

Title IX Compliance: In the Name of Financial Stability or Gender Equality?

An In-Depth Review of Title IX and the University of Nebraska at Omaha Athletic Department's Compliance

Zachary W. Anderson

INTRODUCTION.....	33
I. History of Title IX.....	34
II. The Three-Prong Effective Accommodation Test.....	35
A. Prong One: Substantially Proportionate.....	35
B. Prong Two: Program Expansion.....	36
B. Prong Three: Underrepresented Sex's Interests Accommodated.....	37
III. Primary Benefits of Title IX.....	38
IV. Disadvantages of Title IX.....	39
V. University of Nebraska at Omaha's Title IX Compliance.....	41
CONCLUSION.....	44
APPENDIX: Porterville College Athletics Survey Fall 2001.....	45

INTRODUCTION

Glory, excitement, triumph, reward. These words describe the emotions associated with collegiate wrestlers just coming off their seventh national title in program history, including a three-year streak. Within four hours, these feelings of accomplishment and success are countered by unthinkable news—elimination of the wrestling program.¹ New emotions take over: disbelief, sadness, anger, loss. But emotions tend to overpower logic, particularly when they run from one extreme to another. However, this story is very real and recent for some; and surprisingly common in the realm of non-revenue sports in intercollegiate athletics. This is the story of the University of Nebraska at Omaha (UNO). In addition to dropping a national championship wrestling team in 2011, the school football team was also eliminated—another shock to many.²

Despite the shock and emotional response to the removal of men's athletic teams throughout the country, Title IX has been a tremendous opportunity for women to compete in intercollegiate athletics. In a wave of controversy throughout the nation universities are cutting men's intercollegiate athletic teams in order to come into Title IX compliance.³ The former captain of the University of Delaware track team, a team dropped because of Title IX, questioned the intent of Title IX by asking, "How did we ever get to a place where a program that is supposed to be about creating opportunities for women is now being used in a way to create no opportunities for women and to cut men?"⁴ Quick to allow anger and emotion to overpower coaches and student-athletes, Title IX has become a sensitive subject for some and a difficult standard for intercollegiate athletic departments to balance. Although the principles behind Title IX are

¹ *Id.*

² Henry J. Cordes, *Regents approve UNO's move to Division I, Summit League*, WORLD HERALD, March 25, 2011.

³ Matt Emch, *Title IX Causes Inequality*, THE HOYA, October 28, 2011.

⁴ Katie Thomas, *College Cut Men's Programs to Satisfy Title IX*, N.Y. TIMES, May 1, 2011.

honorable and good, it has caused many athletic departments to drop programs in the name of Title IX while actually being motivated by financial accounting.⁵

Notwithstanding the premise that many universities are motivated by financial accounting, rather than Title IX, in eliminating men's athletic teams, this paper first seeks to discuss the history of Title IX and how institutions are able to comply with it. After reviewing the history and implementation of Title IX, the second part is devoted to reviewing the benefits and disadvantages associated with Title IX. Finally, this paper reviews UNO's decision in seeking to comply with Title IX as a case study and argues that despite the conflict and difficulty involved in compliance, UNO's decision to drop football and wrestling was a reasonable and responsible choice for the university.

I. History of Title IX

In the 1960s, Congress faced a growing concern that colleges and universities were acting in a discriminatory manner towards women.⁶ In response to this growing concern in higher education, Congress assembled committees to write potential bills to overcome and eliminate such discrimination.⁷ As a result of Congress' efforts, on June 23, 1972, President Richard M. Nixon signed into law Title IX of the Education Amendments of 1972.⁸ Title IX states that "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."⁹ The National Collegiate Athletic Association (NCAA) did not support full implementation of Title IX, but rather supported "The Tower Amendment," which excluded men's football and basketball when determining if the male-female proportion for student-athletes was similar to the student body.¹⁰ Although the legislation did not specifically mention athletics, it did require the use of regulations to achieve gender equity in educational opportunities.¹¹ Despite this requirement, higher education institutions were unsure how Title IX would influence intercollegiate athletics and did not know how to maintain the standards and expectations required of them.¹² Regardless, universities throughout the country had a tremendous increase in women's participation in intercollegiate athletics because of the passing of Title IX.¹³

Recognizing the mass confusion Title IX caused in intercollegiate athletics, in 1975, Congress instructed the Secretary of Health, Education and Welfare (HEW) to effectuate regulations to clarify Title IX expectations.¹⁴ Although HEW continued to influence how universities were to comply with Title IX in intercollegiate athletics, universities still struggled with Title IX compliance and over one hundred discrimination complaints from across the nation were received from 1975 to 1979.¹⁵ In response to the complaints by universities as to the ambiguity of how best to comply with Title IX and to the student

⁵ Elisa Hatlevig, *Title IX Compliance: Looking Past the Proportionality Prong*, 12 Sports Law J. 87, 102 (2005). (Increasing the budget and expenditures for revenue sports causes universities to cut smaller, non-revenue sports because of financial stresses).

⁶ *Id.* at 89.

⁷ *Id.*

⁸ *Id.*

⁹ 20 U.S.C. § 1681(a) (1974).

¹⁰ Sara A. Elliott & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. Legal Aspects of Sport 1, 11 (2001).

¹¹ Hatlevig, *supra* note 6, at 89-90.

¹² Megan K. Starace, *Reverse Discrimination Under Title IX: Do Men Have a Sporting Chance?*, 8 Vill. Sports & Ent. L.J. 189, 190 (2001).

¹³ *Id.* at 189.

¹⁴ *Id.*

¹⁵ *Id.*

discrimination complaints, the Office for Civil Rights (OCR) issued a Policy Interpretation of Title IX in 1979.¹⁶ The Policy Interpretation developed a three-prong test for universities to ascertain whether they effectively accommodated the interest of students, particularly potential female student-athletes.¹⁷

II. The Three-Prong Effective Accommodation Test

For an athletic department to demonstrate compliance with Title IX, OCR determined that a university must satisfy one of the three standards:

(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 are underrepresented among intercollegiate athletics, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests 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 that sex have been fully and effectively accommodated by the present program.¹⁸

Of these three prongs, the first prong is generally the most relied upon by institutions because it is the easiest way to show compliance and can be numerically measured. This method is also preferred over the second and third prongs because it has received the most feedback and guidance in showing compliance. However, compliance under the second or third prongs may prove to be more beneficial for non-revenue men's sports because they do not encourage their elimination, but rather maintain current teams while continuously adding new programs.

A. Prong One: Substantially Proportionate

An institution can comply with Title IX by providing athletic opportunities substantially proportionate to the percentage of men and women enrolled full-time at the undergraduate level.¹⁹ Although this prong is one of three potential ways to show compliance, it is the most used by institutions to be compliant with Title IX.²⁰ The first prong is the most widely accepted compliance mode because it provides a "baseline" to measure potential discrimination and has been the most successfully tried and tested in comparison to the other prongs.²¹ This prong is considered to be the most successful for universities because it shows the interests of the students are being met if total student body enrollment matches athletic participation.²² Consequently, it is often regarded as a "safe harbor" from litigation and is the easiest, quickest, cheapest, legally foolproof way to comply with Title IX.²³

As a result of this substantial proportionality test, non-revenue men's athletic teams are bearing the Title IX burden, and universities have cut men's teams to become compliant.²⁴ From 1993 to 2003,

¹⁶ Elliott & Mason, *supra* note 11, at 8.

¹⁷ *Id.*

¹⁸ 44 Fed. Reg. 71413 at 71, 418 (1979).

¹⁹ Hatlevig, *supra* note 6, at 92.

²⁰ *Id.* at 91.

²¹ *Id.* at 96.

²² Elliott & Mason, *supra* note 11, at 9.

²³ *Id.*

²⁴ *Id.* at 10.

over 350 men's athletic teams at the university level were eliminated.²⁵ Although the OCR frowns upon this practice, it is not prohibited.²⁶ Consequently, the substantial proportionality prong has been regarded as a "gender-based quota system" and appears to promote reverse discrimination.²⁷ Illustrating the attitude of reverse discrimination, the OCR has totaled 21 complaints of reverse discrimination in the past two years.²⁸ To counter the elimination of men's sports, eliminated teams have brought reverse discrimination lawsuits against their respective universities or the Department of Education, alleging the substantial proportionality prong violates gender equity.²⁹ To date, no challenges have been successful in appellate courts and the Supreme Court has refused to grant certiorari on the issue.³⁰

Judge Donald E. Shelton of the Michigan Circuit Court thinks the substantial proportionality prong encourages universities to cut men's sports, which he believes does nothing for women.³¹ Judge Shelton further believes the utilization of this prong causes equally bad opportunities for men and women.³² Although the substantial proportionality test is not considered the most successful method to promote gender equity, experts and academia expect courts to continue to look to the substantial proportionality test to determine if universities comply with Title IX.³³

B. Prong Two: Program Expansion

A university will also be considered compliant with Title IX if the university is able to show that the respective athletic department is "demonstratively responsive" to the interest of the underrepresented sex.³⁴ If an institution chooses to comply with Title IX under this prong, the OCR will look to see how it has shown a "responsive" history of expansion and if it is a continuing response to expand according to students' interests.³⁵ Specifically, in a letter dated January 16, 1996, the OCR directed institutions that the second prong could not be met by "increas[ing] the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation for the overrepresented sex to a proportionately greater degree than for the underrepresented sex."³⁶ The same letter also explained that simply creating a new team for the underrepresented sex without follow up or review of the expanded program is insufficient to comply with prong two.³⁷

²⁵ David Klinker, *Why Conforming with Title IX Hurts Men's Collegiate Sports*, 13 Seton Hall J. Sports. L. 73, 73 (2003).

²⁶ Thomas, *supra* note 5.

²⁷ Elliott & Mason, *supra* note 11, at 10.

²⁸ Thomas, *supra* note 5.

²⁹ Elliott & Mason, *supra* note 11, at 10.

³⁰ Victoria Langton, *Stop the Bleeding: Title IX and the Disappearance of Men's Collegiate Athletic Teams*, 12 Vand. J. Ent. & Tech. L. 183, 196 (2009); *see also* Equity in Athletics, Inc. v. U.S. Dep't of Educ., 291 Fed. Appx. 517 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 1613 (2009); Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 383 F.3d 1047 (D.C. Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005); Kelley v. Bd. of Trs., 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).

³¹ *See* Klinker, *supra* note 26 at 81-82.

³² *Id.*

³³ *Id.* at 82.

³⁴ Hatlevig, *supra* note 6, at 93.

³⁵ *Id.*

³⁶ Letter from Norma Cantu, Assistant Sec'y for Civil Rights, Dep't of Educ., to Colleague, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan 16, 1996), <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>

³⁷ *Id.*

This prong has been considered problematic, however, because it has been less charted than the first prong and results in courts and universities being unguided.³⁸ The financial constraints placed on universities makes it nearly impossible for universities to prove they expanded women's athletic programs and, consequently, few universities have been equipped to expand their athletics programs for women to prove compliance under this prong.³⁹ Further, experts believe that this prong is requiring universities "to create demand where it simply doesn't exist."⁴⁰

B. Prong Three: Underrepresented Sex's Interests Accommodated

The third prong focuses on the accommodation of the underrepresented sex's interests and abilities. This prong is considered one of the most viable solutions to Title IX, but perhaps the most difficult to apply because of the difficulty it presents by maintaining a current program and meeting the needs of current interests and abilities of the underrepresented sex.⁴¹ This is perhaps regarded as one of the best options because it allows institutions to better assess financial needs and appropriately proportions the available money to programs with interested and able students.⁴² The OCR is able to determine noncompliance under the third prong by considering any of the following conditions: "(a) an unmet interest in a particular sport; (b) a sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team."⁴³ If any of these conditions have not been met, the institution has not effectively accommodated the represented sex as required by this prong.⁴⁴

One way for universities to assess whether an underrepresented sex's interests and abilities are accommodated is to have potential and current students answer a questionnaire to measure in which potential sports the underrepresented sex would want to participate.⁴⁵ (See attached appendix for sample survey). Upon interpreting the results of the survey, the university would then be expected to modify the sports offered at the university.⁴⁶ Naturally, if students showed little interest or regard for teams present at the university, the athletic department would then eliminate athletic teams without any repercussions from the OCR.⁴⁷ As desirable as this may appear, universities would struggle continuously to reconcile the wants and abilities of the student body because of the likely changing interests of students.⁴⁸

This prong may be more reasonable than the first prong because it will provide equal opportunities based on interests and abilities of students rather than required proportionalities equal to the student body.⁴⁹ Consequently, utilization of this prong would likely create opportunities that would actually be desired rather than forcing opportunities to be created that do not meet the interests of the student body.⁵⁰ Although prong three appears to be a reasonable option, similar to prong two, prong three has been problematic for universities to implement because courts have not interpreted it well.⁵¹ More notably, experts believe the OCR and courts have failed to provide any provisions to assess students'

³⁸ Hatlevig, *supra* note 6, at 91.

³⁹ Klinker, *supra* note 26, at 83.

⁴⁰ Emch, *supra* note 4.

⁴¹ Klinker, *supra* note 26, at 87.

⁴² *Id.*

⁴³ Cantu, *supra* note 37.

⁴⁴ *Id.*

⁴⁵ Klinker, *supra* note 26, at 86.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 87.

⁴⁹ *Id.* at 89.

⁵⁰ *Id.*

⁵¹ *Id.* at 84.

abilities and interests, making it nearly impossible for universities to know if they are in compliance with nonexistent parameters.⁵²

Looking to all three possibilities for compliance with Title IX, each university is given discretion how to best comply. Despite this discretion, the substantial proportionality test appears to be most popular because of the ease of application. Although this may be a viable option, the second and third prongs may be most beneficial to universities because it helps to avoid forcing an interest in sports that does not exist. Universities may be hesitant to attempt compliance with the second or third prong because of the lack of direction from the courts or the NCAA, but avoiding implementation by these measures may create more harm than good. Further, the students at their university will be more likely to see success and satisfaction with the university because a greater majority of student-athletes' interests would be maintained.

III. Primary Benefits of Title IX

Title IX has been reaching the intended objective for women since its enactment.⁵³ Women have been given more athletic participation opportunities, more equitable playing fields, more athletic scholarships, and higher salaries for coaches of women's teams.⁵⁴ To date, the NCAA sponsors nearly 1,000 more teams for women than for men.⁵⁵ Further, women's participation in sports helps to boost self-esteem and grades, develop leadership skills, and promote physical health.⁵⁶ To illustrate this concept, statistics show that four out of five former female college athletes working as executive businesswomen say the lessons learned in athletics contributed to their success in business.⁵⁷

Additionally, according to the NCAA Gender-Equity Task Force, Title IX benefits both men and women.⁵⁸ Specifically, the NCAA states that educational equity resulting from Title IX benefits all students because it helps create an environment encouraging learning and achievement.⁵⁹ As a result, Title IX has allowed men and women to receive equal treatment in providing: (1) equipment and supplies; (2) scheduling of games and practice times; (3) travel and daily allowance/per diem; (4) access to tutoring; (5) coaching; (6) locker rooms, practice, and competitive facilities; (7) medical and training facilities and services; (8) housing and dining facilities and services; (9) publicity and promotions; (10) support services; and (11) recruitment of student-athletes.⁶⁰

Ann Barton Crowe, a former swimmer at the University of Notre Dame, has recognized some of the benefits that Title IX has had on women's swimming. "Title IX has allowed swimming to develop into a pro sport for women. Without women's athletics taken seriously in the college arena, there would be no way female swimming could develop into the pro sport it's heading towards. Swimming has allowed women the ability to excel from grade school to high school and on to college."⁶¹ Additionally, Crowe believes that because swimming is a non-revenue sport, swimming would not be possible without Title IX. She further opined that Title IX encourages girls to compete in sports, stay focused in school, build self-confidence, and stay away from trouble, drugs, and underage drinking.⁶²

⁵² Hatlevig, *supra* note 6, at 96.

⁵³ *Id.* at 88.

⁵⁴ National Collegiate Athletic Association, *NCAA Gender- Equity Task Force Frequently Asked Questions*, 2011.

⁵⁵ Emch, *supra* note 4.

⁵⁶ Marcia D. Greenberger, *A Huge Win for American Girls and Women*, Press Release, July 11, 2003.

⁵⁷ *Id.*

⁵⁸ NCAA, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Interview with Ann Barton, former NCAA Athlete at University of Notre Dame.

⁶² *Id.*

One reason why Title IX has been so beneficial to women is that there has been an acceptance of women's participation in athletics. Studies have shown that sports participation enhances the status of females as well as of males in our society.⁶³ This status has come about because women's athletic participation has become accepted by society.⁶⁴ As a result, participation in intercollegiate athletics has led to greater social value.

According to Tom Jager, a former U.S. Olympic swimmer and coach of Washington State University women's swimming team, "There are so many opportunities for women in college sports today...These women work hard and deserve the opportunity to earn a scholarship."⁶⁵ Jager sees these opportunities for women to compete as a positive for women while also considering the need for universities to have individual Olympic sports, such as swimming, wrestling, and gymnastics.⁶⁶ Although universities cut these sports most commonly because of Title IX, Jager believes "the tide will change and these programs will come back."⁶⁷

The implementation of Title IX has influenced a change for women to seek more competitive opportunities and succeed in athletics, particularly as equal treatment has been provided. Moreover, growth of women's participation in intercollegiate athletics has been conducive to building women's confidence and increasing the social value for society. Through treating female athletes in a similar fashion as male athletes, universities are able to find great poise in their current student-athletes and alumni, which encourage potential student-athletes to seek athletic opportunities and success.

IV. Disadvantages of Title IX

Although Title IX has been a positive step for women's college sports, it has sounded a death knell for men's non-revenue sports. For example, between 1988 and 2002, the NCAA saw an addition of 442 programs and elimination of 616 programs on the Division I level.⁶⁸ Title IX has been considered problematic in intercollegiate athletics because the original law never mentions sports and the law does not hint at the necessity of meeting a quota.⁶⁹ Charlotte Hays, editor of *The Women's Quarterly*, regarded Title IX's goal to warrant equal opportunity, not to demand equal outcomes.⁷⁰ Illustrative of the difficulties associated with compliance with Title IX quotas is the situation that James Madison University faced in 2006 when it eliminated three women's programs and seven men's programs, a total of 144 athletes.⁷¹ In response to the number of discontinued programs at James Madison, Jim McCarthy, spokesman for the College Sports Council, stated his belief that conflict has come between the equality of opportunity and the equality of outcomes and that women have ample opportunities.⁷² The decision at James Madison is considered as part of the sweeping trend—unexpected by coaches and student-athletes,

⁶³ Sue M. Durrant, *Title IX—Its Power and Its Limitations: Title IX at Twenty*, *J. of Phys. Ed., Rec., and Dance*, 60, 61 (1992).

⁶⁴ *Id.*

⁶⁵ Interview with Tom Jager, Washington State University swimming coach.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Anthony Barranco and Lindsey Davison, *Women, men still unequal in sports despite Title IX attempts*, THE MANEATER, November 4, 2011.

⁶⁹ SAMUEL WALKER, CIVIL LIBERTIES IN AMERICA: A REFERENCE HANDBOOK 186 (2004).

⁷⁰ *Id.*

⁷¹ Bill Pennington, *At James Madison, Title IX is Satisfied, but the Students Are Not*, N.Y. TIMES October 7, 2006, http://www.nytimes.com/2006/10/07/sports/othersports/07madison.html?pagewanted=all._r=0.

⁷² Steve Nearman, *Title IX Enforcement hits James Madison hard*, WASHINGTON TIMES, October 29, 2006, <http://www.washingtontimes.com/news/2006/oct/28/20061028-115416-7089r/>.

ratified without any potential or pending lawsuits or complaints, and a drastic change in the make-up of the athletic department.⁷³

Since the implementation of Title IX in collegiate athletics through 2006, colleges have lost 80 swimming programs and 480 wrestling teams.⁷⁴ In addition, 18 gymnastics, 27 outdoor track, 39 tennis, and 53 men's golf teams were lost during the mid-1990s.⁷⁵ These sports are common targets because they are low on the spectator popularity scale and potentially need a large budget to stay afloat.⁷⁶ This is exemplified by the University of Washington's decision to cut both its men's and women's swimming programs to save \$1.2 million, and Massachusetts Institute of Technology elimination of eight sports to save \$1.5 million.⁷⁷ Although Title IX has benefitted women in collegiate sports, the interpretation and implementation of the act is where it has gone wrong.⁷⁸ The net effect has not been an increase in opportunities for women but a detriment to both women's and men's programs since cuts to both have occurred to achieve proportionality.⁷⁹

In another illustration of how Title IX influences swimming, many men's and women's swimming programs are linked together through shared coaching, shared practice times, shared facilities, and shared advertising.⁸⁰ As a result, when a men's team is cut, the women's program is severely hurt regarding team morale and recruiting.⁸¹ Even the rumor of a men's team being cut could affect the recruiting process.⁸² Colleges recruit coed athletes in order to raise the level of their team, making them harder to beat. Many women recruited for sports in which men and women compete usually look for a program where both sexes are present because coed practices can be more beneficial and competitive.

Many coaches believe that Title IX is unfair because universities cut men's programs if the school cannot afford to fund new women's programs.⁸³ Timothy Powers, former Brigham Young University head swimming coach of 37 years and former president of the College Swimming Coaches Association, stated, "This use of Title IX as a shield to justify the elimination of men's sports has taken place at the same time coaching contracts for football and basketball have reached into the millions of dollars...Broad based athletic programs that once fit into the educational objectives of higher education are being replaced by greed and protected by the law."⁸⁴ Men's sports such as golf, gymnastics, swimming, and wrestling generally take one to two percent of the budget.⁸⁵ These "savings" would not be enough to add a program. Instead, money could be taken from other athletic expenditures by removing an extra assistant football line coach or athletic director or not placing the football team in a luxury hotel the night before a home game.⁸⁶

⁷³ Pennington, *supra* note 71.

⁷⁴ Tom Slear, *The Devastation Continues*, SPLASH, Sept./Oct. 2003 at 20-21.

⁷⁵ *Id.*

⁷⁶ Kari Lyndersén, *There is Hope*, SWIMMING WORLD, Oct. 1999 at 31.

⁷⁷ Mark Schlabach, *Programs Struggle to Balance Budget*, ESPN.com, July 13, 2009, http://sports.espn.go.com/ncaa/columns/story?columnist=schlabach_mark&id=4314195.

⁷⁸ Interview with Timothy Powers, former Brigham Young University swimming coach and former president of the College Swimming Coaches Association.

⁷⁹ *Id.*

⁸⁰ Lyndersén, *supra* note 76, at 32.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Powers, *supra* note 79.

⁸⁴ *Id.*

⁸⁵ Phillip Whitten, *Editors Note: A Sleeping Giant Awakens*, SWIMMING WORLD, 6, July 2001.

⁸⁶ *Id.*

University presidents should also take more control over their athletic departments, where it is not unusual for a college football coach to earn over \$900,000 a year or about three times a university president's earnings.⁸⁷ The focus on maintaining high-profile men's sports such as football, basketball, and baseball cause many in athletics to believe intercollegiate athletics has become an accountant-run business rather than a place to educate students.⁸⁸ Jennifer Chapman, a student-athlete at James Madison University responding to the elimination of sports because of Title IX, stated, "What are you saying to young boys involved in youth sports when you offer only six college sports for them? You're saying, 'You better play football or basketball, because if you run track or swim, you don't matter.'"⁸⁹

V. University of Nebraska at Omaha's Title IX Compliance

Numerous individuals within the intercollegiate realm and in the state of Nebraska were surprised when the UNO Athletic Department announced in March 2011, that the football and wrestling programs would be dropped.⁹⁰ Individuals saw this news as particularly surprising given that the announcement was made within hours of the wrestling team winning the NCAA Division II National Championships.⁹¹ The news of dropping the football and wrestling teams should not have been so surprising when looking to key information to determine compliance for the gender quota. In examining the gender quota, the U.S. Department of Education reported 270 males and 149 female varsity athletes from July 2010 to July 2011, a 64% male and 36% female split.⁹² When comparing this proportion to the student body at UNO, the Department of Education reported the general student body is 48% male and 52% female.⁹³ Leo Kocher, a wrestling coach at the University of Chicago and president of the College Sports Council, stated, "While the Nebraska Board of Regents might know little about athletics, they do understand their obligation to protect their university. And if they are being told that not being proportional in the athletic program invites lawsuits, year-around investigations/oversight of their athletic programs by the Department of Education Office of Civil Rights, and even the threat of losing federal funding—nothing could work better to push the Board into action."⁹⁴ Although UNO has not been reviewed by the NCAA, potential lawsuits and investigation are still motivators.⁹⁵ This is particularly relevant since the last women's sport added at UNO was in 1997, illustrating that the university has failed meeting the second prong by not continuously adding women's sports.⁹⁶

Moreover, the university recognized the need to move from Division II to Division I status and was concerned with the ability to financially maintain the needs and requirements of the athletic department.⁹⁷ The Board of Regents and supporters of the move believe that the move to Division I and to the Summit League "would stabilize the finances of UNO athletics, put UNO in a league that's a much better fit academically and create the opportunity for much more local and national exposure for the school."⁹⁸ The potential stability of UNO athletics was reinforced by Alden & Associates, a consulting company, which agreed with UNO's decision to move to Division I while dropping football and wrestling.⁹⁹ Despite Alden & Associates findings, the consulting company believed the athletic

⁸⁷ Powers, *supra* note 79.

⁸⁸ Pennington, *supra* note 72.

⁸⁹ *Id.*

⁹⁰ Henry J. Cordes, *UNO plans Division I move, will drop football, wrestling*, WORLD HERALD, March 13, 2011.

⁹¹ Kocher, *supra* note 1.

⁹² United States Department of Education website, <http://ope.ed.gov/athletics>

⁹³ *Id.*

⁹⁴ Kocher, *supra* note 1.

⁹⁵ Nate Tenopir, *Where do we go from here? Part 2*, UNO GATEWAY, April 7, 2011.

⁹⁶ *Id.*

⁹⁷ Cordes, *supra* note 3.

⁹⁸ *Id.*

⁹⁹ Paula Lavigne, *Wrestling with the truth in Nebraska*, ESPN.com, May 5, 2011.

department was overly optimistic about the potential financial gains relied upon with hockey as the main revenue source.¹⁰⁰ However, the move to the Summit League would provide a pool of universities similar to other metropolitan universities, including Cleveland State University, University of Missouri-Kansas City, and University of Illinois-Chicago.¹⁰¹ Further, UNO's decision to move to the Summit League with the original sports intact would have only provided for three men's team to compete in the league.¹⁰² To better compete and align themselves with the Summit League, UNO chose to eliminate football and wrestling and use the budgets from those sports to fund the newly formed soccer and golf teams.¹⁰³

The move to Division I was considered necessary by the university because Division II athletics was not providing the financial stability the university desired.¹⁰⁴ For the past ten years, the revenues generated by the athletic department were stagnant, notwithstanding UNO's continuous increasing use of universities fees and tuition and tax dollars in the athletic department.¹⁰⁵ Despite the increasing funds made available, the lack of revenues generated caused the athletic department to continuously decrease the budget.¹⁰⁶ Growing expenses and flat revenues were not conducive to athletic success.¹⁰⁷ As a result, UNO Chancellor Dr. John Christensen was concerned that the entire athletic department as a whole would be in jeopardy and result in a "train wreck" in less than five years.¹⁰⁸

Specifically, UNO Athletic Director Trev Alberts reported the football program losing \$1.3 million per year.¹⁰⁹ Alberts considered the football team to be the athletic department's most expensive program by far.¹¹⁰ Public records and financial statements filed with the NCAA indicated, however, the football program lacked the necessary funding by only \$50,500.¹¹¹ The NCAA report suggests the gap between the financial statements and Alberts is a result of Alberts not counting student fees and university funds totaling \$1.2 million.¹¹² Despite the disparity in reporting, Alberts projects the move to Division I would require nearly \$7.9 million to keep football and wrestling, far beyond the \$5.9 million received from student fees and university funds.¹¹³ The additional \$2 million anticipated by Alberts would be a result of the need to increase scholarships, coaches, travel, and recruiting with the Division I move.¹¹⁴ However, economist Andy Schwarz opined that UNO has fallen to the common endemic among athletic department accounting.¹¹⁵ "They're extremely typical in the sort of mistakes they're making. It's sort of a fundamental mark of bad accounting that they just don't have revenues and expenses match. They're charging themselves expenses and not giving themselves account for revenues in the way that they should."¹¹⁶ Further, many opposed to the removal of football and wrestling from UNO believe the university is missing the mark and too focused on maximizing revenue.¹¹⁷ Former UNO football player and member of the UNO athletic department advisory board for 18 years, Van Deeb said "If you start

¹⁰⁰ *Id.*

¹⁰¹ Henry J. Cordes, *UNO plans Division I move, will drop football, wrestling*, WORLD HERALD, March 13, 2011.

¹⁰² Lavigne, *supra* note 100.

¹⁰³ *Id.*

¹⁰⁴ Cordes, *supra* note 3.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Cordes, *supra* note 102.

¹⁰⁸ Cordes, *supra* note 3.

¹⁰⁹ Lavigne, *supra* note 100.

¹¹⁰ Cordes, *supra* note 102.

¹¹¹ Lavigne, *supra* note 100.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Cordes, *supra* note 102.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

basing success on revenues, on trying to make a profit. . . then you're not going to find many successful programs anywhere."¹¹⁸

Dropping men's football is not a foreign consideration by many universities and is regarded as a reasonable option to become financially stable and Title IX compliant.¹¹⁹ It has been estimated that nearly 90% of intercollegiate athletic departments lose money because of football.¹²⁰ Further, in a 1995 survey of Division I schools conducted by the Chronicle of Higher Education, only four out of twenty-seven schools achieving the substantial proportionality prong were able to maintain a football program.¹²¹ This study, as well as other reviews of finances and Title IX compliance, further shows the reduction of football team rosters and available scholarships would reduce expenditures and better assist in achieving gender equity.¹²² Increased expenditures for football leave institutions "financially strapped" to maintain smaller, non-revenue sports and further the gap in becoming substantially proportional.¹²³

The removal of football from UNO was not a new idea to overcome Title IX and spending deficits.¹²⁴ In 1996 and 2006, university officials proposed cutting football to balance the athletic department accounting and better comply with Title IX.¹²⁵ Currently, despite the financial disagreement, Alberts recognized the increased costs associated with keeping football with the move to Division I. UNO would naturally have an increase in costs, with little indication of being able to pay for those costs based on past seasons, with the increased costs of the program to maintain scholarships, coaches, recruiting, and travel—a likely increase in the net deficit.¹²⁶ This is relates directly to Title IX compliance because UNO would be required to account for significant investments for women's athletics—an aspect those opposed to the change failed to consider.¹²⁷

The university considered the possibility of keeping the teams upon moving to Division I, but the number of available scholarship increases due to the move indicated a problematic situation.¹²⁸ For example, the move from Division II, which allows 36 football scholarships, to Division I, which allows 63 football scholarships, would have potentially required the addition of 27 scholarships to be competitive in the Division I football realm.¹²⁹ Additionally, in response to the increase of scholarships potentially made available to football players, UNO would similarly need to increase potential scholarship for female athletes, which may prove difficult if there is no money in the budget for such an increase. Nonetheless, UNO coaches believed that if the university was concerned with Title IX, they could have cut the total roster by 50 players while still adding men's soccer and golf teams.¹³⁰

Despite the uproar and criticism, UNO found the changes as the most reasonable option and comparable to the changes campus-wide.¹³¹ Chancellor Christensen regarded the move to Division I as natural when also looking to the changes in campus housing, increased enrollment, and recognition in

¹¹⁸ *Id.*

¹¹⁹ Allen Barra, *Sack college football, not Title IX*, SALON MAGAZINE, March 1, 2003.

¹²⁰ *Id.*

¹²¹ Elliott & Mason, *supra* note 11, at 8.

¹²² *Id.*

¹²³ Hatlevig, *supra* note 6, at 102.

¹²⁴ *NU regent suggests cutting UNO football*, COLUMBUS TELEGRAM, July 7, 2006.

¹²⁵ *Id.*

¹²⁶ Cordes, *supra* note 102.

¹²⁷ *Id.*

¹²⁸ Lavigne, *supra* note 100.

¹²⁹ Tenopir, *supra* note 96.

¹³⁰ Lavigne, *supra* note 100.

¹³¹ Cordes, *supra* note 102.

academia.¹³² “This is an exciting, next logical step in... transformation.”¹³³ According to experts in Title IX issues, this mentality is part of what is considered “corporate restructuring” in Division I athletics.¹³⁴ “It puts the focus on the sports that will most likely bring distinction and potentially bring fewer headaches.”¹³⁵

However, the decision to drop football is regarded as a strong way to regain control within the athletic department and to comply with Title IX.¹³⁶ Rather than blaming women’s athletics as the “monster” motivating the dropping of men’s teams, football and the male collegiate hierarchy should be considered as the groups that commandeer university athletic departments and cause the elimination of sports in the name of Title IX.¹³⁷ According to data from the 2005-06 athletic year, Division I institutions averaged 269 male athletes and 218 female athletes.¹³⁸ Removing football from the data shows there is a difference between the genders by less than one participant.¹³⁹ Comparably, Division I institutions are allocated \$8,653,600 for men and \$4,447,900 for women, a \$4,205,700 disparity.¹⁴⁰ Upon removing the finances used in football, however, the difference totaled \$267,900.¹⁴¹

CONCLUSION

Title IX has been regarded as one of the most beneficial laws for women’s rights and has had a profound impact on intercollegiate athletics over the past 40 years. Despite Title IX’s tremendous impact and overarching influence, the individual institution implementation has been one of the most controversial issues at campuses throughout the United States. Although intercollegiate athletic departments have been under fire because of the manner in which they choose to comply with Title IX, UNO athletics is an example of an educated and informed decision in compliance. UNO is a particularly strong illustration of complying with Title IX because it was willing to look beyond maintaining the football team to seek the best interest of the institution, the student-athletes, and to further the purposes behind Title IX.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Pennington, *supra* note 72.

¹³⁵ *Id.*

¹³⁶ Barra, *supra* note 120.

¹³⁷ *Id.*

¹³⁸ Barranco & Davison, *supra* note 69.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

APPENDIX: Porterville College Athletics Survey Fall 2001

Hello Porterville College students.

This brief survey is being conducted to help in planning for the future of Porterville College's athletics programs. It is confidential and anonymous. Please do not write your name on these pages. Just circle the most appropriate answer or answers to each question. If you have already completed this survey in another class, please do not complete it again.

Athletics Questions:

1. Did you participate in athletics in high school?

1 Yes

2 No

If yes, in what high school sports did you participate? (circle all that apply)

Male sports

1 Baseball

2 Basketball

3 Cross Country

4 Football

5 Golf

6 Soccer

7 Swimming

8 Tennis

9 Track & Field

10 Water Polo

11 Wrestling

20 Other, specify _____

Female sports

21 Basketball

22 Cross Country

23 Golf

24 Soccer

25 Softball

26 Swimming

27 Tennis

28 Track & Field

29 Volleyball

30 Water Polo

40 Other, specify _____

2. Have you participated in any competitive sports outside your high school which were sponsored through a club, park district, church, city league or some other group?

1 Yes

2 No

If yes, in which sports did you participate? (circle all that apply)

Male sports

1 Baseball

2 Basketball

3 Cross Country

4 Football

5 Golf

6 Soccer

7 Swimming

8 Tennis

9 Track & Field

10 Water Polo

11 Wrestling

12 Martial Arts (Karate, etc.)

13 Roller Hockey

14 Gymnastics/Tumbling

20 Other, specify _____

Female sports

21 Basketball

22 Cross Country

23 Golf

24 Soccer

25 Softball

26 Swimming

27 Tennis

28 Track & Field

29 Volleyball

30 Water Polo

31 Martial Arts (Karate, etc.)

32 Gymnastics/Tumbling

40 Other, specify _____

3. Have you ever participated in any Porterville College sports programs?

1 Yes

2 No

If yes, in which sports programs have you participated? (circle all that apply)

Male sports

1 Baseball

2 Basketball

4 Football

6 Soccer

8 Tennis

Female sports

21 Basketball

24 Soccer

25 Softball

27 Tennis

29 Volleyball

4. If you haven't participated in sports programs at Porterville College, why not? (circle all that apply)

1 Not interested in sports

2 Sport(s) I am interested in are not offered at Porterville College

3 Not athletic

4 Do not have time

5 Can't afford equipment or other expenses

6 Season for my sport(s) hasn't begun yet

7 Other, specify _____

5. Which, if any, Porterville College sporting events have you attended as a spectator? (circle all that apply)

Male sports

1 Baseball

2 Basketball

4 Football

6 Soccer

8 Tennis

Female sports

21 Basketball

24 Soccer

25 Softball

27 Tennis

29 Volleyball

6. If Porterville College were to add a new sport in the next few years, which would you recommend be added first? (circle only one, your first choice)

Male sports

3 Cross Country

5 Golf

7 Swimming

9 Track & Field

10 Water Polo

11 Wrestling

12 Martial Arts (Karate, etc.)

13 Roller Hockey

14 Gymnastics/Tumbling

20 Other, specify _____

Female sports

22 Cross Country

23 Golf

26 Swimming

28 Track & Field

30 Water Polo

31 Martial Arts (Karate, etc.)

32 Gymnastics/Tumbling

40 Other, specify _____

7. Which sport would be your second choice? (circle only one, your second choice)

Male sports

3 Cross Country

5 Golf

7 Swimming

9 Track & Field

10 Water Polo

11 Wrestling

12 Martial Arts (Karate, etc.)

Female sports

22 Cross Country

23 Golf

26 Swimming

28 Track & Field

30 Water Polo

31 Martial Arts (Karate, etc.)

32 Gymnastics/Tumbling

- 13 Roller Hockey
14 Gymnastics/Tumbling
20 Other, specify _____ 40 Other, specify _____

8. Do you know the process for how a new sport is added at Porterville College?

- 1 Yes
2 No

Demographic Background (these questions are for statistical purposes only):

9. What is your gender?

- 1 Male
2 Female

10. How old are you?

Age _____

11. How many units are you taking this semester?

Units _____

12. What is the last high school you attended?

- 1 Monache
2 Porterville
3 Lindsay
4 Strathmore
5 Citrus
6 Delano
7 Porterville Adult
8 Tulare Union
9 Tulare Western
10 Other high school
11 Never attended high school

Thank you very much for completing this survey. If you would like more information, contact Michael Carley, Porterville College Director of Institutional Research at 791-2275 or