

# THE NCAA'S LOSING BATTLE: WHAT HAPPENS WHEN PAYING STUDENT-ATHLETES MEETS TITLE IX?

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## I. INTRODUCTION

“Play for the love of the game!” All athletes hear some form of this statement from the time they pick up a bat, football, soccer ball, volleyball, golf club, or other sporting equipment. Athletes should work hard, practice, and compete for the pure love of their sport; successful athletes often heed this advice and *do* work hard to succeed out of pure passion for the sport and their desire to be the best. Similarly, it is often assumed that playing a sport for a great university is enough.<sup>1</sup> In fact, these critics believe playing for a university should be the only reward an athlete receives for the sacrifices he or she has made to reach the collegiate level and the sacrifices they continue to make while participating in collegiate athletics.<sup>2</sup> Those who oppose paying student-athletes argue that a free education and an opportunity to represent a college is sufficient compensation.<sup>3</sup>

Student-athletes and collegiate sports fans must face the fact that the National Collegiate Athletic Association (NCAA) may no longer be able to fight off the legal pressures to compensate student-athletes. If courts invalidate the NCAA's cap on the amount student-athletes may receive in grant-in-aid (GIA) awards, collegiate athletic departments will be under pressure to quickly figure out how to continue to attract top level athletes while maintaining limited financial budgets. The most highly sought-after student-athletes are Division I football and men's basketball players. If schools are allowed to compete for those highly coveted athletes with the

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1. See Kieran McCauley, *College Athletes Shouldn't Be Paid*, DAILY LOCAL (Apr. 28, 2015, 5:28 PM), <http://www.dailylocal.com/article/DL/20150428/SPORTS/150429826> (“[P]lenty of college students would be happy to play a sport for four years if it meant they did not have to take on that financial hardship.”).
2. *Id.*
3. Kate Murphy, *Privilege, Not Job: College Athletes Shouldn't Be Paid*, PENDULUM (Apr. 13, 2014, 10:57 PM), <http://www.elonnewsnetwork.com/article/2014/04/college-athletes-shouldnt-paid>.

promise of increased GIA compensation, athletic departments will have to quickly adjust to finance such expenditures.

Financing these expenditures, however, may not be the biggest issue for collegiate athletic departments if they increase GIA compensation; rather, Title IX implications will arise if institutions choose this route, and risk losing federal funding for potential violations.<sup>4</sup> What will schools do when presented the opportunity to compete for football and basketball players with increased GIA compensation when Title IX requires schools to provide women with substantially similar opportunities?

This Comment analyzes the issues the NCAA may face under Title IX if collegiate athletic institutions are permitted to compete for student-athletes with increased GIAs, and it recommends solutions to reconcile these issues. Section II provides the background of Title IX with respect to providing both men and women substantially proportionate opportunities for scholarships. Additionally, it discusses the recent litigation concerning compensating student-athletes. Section III argues that increasing GIA compensation will create a two-tiered level of Division I institutions based upon the institutions' financial ability to compete for student athletes. Finally, this Comment proposes that when analyzing disparities in scholarship opportunities between the sexes, the Office of Civil Rights (OCR) should compare similarly situated institutions to determine whether the disparity between the amount of scholarships given to men and women complies with Title IX.

## II. BACKGROUND

### A. History of Title IX

Title VII of the Civil Rights Act excluded educational activities from its anti-discrimination protections, and Title VI of the Civil Rights Act failed to include sex as a class protected from discrimination.<sup>5</sup> Therefore, until the passage of Title IX, discrimination based on sex was not prohibited in the United States.<sup>6</sup>

Title IX of the Education Amendments of 1972 provides: “[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

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4. See generally U.S. DEP'T OF JUST., *Title IX Legal Manual* (last modified Aug. 6, 2016) <https://www.justice.gov/crt/title-ix> (discussing the scope and coverage of federal financial assistance).

5. Christine I. Hepler, *A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 445–46 (2013).

6. *Id.* at 445.

under any education program or activity receiving Federal financial assistance.”<sup>7</sup> Congress sought to first, avoid using federal resources to support discriminatory practices and second, to provide individual citizens protection against those practices.<sup>8</sup>

Title IX made no mention of athletics until the Tower Amendment was proposed in 1974.<sup>9</sup> The Tower Amendment attempted to address this statutory silence by proposing that all intercollegiate athletics be exempt from Title IX.<sup>10</sup> However, the attempt back-fired, and the proposal was defeated in conference committee and replaced with the Javits Amendment.<sup>11</sup> The Javits Amendment required the Department of Health, Education and Welfare (HEW) along with the OCR to promulgate regulations and clarifications to assist in implementing Title IX with respect to intercollegiate athletics.<sup>12</sup> These regulations led to the 1979 Policy Interpretations, which provided guidelines for intercollegiate institutions to follow to comply with Title IX.<sup>13</sup>

The 1979 Policy Interpretations established a two-part approach to determining compliance with Title IX, which eliminated discrimination in financial support, benefits, and opportunities in an institution’s athletic department.<sup>14</sup> The interpretation stated that an institution could establish a presumption of compliance with Title IX if it could demonstrate that:

‘Average per capita’ expenditures for male and female athletes were substantially equal in the area of ‘readily financially measurable’ benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and Benefits and opportunities for male and female athletes, in areas which are not financially measurable, ‘were comparable.’<sup>15</sup>

The Policy Interpretations of 1979 expounded on Title IX’s requirements for athletic scholarships which states: “[t]o 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

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7. 20 U.S.C. § 1681 (1972).

8. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

9. Hepler, *supra* note 5, at 448.

10. *Id.*

11. *Id.* at 449.

12. *Id.*

13. *Id.*

14. *See* Title IX of the Educ. Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979) (to be codified at 45 CFR pt. 86).

15. *Id.*

proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.”<sup>16</sup>

Following the 1979 Policy Interpretations, the OCR evaluated whether an institution provided scholarships to both sexes in substantially equal numbers.<sup>17</sup> The OCR conducted a “financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) were available to men’s and women’s athletic programs.”<sup>18</sup> To determine whether a disparity existed, the OCR used the “z” and “t” tests.<sup>19</sup> The “z” test determined whether the percentage of “total aid awarded to athletes of one sex and the percentage of participants of that sex in the athletics program [was] significant.”<sup>20</sup> The “t” test determined whether “the difference between the average award to male and female athletes [was] significant.”<sup>21</sup> If the OCR’s comparison showed that scholarship aid was available in substantially equal amounts, or the disparity could be explained by nondiscriminatory factors, then an institution was in compliance of Title IX.<sup>22</sup>

Under this analysis, a mere disparity in the amount of financial assistance awarded to each sex did not automatically constitute a violation; if, however, the disparity was “significant,” meaning that the disparity was so substantial as to deny equal opportunities to one sex, it violated Title IX.<sup>23</sup> The OCR further explained that an insignificant disparity, but a disparity nonetheless, would become evidence viewed in light with other factors to determine an institution’s compliance.<sup>24</sup> This differentiation between significant and insignificant disparities led to a tolerated disparity of between three and five percentage points that qualified as compliant with Title IX.<sup>25</sup>

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16. *Id.*

17. *Id.*

18. *Id.* at 71415.

19. VALERIE M. BONNETTE & LAMAR DANIEL, OFFICE OF CIVIL RIGHTS, TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 153 (1990), <http://files.eric.ed.gov/fulltext/ED400763.pdf>.

20. *Id.*

21. *Id.*

22. Title IX of the Educ. Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415.

23. BONNETTE, *supra* note 19.

24. Title IX of the Educ. Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415.

25. VALERIE M. BONNETTE, 1998 POLICY GUIDANCE FOR ATHLETIC SCHOLARSHIPS 1 (2012), <http://titleixspecialists.com/wp-content/uploads/2013/09/1998-Policy-Guidance-for-Athletic-Scholarships-Summary-and-Full-Text.pdf>.

In 1997, the Women's Law Center filed a complaint with the OCR alleging that twenty-five institutions did not comply with Title IX.<sup>26</sup> This investigation led to the OCR issuing a clarification letter ("*Dear Colleagues Letter*"), which addressed the concerns of using the "z" and "t" tests to determine whether an institution complied with Title IX's substantially proportionate scholarship assistance requirement.<sup>27</sup> In 1998, the OCR's *Dear Colleagues Letter* explained that it has not interpreted the 1979 Policy Interpretation to require an equal number of scholarships to men or women, nor does it require the individuals' scholarships be of equal value; it does, however, establish a new "high threshold" for substantial proportionality.<sup>28</sup> The OCR recognized that requiring exact proportionality would place an unreasonable burden on institutions and that there are legitimate, nondiscriminatory reasons why a disparity may exist.<sup>29</sup>

The *Dear Colleagues Letter*, however, altered the acceptable variances in disparity that still qualify as substantial proportionality.<sup>30</sup> Although the OCR permits a disparity, there is a strong presumption that a disparity less than one percent is equitable and nondiscriminatory.<sup>31</sup> Alternatively, a disparity greater than one percent creates a strong presumption that the institution has violated the substantial proportionality requirement.<sup>32</sup> This change addressed the concerns that the "z" and "t" tests were inappropriate to use in college athletics to determine whether discrimination occurred.<sup>33</sup> Finally, the OCR reiterated its procedure of reviewing each matter on a case-by-case basis with regard to the understanding that each case has a unique factual basis.<sup>34</sup>

The requirement under Title IX to provide scholarships on a substantially proportionate basis may be institutions' greatest obstacle if permitted to use increased GIAs as a mechanism to compete for student-athletes.

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26. Amy Shipley, *Title IX Complaints Filed Against 25 Universities*, WASH. POST (June 3, 1997), [https://www.washingtonpost.com/archive/sports/1997/06/03/title-ix-complaints-filed-against-25-universities/eeda0ba8-30a0-4b3c-a655-5ddfa745c199/?utm\\_term=.2a91968c2bf0](https://www.washingtonpost.com/archive/sports/1997/06/03/title-ix-complaints-filed-against-25-universities/eeda0ba8-30a0-4b3c-a655-5ddfa745c199/?utm_term=.2a91968c2bf0).

27. Shellie Y. Pfohl, *40th Anniversary of Title IX: Status of Girls' and Women's Sports Participation*, PRESIDENT'S COUNCIL ON PHYSICAL FITNESS & SPORTS RES. DIG. 1-2 (Sept. 2012), [http://static1.squarespace.com/static/572a208737013b7a93cf167e/t/5773e19ecd0f68c199d0f756/1467212190892/Digest+2012\\_40th+Anniversary+of+Title+IX-Status+of+Girls'+and+Women's+Sports+Participation\\_Series+13+Number+2+\(September\).pdf](http://static1.squarespace.com/static/572a208737013b7a93cf167e/t/5773e19ecd0f68c199d0f756/1467212190892/Digest+2012_40th+Anniversary+of+Title+IX-Status+of+Girls'+and+Women's+Sports+Participation_Series+13+Number+2+(September).pdf).

28. Mary Francis O'Shea, *Dear Colleague Letter: Bowling Green State University*, U.S. DEP'T OF EDUC. (July 23, 1998), <http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html> [hereinafter *Bowling Green State University Letter*].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

### B. *O'Bannon* Anti-Trust

The current landscape of the litigation against the NCAA attacks whether the NCAA's present bylaws, capping student-athlete compensation at a preset GIA amount, violate federal antitrust laws.<sup>35</sup>

In 2009 a former University of California, Los Angeles (UCLA) basketball player, Ed O'Bannon, brought an antitrust class action against the NCAA, challenging its rules prohibiting compensation for elite men's football and basketball players.<sup>36</sup> The plaintiffs challenged the rules barring student-athletes from receiving a portion of the revenue that the NCAA and its member schools earn from using the athletes' names and likeness (NILs) in videogames, live game telecasts, and other footage.<sup>37</sup> Plaintiffs argued that these rules violated Section 1 of the Sherman Antitrust Act of 1890, which prohibits "contract, combination . . . , or conspiracy, in restraint of trade or commerce."<sup>38</sup>

To maintain eligibility as an NCAA student-athlete, an athlete must be academically eligible and have amateur status.<sup>39</sup> To maintain amateur status under the NCAA guidelines, a student-athlete may not, prior to or during enrollment at an NCAA institution, receive any type of payment for his or her athletic skill, have an agent, sign a contract to play professionally, or compete with a professional team.<sup>40</sup> Therefore, NCAA bylaws prohibited student-athletes from receiving any compensation for a school's use of athletes' NILs.<sup>41</sup>

The district court agreed that barring Division I football and basketball players from receiving compensation for their NILs was an unreasonable restraint on trade, thus violating the Sherman Antitrust Act.<sup>42</sup> The court did not mandate that schools provide compensation, but it determined that stipends or trust fund payments would be permissible under the bylaws.<sup>43</sup> Thus, under the district court's ruling, NCAA member schools may compensate Division I football and basketball student-athletes in two ways: (1) increasing GIA to cover the full cost of attendance; and/or (2) setting up

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35. See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n (O'Bannon I)*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part* *O'Bannon v. Nat'l Collegiate Athletic Ass'n (O'Bannon II)*, 802 F.3d 1049 (9th Cir. 2015).

36. *Id.* at 965.

37. *Id.* at 963.

38. *Id.* at 984 (citing 15 U.S.C. § 1 (1890)).

39. NCAA, BYLAW, ARTICLE 12: AMATEURISM 55, <http://Irbears.athleticsite.net/NCAA/BylawArticle12-Amateurism.pdf> (last visited Mar. 10, 2016) [hereinafter BYLAW].

40. See *id.* (providing a complete list of Amateur status infractions).

41. *Id.*

42. *O'Bannon I*, 7 F. Supp. 3d at 1009.

43. *Id.* at 1008.

a trust that pays the student-athletes in deferred cash per year for every year the student-athlete is academically eligible to compete.<sup>44</sup> The compensation cap, the court reasoned, balances the concerns of the student-athlete with that of the NCAA and its member schools.<sup>45</sup> The court explained that the amount should nullify the student-athletes' concerns because it is the same amount as a Pell grant and will not undermine the NCAA's procompetitive goals of integrating academics and athletics.<sup>46</sup> Thus, the district court held that the NCAA may not restrain its member schools from compensating Division I men's basketball and football players with increased GIAs.<sup>47</sup>

On appeal, the Ninth Circuit agreed with the district court's finding that the NCAA's ban on compensating Division I men's basketball and football players violated the Sherman Antitrust Act; it disagreed, however, with the determination that student-athletes could be paid a cash stipend of up to \$5,000 a year.<sup>48</sup>

First, the court acknowledged that a GIA cap at student-athletes' full cost of attendance was a less restrictive alternative to achieve the NCAA's procompetitive goals than its current ban on compensating student-athletes.<sup>49</sup> It explained how raising the GIA cap would not impact amateurism or impede the NCAA's goal of integrating student-athletes into their academic communities.<sup>50</sup> Thus, the Ninth Circuit concluded that the increase of the GIA cap had no relation to the NCAA's procompetitive purpose, and student-athletes would remain amateurs as long as the money they received was used to cover legitimate educational expenses.<sup>51</sup>

Second, the Ninth Circuit disagreed with the district court's rule permitting NCAA member schools to pay cash compensation for student-athletes' NIL, stating that doing so was in direct opposition of the NCAA's interest in maintaining the amateur status of student athletes.<sup>52</sup> The court noted that the question should not be whether compensating student-athletes in small amounts serves a procompetitive purpose, but rather whether the collegiate sports market would be better off if the NCAA made small payments or big payments.<sup>53</sup> There was significant evidence suggesting that compensating student-athletes a large sum of money would

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *O'Bannon II*, 802 F.3d 1049, 1053 (9th Cir. 2015).

49. *Id.* at 1074.

50. *Id.* at 1075.

51. *Id.*

52. *Id.* at 1076.

53. *Id.* at 1077.

harm the student-athlete sports market.<sup>54</sup> The cash payment was not tied to any education-related compensation, and it would essentially nullify the amateurism rules.<sup>55</sup> The court acknowledged that litigation concerning the GIA cap would continue until the NCAA was forced to abandon its amateurism rules entirely, but stated that, in light of the evidence, the court must give the NCAA latitude to superintend college athletics.<sup>56</sup>

Accordingly, the Ninth Circuit vacated the district court's judgment that allowed member schools to pay student-athletes \$5,000 per year in deferred compensation, concluding that the court erred in deciding that deferred compensation was a less restrictive alternative to the NCAA's restraint on compensating student-athletes for their NIL.<sup>57</sup>

### C. *Jenkins v. NCAA*

The Ninth Circuit was correct when it predicted that litigation would continue concerning the NCAA's cap on GIAs until players were given full compensation for their NILs.<sup>58</sup> Stemming directly from the *O'Bannon* decision, the plaintiffs in *Jenkins v. NCAA* argue that the newly permitted increase in GIAs still violates the Sherman Antitrust Act.<sup>59</sup> In *Jenkins*, a group of former and current collegiate athletes brought a class action against the NCAA.<sup>60</sup> The plaintiffs argue that the NCAA's cap on the amount of GIAs student-athletes may receive violates federal antitrust laws.<sup>61</sup> Moreover, the plaintiffs claim that the NCAA's bylaws violate the Sherman Antitrust Act by strictly preventing financial compensation outside of the price-fixed limits, while competition for these desired athletes continues to rise.<sup>62</sup> In support of these assertions, the plaintiffs point out that the top NCAA conferences in football and basketball receive billions of dollars per year in revenue from broadcasting networks to televise their sporting events.<sup>63</sup> The plaintiffs further argue that the cap on GIAs does not serve any procompetitive purposes or promote a competitive

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54. *Id.*

55. *Id.*; see also BYLAW, *supra* note 39 (explaining the rules of amateurism are governed by NCAA Bylaw, Article 12, which indicates the activities that negate an athlete's amateur status).

56. *O'Bannon II*, 802 F.3d at 1077.

57. *Id.*

58. *See id.*

59. *Jenkins v. NCAA*, 311 F.R.D. 532, 537 (N.D. Cal. 2015).

60. Second Amended Complaint–Class Action Seeking Injunction at 2, *Jenkins v. NCAA (In re NCAA Athl. Grant-In-Aid Cap Antitrust Litig.)*, 4:14-cv-02758-CW (Feb. 13, 2015).

61. *Id.*

62. *Id.*

63. *Id.* at 20 (“65 schools in the five Power Conferences reported \$5.15 billion in total revenue in 2011–2012.”).

balance.<sup>64</sup> In sum, the plaintiffs claim that the restraint on GIAs constitutes an anticompetitive, horizontal agreement among the competitors to fix the compensation for services of student athletes, and thus, it is an unreasonable restraint of trade under Section 1 of the Sherman Act.<sup>65</sup> Accordingly, the plaintiffs ask the court to invalidate the NCAA bylaws restraining compensation and benefits of football and basketball players.<sup>66</sup>

The NCAA argues, however, that limiting football and basketball players' compensation to the cost of attendance is consistent with the *O'Bannon* ruling that determined the NCAA bylaws restricting compensation are of a procompetitive nature.<sup>67</sup> The NCAA states that its eligibility requirements have previously been declared lawful under the Sherman Antitrust Act.<sup>68</sup> It argues that the Supreme Court, five federal courts of appeals, and numerous district courts have recognized that the NCAA "may adopt and enforce eligibility rules including rules that limit the amount of compensation that student-athletes may receive for their participation in college sports."<sup>69</sup> Thus, the NCAA asserts that the *O'Bannon* ruling, permitting the NCAA to enforce limitations on the amount of compensation student-athletes receive, does not violate the Sherman Antitrust Act.<sup>70</sup>

If the court in *Jenkins* determines that the NCAA's cap on GIA violates the Sherman Antitrust Act, then the NCAA, its member institutions, and the OCR must be prepared to confront the inevitable changes concerning recruitment of student-athletes and the increased financial expenditures institutions may need to sustain.

### III. ANALYSIS

*O'Bannon* did not require NCAA institutions to provide increased GIAs to student-athletes; it gave these institutions the discretion to do so (up to \$5,000).<sup>71</sup> However, under Title IX, if an institution elects to provide increased GIAs, it must do so in a manner which provides "reasonable

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64. *Id.* at 29.

65. *Id.*

66. *Id.* at 30.

67. Defendants' Motion for Judgment on the Pleadings and Memorandum of Points and Authorities in Support Thereof at 10-11, *Jenkins v. NCAA* (In re NCAA Athl. Grant-In-Aid Cap Antitrust Litig.), 4:14-md-02541-CW (May 16, 2016).

68. Notice of Motion and Memorandum of Points and Authorities in Support of Motion to Dismiss the Complaints at 11, *Jenkins v. NCAA* (In re NCAA Athl. Grant-In-Aid Cap Antitrust Litig.), 4:14-md-02541-CW (Sept. 4, 2015).

69. *Id.* at 24.

70. *Id.*

71. *O'Bannon II*, 802 F.3d 1049, 1074 (9th Cir. 2015).

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.”<sup>72</sup> This Title IX requirement ensures increased GIAs will be awarded at substantially proportionate rates.

If the court concludes in *Jenkins* that *O’Bannon’s* \$5,000 cap on GIAs violates the Sherman Antitrust Act, institutions will need to decide how to finance bidding wars for the best student-athletes. The desire to compete for the best athletes must be tempered by the institution’s financial constraints as well as the requirements to provide substantially proportionate scholarship opportunities for both sexes under Title IX. Budgetary constraints, along with the requirements of Title IX, will likely create a two-tiered level of NCAA Division I institutions.

As discussed above, the OCR does not require exact proportionality between the number and value of scholarships awarded to men and women.<sup>73</sup> As a result, if the court determines that the NCAA’s current GIA cap violates the Sherman Antitrust Act, NCAA institutions under the current Policy Interpretation will have the freedom to decide how to achieve offering substantially proportionate scholarship opportunities. This new freedom will likely cause a divide in how proportionality is met and thus create greater disparities in proportionality.

If the *Jenkins* court overturns the NCAA’s cap on GIAs, the NCAA will face a novel dilemma of how to enforce Title IX while still acknowledging its procompetitive nature. To best serve the NCAA’s procompetitive nature and to allow institutions to compete for student-athletes with increased GIAs, the OCR should permit institutions to comply with Title IX’s substantially proportionate scholarship requirement by awarding GIAs in an acceptable disparity range. This acceptable disparity range should be permitted rather than raise a presumption that an institution violated Title IX by awarding GIAs at a disparity of 1% or greater.

The OCR must recognize that the landscape of collegiate athletics is evolving. Institutions increasingly desire to compensate student-athletes by sharing the increased revenue generated by their athletic abilities.<sup>74</sup> The OCR should no longer presume a disparity above 1% violates Title IX’s requirement for providing scholarship opportunities in substantially proportionate numbers; it should, however, evaluate the disparity as *one* factor—not the deciding factor.

When evaluating an institution’s scholarship program on a case-by-case basis, the OCR’s first step should continue to be whether the

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72. 34 C.F.R. § 106.37(c)(1) (1980).

73. *Bowling Green State University Letter*, *supra* note 28.

74. *See generally O’Bannon I*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014).

scholarship budgets for men and women are substantially proportionate to the rates of athlete participation. Second, the OCR should determine whether female student-athletes are receiving increased GIAs at a consistent rate, or at the same frequency as male athletes. Third, the OCR should evaluate the amount of GIAs awarded to student-athletes in revenue sports in comparison to the amount of revenue generated by their respective sports. Considering several factors to evaluate whether an institution has achieved substantial proportionality allows for a greater acceptable range of disparities, and thus, allows institutions leeway to compete for student-athletes.

This alternative evaluation process to determine whether an institution is in compliance with Title IX accounts for the NCAA's procompetitive nature, while also ensuring that female student-athletes are not discriminated against. The first proposed factor, evaluating whether female student-athletes are receiving increased GIAs at a rate consistent with male student-athletes, eliminates any concern about male student-athletes receiving increased GIAs at a higher frequency than female student-athletes. The second proposed factor, evaluating the amount of GIAs given to student-athletes in comparison to the amount of revenue generated by their respective sport, prevents institutions from allocating disproportionate amounts of funds to recruit student-athletes; this factor will also support the NCAA's interest in maintaining a competitive balance between its sports.<sup>75</sup>

Not all Division I institutions are created equal.<sup>76</sup> Many people wrongly assume that athletic departments pay for themselves, and even make a profit from revenue sports such as football and basketball.<sup>77</sup> Statistics, however, show otherwise.<sup>78</sup> In a study consisting of 347 NCAA Division I institutions, only 24 athletic departments reported generating a profit in 2014.<sup>79</sup> In fact, the majority of athletic departments require subsidies from their institutions.<sup>80</sup> Although most athletic departments do not generate a profit, institutions continue to invest in athletics because of the benefits sports provide to the institution overall, including educational value to student-athletes, an enhanced campus-life, and connections with alumni and other supporters.<sup>81</sup> The commitment to athletics despite not

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75. See *O'Bannon II*, 802 F.3d at 1059.

76. See generally Brian Burnsed, *Athletics Departments that Make More than They Spend Still a Minority*, NCAA (Sept. 18, 2015, 9:30 AM), <http://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority>.

77. *Id.*

78. See *id.*

79. *Id.*

80. *Id.*

81. *Id.* (quoting NCAA Chief Financial Officer, Kathleen McNeely).

producing a profit is reflected within athletic department's mission statements.

The NCAA member institutions' mission statements illuminate the different focuses of athletic departments. The disparity between scholarships given to men and women should be based upon an institution's revenue because the removal of the GIA cap will likely create a two-tiered Division I system. Institutions with a stated goal of putting resources towards winning national championships have historically done so, and will likely be financially able to pay increased GIAs to student-athletes.

#### A. Two-Tier Division I Institutions and Their Mission Statements

An institution in the Southeast Conference (SEC), arguably the best football conference in the country, has won the NCAA Division I Football Bowl Subdivision (FBS) national championship eight out of the last ten seasons.<sup>82</sup> The University of Alabama accounts for four of the eight national championships won by an SEC team. Alabama's athletic department's declared mission is to:

[b]uild and maintain an athletic program that annually ranks among the national elite in all sports; emphasize recruitment of the top student-athlete; construct and develop first-class facilities in which our student-athletes and coaches can train and compete at the highest level; promote community involvement of our student-athletes, coaches and staff as necessary for our program's success; and perpetuate our rich heritage and tradition through the spirited branding of our Crimson Tide name.<sup>83</sup>

In 2014-2015, the University of Alabama's football team alone made a gross profit of \$45.9 million, while the remaining men's sports reported a loss of \$967,000.<sup>84</sup> With men's and women's sports combined, Alabama made \$30 million.<sup>85</sup> For Alabama to maintain its nationally ranked athletic

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82. NCAA, FOOTBALL CHAMPIONSHIP HISTORY, <http://www.ncaa.com/history/football/fbs> (last visited Mar. 20, 2016) (listing champions throughout history) [hereinafter FOOTBALL CHAMPIONSHIP HISTORY]. The National Championship Series was formerly known as the Football Bowl Championship. *See id.*

83. UNIVERSITY OF ALABAMA, ALABAMA STUDENT-ATHLETE HANDBOOK 2016-2017 13, [http://www.rolltide.com/documents/2016/10/25//Alabama\\_Athletic\\_060416\\_FINAL.pdf?id=7953](http://www.rolltide.com/documents/2016/10/25//Alabama_Athletic_060416_FINAL.pdf?id=7953) (last visited Feb. 4, 2017).

84. *See Equity in Athletics Data Analysis*, U.S. DEP'T OF EDUC., <http://ope.ed.gov/athletics/#/institution/search> (last visited Mar. 15, 2016). Utilize the one institution search function to obtain data for the University of Alabama.

85. *Id.*

programs, its focus must be on recruiting the nation's most elite high school athletes.<sup>86</sup>

Similarly situated in the SEC, the University of Florida has won two NCAA Football Bowl Subdivision national championships in the past ten years.<sup>87</sup> Florida's athletic department's strategic purpose is to "[p]rovide a championship experience with integrity on and off the field for student-athletes and the Gator Nation."<sup>88</sup>

Florida's football team grossed a profit of \$37.2 million in 2014-2015; its other men's teams, however, reported a loss of \$6.06 million.<sup>89</sup> Unlike the University of Alabama, the University of Florida broke even when the gross profits and losses of men's and women's sports were combined.<sup>90</sup> As a result, Florida is required to use the gross profits from its football program to cover the expenses of its remaining men's and women's programs.

On the other end of the spectrum is Western Kentucky University (WKU), a NCAA Division I FBS institution and 2015 winner of the Conference USA football championship.<sup>91</sup> WKU's mission is to:

support the university vision by providing a comprehensive, high quality education for student-athletes and to serve the university community, alumni, and friends through success and distinction within an environment of uncompromising integrity. The WKU Athletic Department seeks to be a source of pride for the citizens of the Commonwealth of Kentucky and to be recognized as a nationally prominent program by consistently winning Conference USA championships and by achieving frequent success in NCAA post-season competitions.<sup>92</sup>

In 2014-2015, WKU failed to make a profit.<sup>93</sup> Its football and basketball teams, which are often assumed to be money-making sports, both

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86. See Chris Fuhrmeister, *Alabama Has 2015's No. 1 Recruiting Class, Extending Streak to 5 years*, SB NATION (Feb. 4, 2015), <http://www.sbnation.com/college-football/2015/2/4/7973285/alabama-recruiting-class-2015-winner>.

87. FOOTBALL CHAMPIONSHIP HISTORY, *supra* note 82.

88. UNIVERSITY OF FLORIDA, FLORIDA ATHLETICS, [http://www.floridagators.com/sports/2015/12/10/\\_vision\\_.aspx](http://www.floridagators.com/sports/2015/12/10/_vision_.aspx) (last visited Mar. 15, 2016).

89. See U.S. DEP'T OF EDUC., *supra* note 84. Utilize the one institution search function to obtain data for University of Florida.

90. *Id.*

91. *Western Kentucky Beats Southern Miss 45-28 for CUSA Title*, WKU SPORTS (Dec. 5, 2015), <http://www.wkusports.com/sports/m-footbl/recaps/120515aaa.html> (last visited Feb. 2, 2016).

92. *WKU Athletics Mission Statement and Core Values*, WKU SPORTS, <http://www.wkusports.com/genrel/082508aag.html> (last visited Mar. 15, 2016).

93. See U.S. DEP'T OF EDUC., *supra* note 84. Utilize the one institution search function to obtain data for Western Kentucky University.

broke even.<sup>94</sup> Thus, WKU was unable to profit from the sports that produce the most money in other conferences.<sup>95</sup>

Though not as profitable, men's basketball also has powerhouse conferences. The Atlantic Coast Conference (ACC) has provided three of the last ten NCAA Division I Champions.<sup>96</sup> Duke University, for example, won the men's basketball national championship twice in the past ten years, and it has a history of being a consistent national contender in men's basketball.<sup>97</sup> Duke's athletic department's mission statement provides:

The goal of the intercollegiate program is the same as that of the University's academic programs: excellence . . . . The measure of "excellence" when applied to intercollegiate athletics means also a level of performance that frequently will produce winning seasons and the realistic opportunity to compete for team or individual championships.<sup>98</sup>

Duke's men's basketball team reported a gross profit of \$13.9 million, while the remaining sports grossed only \$6.5 million and the athletic department, as a whole, made only \$513 thousand.<sup>99</sup>

Similarly, the University of North Carolina (UNC), Chapel Hill, whose most recent national championship was in 2009, is consistently a national contender in basketball.<sup>100</sup> Its mission is to "offer programs of regional and national acclaim [and] strive for competitive excellence within the ACC and with other similar institutions."<sup>101</sup> North Carolina's basketball team, in the 2014-2015 fiscal year, made a gross profit of \$13.3 million; the athletic department as a whole, however, only profited \$173,946.<sup>102</sup>

In stark contrast to Duke and UNC, the College of William & Mary (W&M)—also a NCAA Division I institution—has not won a national

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94. *Id.*

95. *Id.*

96. NCAA, BASKETBALL CHAMPIONSHIP HISTORY, <http://www.ncaa.com/history/basketball-men/d1> (last visited Mar. 16, 2016) (excluding Louisville who began play in the ACC in 2014, after its national championship win in 2013) [hereinafter BASKETBALL CHAMPIONSHIP HISTORY].

97. *Id.*

98. DUKE UNIV., STUDENT-ATHLETE HANDBOOK 4 (2011) [https://admin.xosn.com/pdf8/770244.pdf?&KEY=LFNCHBJZWRKODBD.20110706144733&DB\\_OEM\\_ID=4200](https://admin.xosn.com/pdf8/770244.pdf?&KEY=LFNCHBJZWRKODBD.20110706144733&DB_OEM_ID=4200) (last visited Mar. 3, 2016).

99. See U.S. DEP'T OF EDUC., *supra* note 84. Utilize the one institution search function to obtain data for Duke University.

100. BASKETBALL CHAMPIONSHIP HISTORY, *supra* note 96.

101. UNIV. OF N.C. DEP'T OF ATHLETICS, RECRUITING HANDBOOK 2 (Dec. 1, 2004), [http://www.goheels.com/fls/3350/imp\\_photos/genrel/auto\\_pdf/recruit-handbook-05.pdf?DB\\_OEM\\_ID=3350](http://www.goheels.com/fls/3350/imp_photos/genrel/auto_pdf/recruit-handbook-05.pdf?DB_OEM_ID=3350) (last visited Mar. 16, 2016).

102. See U.S. DEP'T OF EDUC., *supra* note 84. Utilize the one institution search function to obtain data for the University of North Carolina at Chapel Hill.

championship in any sport since 1948.<sup>103</sup> W&M's athletic department's mission statement states that it is:

committed to the development of its students as whole human beings, in mind, body and spirit. The College offers a broad-based intercollegiate athletic program in the belief that athletic participation promotes sound physical being, fosters strength of character, builds leadership qualities and contributes positively to the College community. The athletic program is built around the concept of the student-athlete where intellectual and athletic achievement is complementary and supportive. In athletics, competitive excellence is paramount but will not be achieved without a proper balance with the academic and social elements of the collegiate experience.<sup>104</sup>

In the 2014-2015 fiscal year, W&M reported a gross profit of \$4,405.<sup>105</sup> Neither of its traditional revenue sports produced a profit and its only profit came from non-allocated revenues streams.<sup>106</sup> Although most men's football and basketball programs fail to earn a profit, these programs are more likely to do so than any women's team.<sup>107</sup>

Women's sports across the country have historically failed to earn a profit.<sup>108</sup> The University of Connecticut's women's basketball team has won the NCAA Division I national championship five out of the last ten years and yet still failed to earn a profit in 2015.<sup>109</sup> Connecticut is not the only institution failing to profit from its women's basketball programs. The following chart<sup>110</sup> depicts the net profits of the 2015 NCAA Division I Women's Final Four teams:

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103. COLLEGE OF WILLIAM & MARY, *National Championships*, [http://www.tribeathletics.com/sports/2015/10/8/MTEN\\_1008151004.aspx?id=115](http://www.tribeathletics.com/sports/2015/10/8/MTEN_1008151004.aspx?id=115) (last visited Mar. 16, 2016).

104. COLLEGE OF WILLIAM & MARY, *Intercollegiate Policy and Procedural Manual 1*, <http://tribeathletics.test.wm.edu/policies/introduction.pdf> (last visited Mar. 16, 2016).

105. See U.S. DEP'T OF EDUC., *supra* note 84. Utilize the one institution search function to obtain data for the College of William and Mary.

106. *Id.*

107. Burns, *supra* note 76 (quoting NCAA Chief Financial Officer, Kathleen McNeely).

108. Dashiell Bennett, *Only 22 Of 120 Division I Athletic Programs Made Money Last Year*, BUSINESS INSIDER (June 15, 2011), <http://www.businessinsider.com/ncaa-revenue-expense-report-2011-6>.

109. NCAA, WOMEN'S BASKETBALL CHAMPIONSHIP HISTORY, <http://www.ncaa.com/history/basketball-women/d1> (last visited Mar. 4, 2016).

110. U.S. DEP'T OF EDUC., *supra* note 84. Utilize the compare data for multiple schools search function for the University of Notre Dame, the University of Maryland, the University of Connecticut, and the University of South Carolina.

Teams	Revenue	Expenses	Net Profit
University of Connecticut	\$3,991,215	\$6,658,516	(2,667,301)
University of Notre Dame	\$1,459,239	\$5,912,529	(4,453,290)
University of Maryland	\$1,033,076	\$4,242,541	(3,209,465)
University of South Carolina	\$1,581,246	\$6,475,016	(4,893,770)

Although a women's sports team earning profit is not unheard of, athletic departments are not basing their budgets on the projected profits of women's programs.<sup>111</sup> Given that the top four women's basketball teams in 2015 failed to make a profit, it is even more difficult for women's teams who are not top performers to profit.<sup>112</sup>

In contrast to the top women's basketball programs in the country, Wagner College, a Division I institution whose stated mission is: "the student-athlete is encouraged to develop both academic and athletic abilities in an environment where the foremost goal is the successful completion of the College's academic requirements for graduation within four years."<sup>113</sup> In 2014-2015, Wagner's women's basketball team made a gross profit of \$38.<sup>114</sup>

Given the current financial landscape of NCAA Division I institutions, athletic departments will be forced to decide on where to divert limited

111. Chris Smith, *When It's Okay to Lose Money: The Business of Women's College Basketball*, FORBES (Mar. 29, 2012), <http://www.forbes.com/sites/chris-smith/2012/03/29/when-its-okay-to-lose-money-the-business-of-womens-college-basketball/#3060fe2c1a99> (noting that only 43 out of 341 women's teams earned a profit or broke even in 2011).

112. See, e.g., U.S. DEP'T OF EDUC., *supra* note 84. Utilize the compare data for multiple schools search function for Bowling Green State University, which made \$70 in profit, and Southeast Missouri State University, which broke even. See *id.*

113. *Wagner College Athletics Mission Statement*, WAGNER SEAHAWKS, [http://www.wagnerathletics.com/sports/2009/10/30/GEN\\_1030094119.aspx](http://www.wagnerathletics.com/sports/2009/10/30/GEN_1030094119.aspx).

114. See U.S. DEP'T OF EDUC., *supra* note 84. Utilize the one institution search function to obtain data for Wagner College.

resources. This will force institutions to expend more resources on recruiting student-athletes, using increased GIAs to achieve their stated goals, or to allocate resources to provide opportunities geared towards supporting athletes' education.

#### B. The OCR's Solution to Two-Tiered Division I Institutions

The University of Alabama had the top football recruiting class from 2010-2015.<sup>115</sup> In keeping with its mission of maintaining nationally ranked sports by emphasizing recruitment of top student-athletes, Alabama has attracted the best high school football players in the country.<sup>116</sup> If the court in *Jenkins* permits institutions to compete with increased GIAs, universities like Alabama and Florida have the financial means to offer substantially greater GIAs than institutions like WKU and W&M.

As evidenced among the various schools' mission statements, athletic departments have different objectives. Some institutions focus on recruiting elite student-athletes in order to compete for national championships. Other NCAA Division I institutions focus on providing a quality education and opportunity for student-athletes to compete in their respective sports.

This disparity in the missions and values of athletic departments, coupled with their abilities to pay student-athletes increased GIAs, will create friction between the top-tier NCAA Division I institutions and lower-tier institutions. Top-tier institutions with the financial ability to offer dramatically increased GIAs will attract virtually all of the elite student-athletes. These institutions will couple financial incentives with the potential of competing for a national championship each year, foreseeably outweighing the offer of gaining a great education while competing for an institution. Not only will the drive of student-athletes seeking increased GIAs cause the two-tiered division, but top-tier schools will be driven to attract top-tier athletes to win championships which in-turn leads to greater profits for those institutions.<sup>117</sup>

Conflicts will arise as top-tier institutions compete for elite student-athletes while attempting to comply with Title IX's requirement to provide substantially proportionate scholarship opportunities at a disparity of one percent or less. Top-tier institutions will need to determine the most

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115. Fuhrmeister, *supra* note 86.

116. *Id.*

117. See Jacob Pramuk, *Playoffs Are a Revenue Bonanza for College Football*, CNBC (Jan. 1, 2015), <http://www.nbcnews.com/business/business-news/playoffs-are-revenue-bonanza-college-football-n277641>. ESPN is estimated to have made a \$610 million commitment for the television rights of the "Power Five" Conferences (ACC, Big 12, Big 10, Pac 12, and SEC). *Id.*

economically efficient way to provide substantially proportionate GIAs to both male and female student-athletes.

To temper this inevitable conflict and to allow for the procompetitive nature of the NCAA, the OCR should permit the disparity between GIAs offered to men and women in top-tier institutions to be larger than one percent. To determine if it is equitable for a disparity to exist in the amount of GIAs given to men and women the OCR should base its evaluation of an institution's financial means to provide increased GIAs upon the amount of revenue the institution made. For example, if an institution, like the University of Alabama or the University of Florida, makes an excess of \$30 million a year in profit, it should be permitted a slightly greater disparity in the amount of GIAs given to men and women. This solution allows these institutions to maintain competitiveness in recruiting student-athletes.

On the other hand, institutions like WKU and Wagner University, who fail to profit from their athletic programs, have not historically been able to recruit elite student-athletes. The lower-tier institutions' mission statements focus primarily on providing student-athletes with a great education and secondarily on athletic success and recruiting. Because these institutions are not focused on attracting the nation's elite athletes, requiring them to provide scholarship opportunities at higher thresholds of substantial proportionality will not inhibit them from reaching their athletic department's goals.

Analyzing an institution's compliance with Title IX in this manner will allow the OCR to enable top-tier institutions to compete against similarly situated institutions, while also allowing lower-tier institutions to compete for student-athletes against similarly situated institutions. This will result in institutions, like UNC and Duke, having a slightly higher disparity between the scholarship opportunities for men and women to give them the opportunity to compete for student-athletes. These institutions' constraints will be whether they can afford the increased GIAs for men and whether they can provide increased GIAs for women within an appropriate disparity range. On the other hand, institutions like W&M will remain on virtually the same playing field because they will not be permitted the extra disparity percentage points.<sup>118</sup> This will further the lower-tier institutions' goal to provide the most opportunities for student-athletes to compete while maintaining a commitment to academics.

In 2014, the NCAA reported revenues of just under \$1 billion, while student-athletes, until the *O'Bannon* decision, were unable to receive any

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118. See U.S. DEP'T OF EDUC., *supra* note 84. Utilize the one institution search function to obtain data for the University of Delaware recorded, which reported no profit in the 2014–2015 fiscal year.

compensation under the NCAA amateurism rules.<sup>119</sup> With the current trend leaning towards compensating student-athletes and pending litigation such as *Jenkins*, student-athletes will likely be compensated in the near future for the first time in history. This compensation, as previously stated, will be closely evaluated by the OCR to determine whether it complies with Title IX requirements. Therefore, the OCR should make definitive provisions to address the issues that may arise if institutions are permitted to compensate student-athletes.

Opponents of this solution will argue that permitting an institution to provide GIAs to male athletes who play a revenue sport at a greater proportion than women athletes will defeat Title IX's requirement that scholarships be offered in substantially proportionate numbers. This argument fails to recognize the current landscape of collegiate athletics. A balance must be struck between student-athletes' interest in being compensated for athletic talents that, in limited circumstances, create a profit for institutions, and providing women with similar compensation. Not all student-athletes will play for an institution whose athletic departments produce a profit, but the OCR should recognize those who do. Moreover, the OCR should weigh whether or not an athletic department produces a profit into its analysis when considering whether an institution provides scholarship opportunities to both sexes in substantially proportionate numbers. Allowing the OCR to include an institution's athletic department's mission and permitting a slightly larger leeway in determining substantial proportionality does not undermine the OCR's requirement of substantial proportionality in order to eliminate sex discrimination in government funded institutions.

## V. CONCLUSION

If the court in *Jenkins* declares the NCAA's cap on GIAs at \$5,000 violates the Sherman Antitrust Act, schools will be free to compete for the most elite student-athletes within the confines of Title IX. The OCR will then be tasked with determining whether institutions providing increased GIAs to student-athletes are doing so in a manner that is substantially proportionate for both men and women. It is plausible that when the legislature passed Title IX, it did not foresee that the NCAA would be a multi-million-dollar institution, but it did have the foresight to allow the OCR to use its discretion in enforcing the statute.

Title IX's mission to eliminate discrimination based on sex remains of great importance, but the OCR, in enforcing Title IX, must also consider

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119. BYLAW, *supra* note 39.

the landscape of today's society. The NCAA struggles to operate in a way that emphasizes the concept that collegiate athletes are not only athletes but also students.<sup>120</sup> The NCAA has, throughout history, emphasized this concept by enforcing educational requirements and implementing amateur rules that prohibit institutions from compensating students for their athletic talents. After *O'Bannon*, student-athletes will now be compensated for participation in collegiate athletics, and if the court in *Jenkins* removes the cap on GIAs, student-athletes will be compensated at rates that are only mitigated by Title IX constraints.

The OCR, in continuing with its history of analyzing the disparities between scholarship opportunities between men and women on a case-by-case basis, should consider the amount of profit an institution makes. Additionally, the OCR should consider an athletic department's mission statement to determine whether the institution is focused on competing for elite student athletes and national championships or concerned with providing the best environment for athletes to compete while gaining an education. The differences between these two types of institutions are important because they do not attract the same types of athletes, make the same amount of money, or provide the same experience to student-athletes. Thus, the OCR, when analyzing disparities in scholarship opportunities between the sexes, should compare similarly situated institutions to determine whether the disparity between the amount of scholarships given to men and women complies with Title IX. This comparison will prevent institutions from being compared to dissimilar institutions with different goals, while also maintaining the procompetitive goals of the NCAA.

Compensation for student-athletes is no longer a far-fetched wish. It has become a current issue, and all parties involved must be prepared to navigate the uncharted waters. Adjusting the OCR's examination of Title IX compliance concerning scholarship opportunities allows the OCR to look at the institution as a whole and evaluate its goals and purpose, instead of holding every institution to the same strict disparity requirements. This adjustment will help preserve the nondiscriminatory goals of Title IX.

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120. See generally Ravi Lulla, *10 Worst Scandals in NCAA History*, BLEACHER REPORT (Sept. 28, 2011), <http://bleacherreport.com/articles/869007-10-worst-scandals-in-ncaa-history>.