Sherman Act. The court held that extending the package to include full cost of attendance was less restrictive in the commercial marketplace while still honoring the NCAA's principle of amateur athletics.⁹⁵ While Division I colleges and universities have been offering athletics scholarships, including the cost of attendance, for the past two years, the data available on the Equity in Athletics Data Cutting Tool has not been updated since the 2014–15 calendar year. Future research should explore the impact of this new NCAA bylaw on compliance with the Title IX financial aid regulations.

To ensure fairness and an even playing field, the NCAA designates a maximum number of scholarships that may be awarded for each men's and women's sport.⁹⁶ These scholarships are categorized into two categories—head-count⁹⁷ and equivalency.⁹⁸ In head-count sports, each student-athlete counts as one full scholarship if he or she receives any kind of financial aid; most institutions will provide a full athletics scholarship up to the team limit. Table 2 illustrates the current NCAA head-count sports and scholarship limits for men and women in Division I.

Table 2. NCAA Head-Count Scholarship Limits

Men's Sports	Limit	Average Roster Size
Basketball	13	15.7
Football	85	118.4
<i>Total</i>	98	134.1

Women's Sports

⁹³ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1052–1061 (9th Cir. 2015); Second Amended Complaint- Class Action Seeking Injunction, *Jenkins v. NCAA*, No. 4:14-cv-02758-CW (N.D. Cal. Dec. 4, 2015).

⁹⁴ NCAA OPERATING BYLAWS, *supra* note 48, art 15.1.

⁹⁵ *O'Bannon*, 802 F.3d at 1079.

⁹⁶ NCAA OPERATING BYLAWS, *supra* note 48, art. 15.5.3 (Equivalency Sports)

⁹⁷ *Id.* art. 15.5.2.

⁹⁸ *Id.* art. 15.5.3.

Basketball	15	21.7
Gymnastics	12	18.6
Tennis	8	9.9
Volleyball	12	17.2
<i>Total</i>	<i>47</i>	<i>67.4</i>

The remaining NCAA sports are equivalency sports, meaning each team is allotted a limited number of athletics scholarships that can be divided among multiple student-athletes on each team.⁹⁹ All men's sports, other than the high visibility, revenue-producing football and men's basketball teams, are equivalency sports as are the majority of women's teams. Table 3 lists the NCAA equivalency sports and their associated limits on the number of scholarships.

Table 3. NCAA Equivalency Scholarship Limits

Men's Sports	Limit	Average Roster Size
Baseball	11.7	36.4
Cross Country/Track and Field	12.6	108.3
Fencing	4.5	23.3
Golf	4.5	10.5
Gymnastics	6.3	20.2
Ice Hockey	18	26.9
Lacrosse	12.6	47.8
Rifle	3.6	8.3
Skiing	6.3	11
Soccer	9.9	29.5
Swimming and Diving	9.9	33.3
Tennis	4.5	10.8
Volleyball	4.5	19.2
Water Polo	4.5	30.5
Wrestling	9.9	35.6
<i>Total</i>	<i>123.3</i>	<i>451.6</i>
Women's Sports		
Bowling	5	12
Cross Country/Track and Field	18	118.4
Equestrian	15	50
Fencing	5	21.3
Field Hockey	12	23.6

⁹⁹ *Id.*

Golf	6	8.9
Ice Hockey	18	25.2
Lacrosse	12	34.3
Rowing	20	80.8
Rugby	12	31
Sand Volleyball	6	18.3
Skiing	7	11.7
Soccer	14	29.9
Softball	12	21.6
Swimming and Diving	14	31.4
Triathlon	3.5	5.1
Water Polo	8	25.6
<i>Total</i>	<i>187.5</i>	<i>549.1</i>

Head-count and equivalency-count designations as well as the arbitrary limit on the number of scholarships per sport likely contribute to the lack of compliance by NCAA members with the scholarships regulation. There are more than twice as many head-count scholarship opportunities available for men as there are for women. This designation discrepancy may explain the imbalance of athletics scholarships, which favor male athletes at the FBS level, and favor female athletes at schools without football. While the number of head-count scholarship opportunities is not dispositive for lack of scholarships compliance, the disparity in experience for student-athletes who receive a full athletics scholarship compared to those who only receive a partial scholarship is significant. The lure of a full scholarship may contribute to the bloat in football rosters, even though many student-athletes never actually participate in a game. Conversely the lack of full-scholarships funding may limit equivalency sport athletes' access to higher education or reduce roster size since it is likely only student-athletes who log significant playing time will be willing to stay on a team instead of pursuing other college-related experiences or gainful employment. If the NCAA was serious about providing scholarships equity for male and female athletes, the head-count sports for women would include basketball, volleyball, cross country/track and field, soccer, softball, tennis, gymnastics and golf, which still only equals ninety-six full scholarship opportunities compared to the ninety-eight available in football and men's basketball.¹⁰⁰

For institutions not offering football programs, both the increased number of head-count scholarship opportunities for female athletes (forty-seven for women's head-count sports and only thirteen for men's basketball) and the slightly increased number of women's equivalency scholarships compared to the

¹⁰⁰ See generally ERIN IRICK, NAT'L COLLEGIATE ATHLETIC ASS'N, STUDENT-ATHLETE PARTICIPATIONS: NCAA'S SPORTS SPONSORSHIP & PARTICIPATION RATES REPORT 1981-82 – 2015-16, 8, <http://www.ncaapublications.com/productdownloads/PR1516.pdf>. The suggested list of women's sports is based on the current women's head count sports plus the next most popular sports offered by the NCAA membership. Current scholarship limits remained the same whether the sport is currently a head count or an equivalency count sport.

same sports for men likely explain the majority of Division I and II member institutions that disproportionately favor female athletes in Title IX scholarships compliance calculations. In order to be competitive, most institutions strive to fully fund their athletics teams to the NCAA allowed limit.

D. Insufficient NCAA Rules

While all educational institutions receiving federal funding are required to comply with Title IX, the lack of NCAA oversight or a mandate for Title IX compliance for its members, combined with the lack of knowledge relative to Title IX compliance previously discussed,¹⁰¹ may also contribute to the lack of compliance with the scholarships regulation. The NCAA Division I Manual identifies the Principle of Gender Equity¹⁰² as a core principle for the Association, but puts responsibility for compliance with the law strictly on each member institution.¹⁰³

E. The Title IX Compliance Formula for Financial Aid Itself

The Title IX regulation itself allows schools to perpetuate discrimination against female athletes because financial assistance is only measured in relation to the percentage of male and female athletes, and not holistically, relative to participation opportunities. Undergraduate student enrollment at NCAA Division I and II institutions averages a ratio of 54% female students to 46% male students. However, these athletics programs average 55% participation opportunities for male student-athletes and only 45% for females. Even if the average institution was in compliance with the athletics scholarships proportionality requirement by providing funding within 1% of the male-female student-athlete ratio, the real goal of equality is not met. Real female athletes are still denied access to higher education and the additional benefits of participation in college athletics because they have about 11% fewer athletics scholarship opportunities.

For example, Public University has an undergraduate population of 40% male students and 60 % female students. The athletics program offers participation opportunities for 46% male student-athletes and 54% female student athletes. Scholarships funding of \$2,820,000 goes to the male student-athletes and \$3,180,000 to the female student-athletes, which complies with the Title IX regulations as it is within 1% of the male-female student-athlete ratio. However, Public University is not in compliance with the participation opportunities regulation of Title IX¹⁰⁴ by providing 6% fewer spots on teams for women as

¹⁰¹ See Erienne A. Weight & Ellen J. Staurowsky, *Title IX Literacy Among NCAA Administrators and Coaches: A Critical Communications Approach*, 15 INT'L J. SPORT MGMT., 257, 257-85 (2014); Ellen J. Staurowsky & Erienne A. Weight, *Title IX Literacy: What Coaches Don't Know and Need to Find Out*, 4 J. INTERCOLLEGIATE SPORT, 190, 190-209 (2011).

¹⁰² NCAA CONST. art. 2.3, in DIVISION I MANUAL (2016).

¹⁰³ *Id.* art. 2.3.1.

¹⁰⁴ This assumption is based only on the proportionality prong of the three-part test in Title IX Policy Interpretation and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (proposed Dec. 11, 1979).

compared to the ratio of male and female undergraduate students. In real numbers, this translates to a failure to provide forty actual participation opportunities for women and \$360,000 in lost athletics scholarships.

When viewed on its own, the scholarships regulation appears equitable because funding is provided for an equally-proportionate percentage of male and female student-athletes. But when viewed holistically based on the requirement of the Title IX statute to prohibit sex discrimination, NCAA Division I and II member institutions are perpetuating discrimination against female student-athletes. It is discriminatory to provide inadequate participation opportunities which results in lost educational and financial opportunities. Women comprise an average of 43% of the student-athletes at NCAA Division I and II member institutions, and female athletes receive 46% of the scholarship dollars overall, which is at least 2% more than is equitable based on the Title IX scholarships regulations. However, because women are, on average, 54% of the undergraduate student population, participation opportunities are lagging by 11%. Instead of a 2% advantage to women in the athletics scholarships equation, there is now a net loss of 9% in scholarship funding, which translates into \$257,185,571 of lost opportunity for female student-athletes.¹⁰⁵

V. EQUITABLE RECOMMENDATIONS FOR IMPROVING TITLE IX AND/OR TITLE IX COMPLIANCE

The combined lack of compliance with the scholarships regulation, lack of fundamental Title IX knowledge by coaches and administrators, and lack of enforceable NCAA gender equity rules warrants mandatory Title IX education and training for all athletics department administrators, coaches and staff. The NCAA historically provided Title IX education through their Gender Equity Forum, that program has transitioned into the NCAA Inclusion Forum which addresses a broader range of topics for the membership.¹⁰⁶ This research indicates a need for the NCAA to create bylaws to require mandatory Title IX education and testing. Currently the NCAA requires a recruiting certification test to assure employees at member institutions are familiar with NCAA recruiting rules.¹⁰⁷ Given the expressed importance of the principle of gender equity¹⁰⁸ as a condition of employment at an NCAA member institution, every employee should participate in Title IX training and take a certification examination. As every

¹⁰⁵ All calculations based on the 2014 data provided *in* U.S. Department of Education Office of Postsecondary Education, Equity in Athletics Data Cutting Tool, <https://ope.edu.gov/athletics/#/>.

¹⁰⁶ NCAA Inclusion Forum at the Omni Providence Hotel in Providence, Rhode Island (forthcoming Apr. 21-23, 2017).

¹⁰⁷ NCAA OPERATING BYLAWS, *supra* note 47, art 11.5.1; *see* Recruiting (Certification) Test for Coaches (2017), <http://www.ncaa.org/student-athletes/resources/recruiting-calendars/recruiting-certification-test-coaches>.

¹⁰⁸ NCAA CONST. *supra* note 47, art. 2.3 (The Principle of Gender Equity).

educational institution is required to have a Title IX coordinator,¹⁰⁹ this training could happen in person on campus, or very easily in an online-module format.¹¹⁰

The current NCAA scholarships designations and limits could also be modified to provide more equitable experiences for male and female student-athletes. A potential solution could include increasing the number of women's sports with head-count scholarships (assuming full scholarships funding), which would significantly reduce scholarships funding inequities at institutions with football programs, but may exacerbate overfunding for female athletes at non-football member institutions. Head-count designations could be eliminated in favor of providing equivalency limits across all sports. This solution would spread the benefits and burdens of partial scholarships across all sports. Benefits of the equivalency model include providing some level of athletics scholarship funding for more student-athletes, while burdens include lower accessibility to education caused by lower levels of financial assistance per student-athlete. This burden could be addressed by allowing student-athletes to also accept need-based financial aid.

Title IX has been characterized as pragmatic feminism¹¹¹ and other pragmatic solutions to scholarships inequities should be explored. The original NCAA scholarship limits were financially motivated and based around limitations for football.¹¹² Slight reductions were made in the overall number of scholarships offered over time, but it wasn't until 1982 when women's sports were sponsored by the NCAA that four main rationales were adopted in determining scholarship limits: size of the prospective student-athlete pool, the inherent risk of injury in the sport, the competitive squad size, and/or the particular team scoring method.¹¹³ It may be time to replace the old rationales with pragmatic criteria applicable and equitable to all sport participants such as basing scholarships on the number of players in a starting line-up or rotation, average number of players who participate in a contest, or as a percentage of the number on the average roster.

Finally, it may be time for the Title IX scholarships calculation in the regulations to be updated. While basing compliance on substantial proportionality for male and female student-athletes may have been reasonable at the time the regulations were enacted in 1975, when very few athletics programs offered participation opportunities or athletics scholarships for women, colleges and universities have had forty-five years to provide equity. Every other measurable component of the athletics experience is calculated by the holistic impact of quality and quantity on the student-athlete; only the scholarships

¹⁰⁹ Designation of Responsible Employee, 45 C.F.R. § 86.8(a) (1972).

¹¹⁰ See, e.g., Association of Title IX Administrators, ATIXA, (2011–17), <https://atixa.org/events/training-and-certification/>.

¹¹¹ See generally Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 513–46 (2007); DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 143–68 (2010).

¹¹² NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE ANNUAL CONVENTION, 67th, 122–29 (1973); see also NAT'L COLLEGIATE ATHLETIC ASS'N, 1972–73 ANNUAL REPORTS 9–14 (1973).

¹¹³ NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE ANNUAL CONVENTION, 76th, 108, 108–09 (1982).

requirement is measured by dollars spent. Women have outnumbered men as undergraduates for decades, yet athletics opportunities still favor male athletes. A new scholarships compliance formula that integrates participation opportunities with the percentage of scholarships funding and the type of funding provided (full or partial scholarships) will better achieve the purpose of Title IX to provide equitable experiences for all student-athletes.