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Roadblocks: Examining Title IX & the Fair Compensation of Division I Intercollegiate Student-Athletes

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ROADBLOCKS: EXAMINING TITLE IX & THE FAIR COMPENSATION OF DIVISION I INTERCOLLEGIATE STUDENT-ATHLETES

Undoubtedly, the world of Division I intercollegiate athletics generates hundreds of millions of dollars each year for the National Collegiate Athletic Association (NCAA), Division I athletic conferences, and the respective universities. During the 2013–2014 year alone, the NCAA's gross revenue totaled $497,600,000,[1] with a majority of the revenue generated through various media rights payments.[2] For example, in 2010, the NCAA, CBS, and Turner Sports agreed to a fourteen-year, $10.8 billion agreement for the media rights to the sixty-eight team Division I men's basketball tournament.[3] More recently, ESPN and the Football Bowl Subdivision (FBS), an organization composed of Division I member conferences and their respective institutions, agreed to a twelve-year, $5.64 billion deal for the newly created college football playoff system.[4] The NCAA also has an agreement with ESPN granting the TV network the right to broadcast the NCAA women's basketball tournament, College World Series, and twenty other NCAA championships worth close to $18 million per year.[5] According to the NCAA, all of its revenue is distributed amongst Division I member institutions and their respective conferences through the *Division I Revenue Distribution Plan*.[6] The plan is described as a method "that rewards competitive performance over time, . . . promotes athletically related financial aid and sports sponsorship, . . . enhances academic performance, . . . [and] provides special assistance for student-athletes with financial needs."[7]

1. *Revenue*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sites/default/files/2013-14%20Revenue%20Distribution%20Plan.pdf (last visited Feb. 18, 2014).

2. *Finances*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/about/resources/finances (last visited Feb. 18, 2014).

3. Thomas O'Toole, *NCAA Reaches 14-year Deal with CBS/Turner for Men's Basketball Tournament, which Expands to 68 Teams for now*, USA TODAY, Apr. 22, 2010, http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbsturner/.

4. Rachel Bachman, *ESPN Strikes Deal for College Football Playoff*, WALL ST. J., Nov. 21, 2012, http://www.wsj.com/articles/SB10001424127887324851704578133223970790516 (estimating the deal to generate upwards of $470 million annually).

5. *See* O'Toole, *supra* note 3.

6. *Distributions*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/about/resources/finances/distributions (last visited Feb. 18, 2014).

7. *Id.*

Although athletic programs receive portions of their revenue from NCAA agreements, it is not the sole source for many of the top programs. In a study documenting the revenues and expenses at NCAA Division I public universities from 2006 to 2011,[8] *USA Today Sports* determined the nation's top five athletic programs each grossed over $120 million in revenue during the six-year period.[9] Additionally, some athletic programs, such as the University of Texas, have secured their own media rights agreements. The university, in

8. USA TODAY SPORTS, USA TODAY SPORTS' COLLEGE ATHLETICS FINANCES: DETAILS OF REVENUES AND EXPENSES AT NCAA D-I PUBLIC SCHOOLS 2006-2011, May 16, 2012, *available at* http://usatoday30.usatoday.com/sports/college/story/2012-05-14/ncaa-college-athletics-finances-database/54955804/1.

9. *Id.* The top five revenue generating athletic programs (in order) were the University of Texas, the Ohio State University, the University of Michigan, the University of Alabama, and the University of Florida. *Id.* Total revenue include (1) ticket sales ("Sales of admissions to athletic events. Include ticket sales to the public, faculty and students, and money received for shipping and handling of tickets. Does not include amounts in excess of face value or sale for conference and national tournaments that are pass-through transaction."), student fees ("Fees assess to support athletics."), (2) school funds ("Includes both direct and indirect support from the university, including state funds, tuition, tuition waivers etc. as well as federal Work Study amounts for athletes. It also includes university-provided support such as administrative costs, facilities and grounds maintenance, security, risk management, utilities, depreciation and Sponsored Links debt service."), (3) contributions ("Includes amounts received directly from individuals, corporations, associations, foundations, clubs or other organizations by the donor for the operation of the athletic program. Report amounts paid in excess of ticket's value. Contributions include cash, marketable securities and in-kind contributions such as dealer-provided cars, apparel and drink products for team and staff use. Also includes revenue from preferential seating."), (4) rights/licensing ("Includes revenue for athletics from radio and television broadcasts, Internet and ecommerce rights received from institution-negotiated contracts, the NCAA and conference revenue sharing arrangements; and revenue from corporate sponsorships, licensing, sales of advertisements, trademarks and royalties. Includes the value of in-kind products and services provided as part of the sponsorship e.g., equipment, apparel, soft drinks, water and isotonic products.), and (5) other revenue ("All other sources of revenue including game guarantees, support from third-parties guaranteed by the school such as TV income, housing allowances, camp income, etc.; tournament/bowl game revenues from conferences; endowments and investments, revenue from game programs, novelties, food or other concessions; and parking revenues and other sources."). Calculations completed through subtracting total expense figures from total revenue figures. Total expenses include (1) scholarships ("athletically-related student aid, including summer school and tuition discounts and waivers . . . and aid for non-athletes such as student managers"), (2) coaching staff ("all salaries, bonuses and benefits reported on the university's tax forms for coaches and staff, as well as third-party contributions"), (3) facilities ("facilities costs charged to the athletic program, including debt service, maintenance, utilities and rental fees."), and (4) other ("Includes guarantees paid to other schools, severance payments to past coaches and staff, recruiting, team travel, equipment and uniforms, game day and camp expenses, fundraising and marketing costs, spirit group support, medical expense/insurance and conference dues. It also includes expenses charged to athletics by the university, such as building maintenance.").

conjunction with ESPN, created the "Longhorn Network."[10] The twenty-year, $300 million agreement[11] created what is described as "a broadband network for University of Texas live sports programming"[12] that "harnesses the quality ESPN has built through its TV networks and delivers online programming to Longhorn fans through a rich, interactive, and easy-to-use experience."[13]

As the revenue continues to grow, the NCAA maintains its bar against compensating student-athletes outside of the grant-in-aid they may receive.[14] Pursuant to the *NCAA Division I Manual*, "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport."[15] They are prohibited from receiving a share of the revenue generated by *any* of the aforementioned agreements. In fact, a student-athlete may lose his or her eligibility to participate in NCAA competition if the individual[16] (1) uses his or her athletic skills (directly or indirectly) for pay in any form in that sport;[17] (2) accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;[18] (3) signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received;[19] (4) receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletic skill or participation, except as permitted by NCAA rules and regulations;[20] (5) competes on any professional athletics team, even if no pay or remuneration for expenses was received;[21] (6) after initial full-time collegiate enrollment, enters into a professional draft;[22] or (7) enters into an agreement with an agent.[23]

10. *See* THE LONGHORN NETWORK, http://espn.go.com/longhornnetwork/ (last visited Feb. 18, 2014).

11. Michael Rosenberg, *University of Texas' TV Network is a Lucrative Web of Conflicts*, SPORTS ILLUSTRATED, Jan. 20, 2011, http://www.si.com/more-sports/2011/01/20/texas-tv.

12. *See* THE LONGHORN NETWORK, *supra* note 10 (follow "ABOUT" hyperlink).

13. *See id.* (follow "ABOUT" hyperlink).

14. *See* NCAA ACAD. & MEMBERSHIP AFF. STAFF, NCAA DIVISION I MANUAL art. 12, § 12.1.4 (2013) ("A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skills, provided it does not exceed the financial aid limitations set by the Association's membership.") [hereinafter NCAA DIVISION I MANUAL].

15. *Id.* § 12.1.1.

16. *Id.* § 12.1.2.

17. *Id.* § 12.1.2(a).

18. *Id.* § 12.1.2(b).

19. *Id.* § 12.1.2(c).

20. NCAA DIVISION I MANUAL, *supra* note 14, § 12.1.2(d).

21. *Id.* § 12.1.2(e).

22. *Id.* § 12.1.2(f).

23. *Id.* § 12.1.2(g).

The rules are clear. With that being said, discussions regarding whether or not student-athletes should receive compensation arise with more and more frequency. Those opposed to paying student-athletes argue the ideal of amateurism at the collegiate level would disappear, the distinction between professional and collegiate athletics would effectively be erased, and the simple concept of a "level playing field" would be eviscerated. On the other hand, proponents argue that the student-athletes, the ones largely responsible for the growth in revenue and popularity of collegiate sports, are entitled to their piece of the billion-dollar pie. Proponents point to the frequency of highly publicized media and NCAA investigations regarding impermissible benefits as a clear indication that the rules simply do not work.[24] Moreover, organizations such as the National Collegiate Players Association[25] (NCPA) continue to push for some form of compensation. In conjunction with Drexel University, the NCPA published a study documenting "the shortfall that exists between what a 'full' scholarship covers and what the full cost of attending college is compared to the federal poverty guideline."[26] The study included an estimation of players' fair market value,[27] and provided "a perspective on the disproportional levels of compensation to which college sports officials have and access compared to the limits imposed on revenue-generating athletes."[28] According to the study, for the 2011–2012 academic year the average annual scholarship shortfall[29] of an FBS "full scholarship" athlete was $3,285,[30] and the percentage of FBS schools whose full athletic scholarships leave their

24. For example, in September of 2013, *YAHOO! Sports* revealed that five Southeastern Conference football stars violated NCAA rules by receiving extra benefits prior to completing their careers. The record indicates a former University of Alabama defensive end funneled over $45,000 to five collegiate football players. *See* Charles Robinson & Rand Getlin, *Ties Between Former Alabama Player and Agents Documented by Text Messages*, YAHOO! SPORTS, Sept. 11, 2013, http://sports.yahoo.com/news/ncaaf—ties-between-former-alabama-player-and-agents-documented-by-text-messages-203153323.html. The allegations violate NCAA bylaw 12.3.1.2, prohibiting student-athletes from receiving extra benefits from prospective agents or marketing representatives, and could result in retroactive penalties against both the student-athletes still competing and their universities. *See* NCAA DIVISION I MANUAL, *supra* note 14, § 12.3.1.2.

25. The NCPA is a nonprofit advocacy group serving as the only independent voice for college athletes across the nation. Its mission is to provide the means for college athletes to voice their concerns and change NCAA rules. *See Mission & Goals*, NAT'L COLLEGE PLAYERS ASS'N, http://www.ncpanow.org/about.

26. RAMOGI HUMA & ELLEN J. STAUROWSKY, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORTS 3 (2011).

27. *Id*.

28. *Id*.

29. "Shortfall," according to the study constitutes out of pocket expenses incurred by the student-athletes themselves. *See* RAMOGI HUMA & ELLEN J. STAUROWSKY, THE $6 BILLION HEIST: ROBBING COLLEGE ATHLETES UNDER THE GUISE OF AMATEURISM 11 (2012).

30. *Id.* at 12.

players in poverty ranged from 82%[31] to 90%.[32] The study concluded that after accounting for about $23,000 in full athletic scholarships, Division I football players were denied approximately $114,153 per year while basketball players were denied approximately $289,031 per year.[33]

Whether or not one believes these student-athletes should be paid, the discussion of whether they *can* be paid remains a critical jumping-off point. Central to the examination of legally compensating student-athletes beyond the cost of attendance is Title IX of the Education Act of 1972.[34] Legal scholars note that "[p]erhaps no law has received more attention in the sports industry, specifically within high school and collegiate sports, than Title IX. Forty years after its enactment, this educational statute has truly reshaped the landscape of American Sport."[35] How does Title IX influence the structure and organization of paying student-athletes? Can a small percentage of student-athletes, specifically those participating in Division I football and basketball programs, be compensated without violating Title IX? If Title IX does apply in the compensation scheme, will most universities be able to fiscally manage payment of their student-athletes?

This article contends that Title IX of the Education Amendments of 1972 has the potential to effectively bar, or severely limit, payment of student-athletes outside of their current grant-in-aid. Whether directly or indirectly, Title IX effectively prevents most forms of compensation outside of what student-athletes currently receive. In order to fully examine the topic, this article will first address the history and longstanding relationship between intercollegiate athletics and Title IX. Next, this article addresses some of the more popular payment proposals by members of the NCAA, legal scholars, and members of the media. Finally, this article explores the relationship between the proposals and Title IX, examining how and why Title IX may prevent such plans from coming to fruition.

I. A BRIEF HISTORY OF THE RELATIONSHIP BETWEEN TITLE IX AND INTERCOLLEGIATE ATHLETICS

Enacted as part of the Education Amendments of 1972,[36] Title IX provides 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

31. *Id.* (stating this percentage applies to those scholarship athletes who live on campus).

32. *Id.* (stating this percentage applies to those scholarship athletes living off campus).

33. *Id.*

34. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012).

35. Paul M. Anderson, *Title IX at Forty: An Introduction and Historic Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS. L. REV. 325, 325 (2012).

36. Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 934 (D.C. Cir. 2004).

funds."[37] The statute's "heart is a broad prohibition of gender-based discrimination in all programmatic aspects of educational institutions."[38] It generally prohibits "gender-based discrimination by educational institutions receiving federal financial support—in practice, the vast majority of all accredited colleges and universities."[39] Title IX was passed with two objectives in mind: "to avoid the use of federal resources to support discriminatory practices"[40] and "to provide individual citizens effective protection against those practices."[41]

Although enacted in 1972, Title IX's application to intercollegiate sports did not arise until 1974 with the passing of the Javits Amendment (the "Amendment").[42] The Amendment required the Department of Health, Education, and Welfare (HEW)[43] to "prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletics reasonable provisions considering the nature of particular sports."[44] Published in 1975, the regulations state:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.[45]

The regulations also established ten principle factors to be considered when examining compliance under the above standard.[46] Regarding general athletic expenditures, the regulations state:

37. 20 U.S.C. § 1681(a).

38. Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993).

39. *Id.* at 893.

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

41. *Id.*

42. Anderson, *supra* note 35, at 330.

43. *Id.* at 330 n.25 (stating the Department of Health, Welfare and Education is currently known as the Department of Education).

44. *Id.* at 331 (quoting Pub. L. No. 93-380, Title VII, Part D, § 844, 88 Stat. 612 (1974)).

45. 34 C.F.R. § 106.41(a) (2012).

46. *Id.* The factors are (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms, practice and competitive facilities; (8) provision of medical and training facilities and services; (9) provision of housing and dining facilities and services; and (10) publicity. 34 C.F.R. § 106.41(c) (2012).

> [U]nequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.[47]

Additionally, the regulations include a provision specific to athletic scholarships, which provides, "[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 proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics,"[48] and "[s]eparate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with . . . §106.41."[49]

By the end of July 1978, HEW "received nearly 100 complaints alleging discrimination in athletics against more than fifty institutions of higher education."[50] In response to these complaints and "questions from the university community," the agency published a policy interpretation (the "Interpretation") specifically designed for intercollegiate athletics.[51] The Interpretation was identified as a means for clarifying "the meaning of 'equal opportunity' in intercollegiate athletics,"[52] and "explain[ed] the factors and standards set out in the law and regulation which the Department [would] consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations."[53] The Interpretation established three broad categories of compliance:[54] (1) compliance in financial assistance (scholarships) based on athletic ability;[55] (2) compliance in other program areas[56] (including equipment and supplies, games and practice times, travel and per diem, coaching and academic tutoring, assignment and compensation of coaches and tutors, locker rooms, and competitive facilities, medical and training facilities, housing and dining facilities, publicity,

47. 34 C.F.R. § 106.41(c).

48. 34 C.F.R. §106.37(c)(1) (2012).

49. 34 C.F.R. § 106.37(c)(2) (2012).

50. Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86) [hereinafter 1979 Policy Interpretation].

51. *Id.*

52. *Id.* at 71,414.

53. *Id*.

54. *Id*.

55. *Id.* (Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.)

56. 1979 Policy Interpretation, *supra* note 50, at 71,414 ("[T]he governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.").

recruitment, and support services);[57] and (3) compliance in meeting the interests and abilities of male and female students.[58]

With regards to the first category, the policy interpretation does not require identical assistance for both sexes.[59] Instead, institutions will be found compliant if the comparison of financial aid offered to men's and women's athletic programs is "in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors."[60] The Interpretation clarifies that it does not require the number of scholarships offered to be equal in dollar value; instead, the requirement is met if "the total amount of scholarship aid made available to men and women [is] substantially proportionate to their participation rates."[61]

With regards to the second category,[62] the policy interpretation notes that "institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect."[63] Each factor listed within the regulation is assessed by "comparing the availability, quality and kinds of benefits, opportunity, and treatment afforded to members of both sexes."[64] If an initial assessment finds a disparity, the disparity may then be justified by certain nondiscriminatory factors including "unique aspects of particular sports or athletic activities"[65] and "legitimately sex-neutral factors related to special circumstances of a temporary nature."[66] Through this statement, the Interpretation recognizes that men's and women's teams may have different financial requirements "because of unique aspects of particular sports or athletic activities,"[67] and allows such disparities "[i]f sport-specific needs are met equivalently in both men's and women's programs."[68] If a recipient fails to provide a legitimate justification for the disparity, the Interpretation provides for specific criteria to be used in assessing each part of the evaluation.[69]

After an analysis involving the specific criteria is completed, the Interpretation provides three alternate grounds on which the agency could render a finding of noncompliance: (1) whether the policies of an institution

57. *Id.*

58. *Id.* ("Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.").

59. *Id.* at 71,415.

60. *Id.*

61. *Id.*

62. *See* Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75, 78 (2003) (stating this category is also referred to as "equal treatment").

63. 1979 Policy Interpretation, *supra* note 50, at 74,415.

64. Anderson, *supra* note 35, at 339.

65. *Id.*

66. *Id.*

67. Pieronek, *supra* note 62, at 79.

68. *Id.* at 79–80

69. Anderson, *supra* note 35, at 338.

are discriminatory in language or effect;[70] (2) whether the disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole;[71] or (3) whether the disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.[72] For the purposes of payments to student-athletes, it is important to note the Interpretation declares the "laundry list" of categories "not exhaustive,"[73] and that it "may be expanded as necessary at the discretion of the Director of the Office for Civil Rights."[74]

With regards to the final category, the policy interpretation established a "trinitarian model under which the university must meet at least one of three benchmarks"[75] to comply with Title IX: (1) whether intercollegiate levels of participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;[76] or (2) where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex;[77] or (3) where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[78]

It is important to note that compliance under this section is not based on an overall evaluation of each part.[79] Instead, compliance is based on whether a program meets any one of the particular tests.[80] In effect, the "substantial proportionality" test provides a safe harbor for recipients under Title IX.[81] However, if an institution lacks such proportionality and fails to show that it is

70. Erin E. Buzuvis & Kristine E. Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX's Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427, 435 (2012). *See also* 1979 Policy Interpretation, *supra* note 50.

71. Buzuvis & Newhall, *supra* note 70, at 435.

72. *Id.*

73. *Id.* at 443; *see also* 1979 Policy Interpretation, *supra* note 50.

74. 1979 Policy Interpretation, *supra* note 50.

75. Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993).

76. *Id.* (citing to the 1979 Policy Interpretation).

77. *Id.*

78. *Id.*

79. Anderson, *supra* note 35, at 340.

80. *Id.*

81. Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 829 (10th Cir. 1993).

"continuing to expand opportunities for athletic participation by the underrepresented gender," then it must "fully and effectively accommodate" the interests and abilities among members of the underrepresented gender.[82] Although the standard of full and effective accommodation is high, the fact that there is mere interest in a sport does not require an institution to provide a varsity team in order to meet compliance.[83] Rather, "institutions can satisfy the third benchmark by ensuring participatory opportunities at the intercollegiate level when, and to the extent that, there is 'sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonably expectation of intercollegiate competition for that team.'"[84]

Courts, generally, categorize the regulations into two broadly defined areas: effective accommodation, which concerns the availability of participation opportunities,[85] and equal treatment, which includes athletic scholarships as well as other athletic benefits or opportunities.[86]

Of particular importance is the court's prohibition against allowing universities to replace public funding with private funding to support a particular athletic program. Support of an athletic program with private funds instead of public funding does not remove the program from the Title IX substantial proportionality calculus.[87] In *Chalenor v. The University of North Dakota*, the Eight Circuit held "a school may not skirt the requirement of providing both sexes equal opportunity in athletic programs by providing one sex more than substantially proportionate opportunity through the guise of outside funding."[88] After the men's wrestling program was cut in response to budgetary constraints, members of the program subsequently filed suit against the university.[89] In contesting the dismissal of their team, members of the program alleged the university's budgetary considerations were an illusory justification for dropping the team since a "private donor had offered to fund the wrestling program."[90] Thus "the program would not have used resources that otherwise would have been available to female athletes."[91] Since the program had guaranteed itself funding, members of the team alleged the university's true purpose in cutting the program fulfilled the "University's

82. *Id.*

83. *Cohen*, 991 F.2d at 898.

84. *Id.*

85. Pieronek, *supra* note 62, at 78; *see also* Biediger v. Quinnipiac Univ., 691 F.3d 85, 92 (2d Cir. 2012).

86. Pieronek, *supra* note 62, at 78; s*ee also* Biediger, 691 F.3d at 92.

87. Andrew J. Weissler, *Unasked Questions: Applying Title IX's Effective Accommodation Mandate to Interscholastic Athletics*, 19 SPORTS LAW. J. 71, 87 (2012).

88. *Id.* at 87–88; *see* Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048 (8th Cir. 2002).

89. *Chalenor*, 291 F.3d at 1043.

90. *Id.* at 1048.

91. *Id.* at 1043.

desire to equalize rates of participation and resource allocation in sports by sex."[92] They argued allowing the university to take such action represented the implementation of a quota system which would run contrary to the purpose of Title IX.[93]

In finding for the university, the Eighth Circuit made several key determinations regarding the use of private funds in support of intercollegiate athletic programs.[94] The court reasoned that "once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in disbursement."[95] Thus, the use of private funds to support an athletic program cannot be used as a shield for a "university which provides more than substantially proportionate athletic opportunities to one gender in violation of Title IX."[96] The court noted "the University had no obligation to accept the donation, and, even if it had, disbursement of the funds still would have been subject to the strictures of Title IX."[97] Even though the team may have acquired the requisite funding, its participation violated Title IX's equal participation requirements.[98] Therefore, any use of private funds "in support" of an athletic program is effectively barred if the use of those funds provides greater opportunities of participation for one sex over the other at the intercollegiate level.[99]

Additionally, *Daniels v. School Board of Brevard County, Florida* illustrates how the principle announced in the effective-accommodation context of *Chalenor* applies with regard to equal treatment.[100] Here, members of a girls' varsity softball team at Merritt Island High School (MIHS) asserted Title IX violations and sought a preliminary injunction to remedy inequalities between the MIHS girls' softball and boys' baseball facilities.[101] The alleged inequitable treatment included the presence of an electronic scoreboard, batting cages, bleachers, signs, bathroom facilities, concession stands, a press box, an announcer's booth, field maintenance, and lighting at the boys' field, all of which the girls' softball field lacked.[102] The board, in an attempt to justify the discrepancies, contested it could not be found in violation of Title IX's requirements since it provided equivalent funding to both programs.[103] Any

92. *Id.*
93. *Id.*
94. *Id.* at 1048.
95. *Chalenor*, 291 F.3d at 1048.
96. *Id.*
97. *Id.*
98. Pieronek, *supra* note 62, at 115.
99. *Id.*
100. *Id*; Daniels v. Sch. Bd. of Brevard Cnty., Fla., 985 F. Supp. 1458 (M.D. Fla. 1997).
101. *Daniels*, 985 F. Supp. at 1460–61.
102. *Id.*
103. *Id.* at 1462.

improvements in the boys' facilities resulted from private funds raised through the work of an active booster organization.[104] It argued that "it cannot be held responsible if the fundraising activities of one booster club are more successful than those of another."[105]

In rejecting the school board's argument, the court stated "it is the Defendant's responsibility to ensure equal athletic opportunities, in accordance with Title IX."[106] Furthermore, it concluded that "[t]his funding system is one to which the Defendant has acquiesced."[107] Thus, the district court held the school board, as a result of its acceptance of such a funding structure, was "responsible for the consequences of that approach."[108] The district court concluded the inequalities indicated the school board "ha[d] chosen to favor the boys' baseball team . . . but ha[d] not seen fit to provide the girls' softball team with any of these things."[109] Furthermore, the court stated "[e]ach day these inequalities go unredressed, the members of the girls' softball team, prospective members, students, faculty and the community, are sent a clear message that girls' high school varsity softball is not worth as much as boys' high school varsity baseball, i.e., that girls are not as important as boys."[110] Thus, any financial disparities, whether resulting from internal or external mechanisms, may result in noncompliance with the equal treatment provisions of Title IX.[111] Acceptance of such a system, pursuant to *Daniels*, which results in unequal opportunities presented to one sex does not excuse a university's obligations to seek and maintain equal opportunity for both sexes. Ultimately, *Daniels* could potentially limit any argument universities may have with regards to providing a sex-neutral system which creates substantial disparities between male and female student-athletes.

Title IX's applicability to the NCAA also warrants consideration. In *NCAA v. Smith*, the Supreme Court held the NCAA's receipt of dues payments from recipients of federal funding did not sufficiently subject the organization to Title IX's requirements.[112] Renee Smith filed suit against the NCAA alleging the NCAA's refusal to grant her a waiver under its postbaccalaureate bylaw violated Title IX by excluding her from participation in intercollegiate athletics on the basis of her sex.[113] While the complaint did not attack the bylaw on its face, it alleged that the NCAA discriminated on the basis of sex through

104. *Id.*
105. *Id*.
106. *Id.*
107. *Daniels*, 985 F. Supp. at 1462.
108. *Id.*
109. *Id.* at 1461.
110. *Id.*
111. Pieronek, *supra* note 62, at 115.
112. Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 462 (1999).
113. *Id.* at 464.

granting more waivers from eligibility restrictions to male than female postgraduate student-athletes.[114] The NCAA moved to dismiss the claim on the grounds that the complaint failed to sufficiently allege that the NCAA was a recipient of federal financial assistance.[115] Countering this claim, Smith argued that the NCAA, through its receipt of dues from intercollegiate athletic programs, benefited economically from its members' receipt of federal funds, and, therefore, Title IX applied.[116]

The Supreme Court, interpreting Section 106.2(h)'s definition of "recipient,"[117] determined the definition "makes clear that Title IX coverage is not triggered when an entity merely benefits from federal funding."[118] The Court stated "[e]ntities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX. . . . Entities that only benefit economically from federal assistance are not."[119] Thus, while the complaint established the NCAA *indirectly* received benefits from federal assistance afforded to its members, such a "showing, without more, is insufficient to trigger Title IX coverage."[120] Thus, while the NCAA currently controls the regulations of student-athletes regarding compensation and impermissible benefits, if it were to allow compensation of student-athletes beyond the cost of attendance, any subsequent violations of Title IX would fall upon the individual university providing or permitting such compensation.

II. HOW SHOULD STUDENT-ATHLETES BE COMPENSATED? PROMINENT PROPOSALS REGARDING THE PAYMENT OF STUDENT-ATHLETES

Legal scholars, members of the media, and members of the athletic community alike have suggested new systems through which the NCAA or its member institutions might compensate student-athletes for their performance. Suggestions range from permitting student-athletes to enter into endorsement deals to having the NCAA's member institutions send paychecks directly to its players.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* "Section 106.2(h) defines 'recipient' to include any entity 'to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance.'" *Id.* at 468; *see also* 34 C.F.R. § 106.41(h) (2012).

118. *Smith*, 525 U.S. at 468.

119. *Id.*

120. *Id*. at 469.

A. Pay-for-Play (Stipend Programs)

Garnering the greatest support amongst the various proposals, the basic pay-for-play model asserts that universities should compensate student-athletes for their participation in various athletic programs through the provision of a monthly stipend.[121]

Evidence of the proposal's legitimacy came in 2011 when the NCAA's board approved a plan to funnel a $2,000 stipend to scholarship athletes regardless of their need.[122] While the plan was ultimately overridden by 160 of the 350 Division I member schools, NCAA leaders are likely to reconsider the stipend program again in 2014.[123] The original proposal would have allowed Division I universities to increase grants to student-athletes by $2,000, "to more closely approach" the full cost of attending college.[124] Mark Emmert, current president of the NCAA, described the plan as a means to "close the gap between a scholarship—which only covers tuition, room and board, and books—and the 'full cost of attendance,' which includes other miscellaneous expenses incurred by athletes who travel during their seasons."[125] While the proposal has not yet been finalized, Emmert hopes to unveil a retooled stipend plan likely to include a "need-based" component.[126] The plan's options would include (1) athletes applying for money through the Free Application for Federal Student Aid,[127] (2) giving universities or conferences discretion as to how the funds would be allocated,[128] and (3) calculating the stipend payments based on family contributions.[129]

While the NCAA continues consideration of its own form of a stipend, legal scholars have also proposed various programs. These include a proposal advocating, generally, for the payment of stipends to specific athletic

121. Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 405 (2012).

122. Jeremy Fowler, *NCAA President Mark Emmert Hopes to Unveil New Stipend Plan in April*, CBS SPORTS, Jan. 1, 2013, http://www.cbssports.com/collegefootball/writer/jeremy-fowler/21483211/ncaa-president-mark-emmert-hopes-to-unveil-new-stipend-plan-in-april.

123. Rich Kirchen, *Emmert: NCAA Will Reconsider Athlete 'Stipends' in 2014*, MILWAUKEE BUS. J., Sept. 16, 2013, http://www.bizjournals.com/milwaukee/blog/2013/09/emmert-ncaa-will-reconsider-athlete.html?page=all.

124. *NCAA Pushes for $2K Increase for Athletes*, ESPN, Oct. 25, 2011, http://espn.go.com/college-sports/story/_/id/7143961/ncaa-weighing-2000-payments-student-athletes.

125. *NCAA Prez: Stipend not 'pay for play'*, ESPN, Nov. 3, 2011, http://espn.go.com/college-sports/story/_/id/7187028/ncaa-stipend-not-lean-pay-play-president-mark-emmert-says.

126. Fowler, *supra* note 122.

127. *Id.*

128. *Id.*

129. *Id.*

programs,[130] and another which promotes a smaller-sized "laundry money" payment made to all student-athletes.[131] Within the structure of the first proposal, stipends would be available to student-athletes participating in the men's football and basketball programs, as well as student-athletes participating in the women's basketball and volleyball programs.[132] Additionally, the proposal provides each university with discretion in initially implementing the program and discretion regarding the dollar amount ultimately paid to the student-athletes.[133] Finally, the proposal lifts NCAA monetary cap restrictions with regards to employment for scholarship student-athletes participating in nonrevenue sports.[134] The second proposal, the "laundry money" model, offers Division I universities the opportunity to pay "all student-athletes a small amount of spending money, perhaps $30–$50 per month, as part of their athletic scholarship."[135] Similar to the first proposal, all universities would be provided discretion as to whether or not they implement the system as well as discretion regarding the final amount provided.[136] Unlike the first proposal, the second offers an additional form of monetary compensation through the incorporation of a revenue-sharing scheme.[137] It would make "available to student-athletes a reasonable percentage of revenue derived each year from the football bowls, the men's and women's NCAA basketball tournaments, and shoe and apparel deals."[138] However, the plan would limit such payments to those student-athletes participating in programs producing the revenue.[139] Furthermore, the proposal notes the revenue-sharing component would require some form of payment to members of women's

130. *See* C. Peter Goplerud III, *Pay for Play For College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081, 1089 (1997).

131. *See* Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 78–82 (2000).

132. Goplerud, *supra* note 130, at 1089. The proposal additionally states that other women's sports may be included "in sufficient numbers to satisfy gender equity requirements." *Id.*

133. *Id.* The proposal also sets forth a "salary cap" at an average of $300 per month, thus, capping the total amount allocated to student-athletes. *Id.*

134. *Id.*

135. Hurst & Pressly, *supra* note 131, at 78–79. The proposal indicates such payments would cost most universities less than $100,000 per year, and, therefore, would not financially cripple most Division I universities. *Id.*

136. *Id.* at 79.

137. *Id.*

138. *Id.* at 79–80.

139. *Id.* The proposal uses the following example to illustrate this point: "[I]f the University of Florida football team received $3 million for its invitation to play in the 2000 Orange Bowl, the student-athletes on that team (and that team only) would receive a small percentage of that payout." *Id.*

teams, and advocates for a blanket payment to "each female student-athlete in all sports."[140]

B. Revenue-Sharing Model

The revenue-sharing model, a variation of the pay-for-play model,[141] argues that universities should compensate student-athletes through sharing with their student-athletes a percentage of the revenue generated by their respective teams.[142] Generally, the model proposes that student-athletes receive a portion of the *net*[143] profits generated by the athletic department.[144] This would ensure that teams operating at a deficit would not suffer greater financial loss as a result of having to share a portion of its gross revenue.[145] The practice essentially involves pooling together revenue from agreed-upon sources and then distributing it among parties to the agreement.[146]

In order to effect such change, some scholars propose an amendment to NCAA section 12.02.2.[147] The section defines "pay" as the "receipt of funds, awards, or benefits not permitted by the governing legislation of the Association for participation in athletics."[148] The amendment would permit student-athletes to receive a portion of the revenues generated by their teams.[149] Discussed below, the proposal includes four parts: (1) system based on seniority, (2) inclusion of postseason compensation, (3) compensation for election to athletic and academic All-American teams, and (4) partial revenue sharing of endorsement monies.

The first section of the model proposes a division of revenues according to seniority, or "years of service,"[150] as follows: (1) each player in his or her

140. Hurst & Pressly, *supra* note 131.

141. *See* Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM, 861, 884 (2002).

142. Corgan, *supra* note 121, at 410.

143. *Id.* at 411. The model takes into consideration the relative costs associated with each sport, which leads to the focus on sharing the *net*, rather than *gross*, profits generated by each team. Consequently, if a certain team for some reason fails to make any profit for that school year, each student-athlete on that team would rely on his or her scholarship as the sole means of compensation. *See* Michael P. Acain, *Revenue Sharing: A Simple Cure For the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 336 (1998).

144. Corgan, *supra* note 121, at 411.

145. *Id.*

146. Acain, *supra* note 143, at 336.

147. NCAA DIVISION I MANUAL, *supra* note 14, § 12.02.3 (amended 2012). Additionally, the proposal argues NCAA Rule 15.2 would need to be amended, and NCAA Rule 12.1.1 would need to be repealed in part and amended in part to implement the various forms of compensation that would be available to student-athletes under this plan. Acain, *supra* note 143, at 337.

148. NCAA DIVISION I MANUAL, *supra* note 14, § 12.02.3 (amended 2012).

149. Acain, *supra* note 143, at 337.

150. *Id.* at 338.

fourth year of participation would receive 1% of all revenues generated for that year, (2) each player in his or her third year would receive 0.75%, (3) each player in his or her second year would receive 0.50%, and (4) each player in his or her first year would receive 0.25% of the revenue.[151] Finally, any money remaining after the division of revenue would go to the athletic department to pay for miscellaneous expenses associated with the program.[152]

Next, the model proposes a division of any revenue generated from monetary rewards paid to teams participating in postseason games and tournaments.[153] With regards to the distribution of such profits, the model proposes that "instead of dividing the revenues according to 'years of service,'[154] playoff money generated by each respective team should be divided according to the role each student-athlete plays in the post season."[155] Similarly, the third part of the model includes additional compensation that would be awarded on the basis of either a student-athlete's receipt of an academic or athletic award, or selection to academic or athletic All-American teams.[156]

Finally, the model proposes that universities and colleges share with student-athletes a portion of the merchandising and endorsement revenues they generate.[157] Accordingly, this could be achieved one of three ways.[158] First, universities could divide a portion of all fees collected by the university through licensing agreements, and allocate a portion of the profits to the athletic department for distribution.[159] Alternatively, universities could allow for individual teams to enter into sponsorship agreements with product manufactures.[160] The model, as a third alternative, advocates for further amendments to NCAA rules to "allow student-athletes to endorse products both nationally and locally."[161]

151. *Id.*

152. *Id.*

153. *Id.* at 338–39. For example, a university could establish a 65% to 35% distribution in favor of the university in order to share profits made during successful postseason play. *Id.*

154. *Id.* at 338. The term "years of service" refers to Part I of the plan basing payments to students on seniority.

155. Acain, *supra* note 143, at 339. For example, of the 35% shared with student-athletes, 50% should go to the starters on the team, 35% should go to the "key reserves," and 15% should go to the remaining players. *Id.*

156. *Id.* at 339–40. The model declares "because the NCAA purports to draw a connection between athletics and education, lucrative awards should be given to all student-athletes who succeed both athletically and academically." *Id.*

157. *Id.* at 341.

158. *Id.* at 341–42.

159. *Id.* at 342.

160. Acain, *supra* note 143, at 342.

161. *Id.*

As a result, it is argued that such a model equalizes profit in collegiate athletics without a need for destruction of the current system and balances the interests of the student-athletes and the universities they represent.[162]

C. NCAA Deregulation of Indirect Financial Endeavors: The "Free Market" System

Under the deregulation model, star student-athletes would earn "close to fair-market values" as "free agents."[163] They would do so through competing in seasonal professional leagues, signing endorsement deals, and engaging in paid promotional appearances.[164] The model would permit individual student-athletes to enter into financial agreements for their participation in the aforementioned areas.[165] In effect, the model provides student-athletes the opportunity to "work" within their preferred fields during the offseason.[166] It is argued that an offseason spent within a professional league provides the opportunity "for these student-athletes to assess a sports career while earning some money, much as other student do."[167] Additionally, advocates of the plan claim many star collegiate athletes have similar national recognition, and as a result, similar levels of marketability as those athletes competing at the professional level.[168] The student-athletes would benefit from their own market ventures, while not detracting from university funds.[169] Thus, allowing student-athletes to benefit from endorsement opportunities and promotional appearances provides an effective means of compensating those student-athletes.[170] Argued as a "middle ground solution between traditional revenue sharing and stipends,"[171] the plan preserves the NCAA's notion of amateurism, encourages student-athletes to earn monies close to what they would earn in the fair market, and does not promote the shifting of more university funds into athletic programs.[172]

162. *Id.* at 346. Additional benefits of the proposed plan include NCAA avoidance of possible antitrust violations, allowance of student-athletes to profit off of their own athletic success, and a solution to "fixing" the current imbalance between the levels of profit enjoyed by the NCAA and lack of profit experience by student-athletes. *See id.* at 343–45.

163. Edelman, *supra* note 141, at 886.

164. *Id.*

165. *Id.*

166. *Id.* The "conventional college experience" described within the proposal suggests that students work in their preferred field during the summer[s] prior to graduation. The experience allows them to determine if the field they work in is something they might pursue upon graduation. *Id.*

167. *Id.*

168. *Id.* at 887.

169. Edelman, *supra* note 141, at 887.

170. *Id.* at 886–87.

171. *Id.* at 885.

172. *Id.*

Under a free market system, student-athletes would be treated similarly to "any other employee in the United States."[173] Under such a system, a high school athlete would be able to market his services to the highest bidder.[174] In essence, "schools that value winning and its economic benefits would pay college athletes in addition to offering them education and training."[175] Thus, the market would set the appropriate compensation for each athlete,[176] and the athlete will be "encouraged to attend a college where his talents are most useful and productive."[177] Additionally, the system, coupled with the one-year scholarship system employed by the NCAA,[178] would permit universities to terminate the services of nonproductive athletes if they failed to perform up to expectations.[179] Finally, the system would require supplemental education regulations in order to ensure the system's effectiveness.[180] It is argued that "in a free market, [student]-athletes would get the wonderful benefits colleges now offer: access to world-class education, quality coaching and facilities, and exposure to professional leagues."[181] Furthermore, as a result of providing student-athletes the ability to negotiate "longer scholarships and ensure adequate finances to make it through college when their playing days are over," the model would most likely increase graduation rates.[182] Finally, it is proposed that the market would ultimately ensure competitive balance, while allowing the NCAA to focus on improving the academic standing of the student-athletes.[183]

D. Alternative IOC/Trust Fund Models

Advocates suggest the NCAA could also adopt a proposal similar to the model currently employed by the International Olympic Committee (IOC).[184] Under IOC regulations, an athlete may receive compensation for athletic competitions as well as outside incidental activities without losing his or her

173. Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS L. J. 25, 42 (1996).

174. *Id.*

175. Andy Schwarz & Dan Rascher, *Opposing View: College Sports Should Work as a Free Market*, USA TODAY, Jan. 12, 2012, http://usatoday30.usatoday.com/news/opinion/story/2012-01-12/college-football-free-market/52524448/1.

176. Schott, *supra* note 173, at 42.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 42 n.90. Schott notes that these payments "can be used to fund continuing education and provide incentives to remain academically eligible and encourage graduation." *Id.*

181. Schwarz & Rascher, *supra* note 175.

182. *Id.*

183. *Id.*

184. Schott, *supra* note 173, at 42.

status as an amateur.[185] The revenue is then entered into a trust fund[186] from which athletes are permitted to withdraw funds for living and training expenses, but prohibited from withdrawing the full amount of the trust fund until they retire.[187] For example, The Athletics Congress (TAC) regulates American track and field athletics in such a way.[188] Appearance fees to the athletes, living and training grants, and endorsement revenues are funneled to trust funds established by TAC, and athletes may only withdraw from the fund pursuant to specific TAC guidelines.[189]

The National College Players Association (NCPA) advocates for NCAA adoption of the IOC's system.[190] According to the NCPA, the "Olympics international definition of amateurism permits amateur athletes access to the commercial free market.[191] They are free to secure endorsement deals, get paid for signing autographs, etc."[192] As a result of such a model, the student-athlete would have the ability to contract with businesses, advertisers, apparel companies, and others to profit from his or her success.[193] The NCPA argues that the "NCAA's version of amateurism is impractical and is an unjust financial arraignment imposed upon college athletes."[194] If adopted, the Olympic model would still regard student-athletes as "amateurs," thus fulfilling the spirit of intercollegiate sports, while also allowing student-athletes to benefit from individual commercial endeavors.[195] Moreover, legal scholars in favor of adopting the model argue it does not compromise the NCAA's stated goal of amateurism.[196] The Olympics, "the most sacred of 'amateur institutions,'"[197] recognizes compensation to athletes without significantly altering or detracting from its goal of amateurism, and, therefore,

185. *Id.*; *see also* Christopher L. Chin, *Illegal Procedures: The NCAA's Unlawful Restraint on the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1249 (1993).

186. Schott, *supra* note 173, at 45.

187. *Id.* The athletes may acquire the full value of the trust fund at the end of their careers—i.e., retirement. *Id.*

188. Valdimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTING COMM. & ENT. L.J. 135, 155–56 (1996).

189. *Id*. at 154.

190. HUMA & STAUROWSKY, *supra* note 26, at 26.

191. *Id.*

192. *Id.*

193. *See* Mary Grace Miller, *The NCAA and the Student-Athlete: Reform is on the* Horizon, 46 U. RICH. L. REV 1141, 1167 (2012).

194. *Id.*

195. *Id.*

196. *See* Belo, *supra* note 188, at 155.

197. *See id.*

the NCAA can follow suit.[198] The proposed plan would allow both the NCAA and its member institutions to refrain from offering any money to individual athletes, while acknowledging "the commercial nature of intercollegiate athletics"[199] and recognizing "that student-athletes are valuable contributors to its success."[200] Furthermore, the funds for the accounts could be drawn from preexisting sources,[201] thus eliminating the potential for bankrupting universities unable to support the stipend program.

Within the context of intercollegiate athletics, several variations of the Olympic model set forth further guidelines regarding what compensation might enter the trust and further limitations on the withdrawal from the trusts. For example, compensation could be limited to those funds associated with merchandise sales.[202] Regarding limitations, the NCAA and its member institutions would be responsible for delineating permissible circumstances where student-athletes could draw from the funds.[203] In order to ensure student-athletes do not abuse such a system, "each student's trust account [could] be supervised by an NCAA-appointed (and student-athlete approved) trustee."[204] The trustee would be responsible for withdrawing funds from the account for activities deemed "appropriate."[205] The standards for withdrawal could be made as a result of negotiation, at the outset of negotiations, and made on a case-by-case determination accounting for the specific circumstances of each individual student-athlete.[206] Alternatively, the withdrawal could be further limited to allow withdrawals for "money needed to supplement the direct costs of education."[207] Furthermore, the NCAA could implement restrictions requiring satisfactory academic benchmarks and continued participation in athletics for receipt of any funds.[208] Finally, others propose that receipt of the funds be conditioned upon the student-athlete's

198. *See id.* The proposal notes that "[a]rguably, this still would not be pure amateurism." *Id*. at 155 n.139 (citing Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J 269, 273 (1994)).

199. *See id.* at 155.

200. *See id.*

201. Schott, *supra* note 173, at 45.

202. *Id.* ("Merchandise" includes monies associated with the selling of game jerseys or any other revenue marketing a student-athlete's name and likeness.).

203. *Id.*

204. Laura Freedman, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP., MEDIA & ENT. L.J., 673, 708 (2003).

205. *Id.*

206. *See id*. During the initial phase of creation of the agreement, specific standards would be placed in writing, and the writing would include a dispute resolution process to ensure a fair process for determination of expenditures. *Id.*

207. Belo, *supra* note 188, at 155–56.

208. Schott, *supra* note 173, at 46.

graduation with a bachelor's degree.[209] Simply put, "[i]f you go pro early or drop out, you never get the income. You only get paid when you earn your diploma."[210] While "there will always be those one-and-done bonanzas," fewer than 2% of college football and basketball players make it onto a professional team roster.[211] Therefore, "if a player leaves college without a degree but returns later—for instance, after that pro career has ended or never started—to finish the necessary coursework for it, the escrow account would be waiting with accumulated interest."[212]

III. WILL ANY OF THEM WORK? EXAMINING TITLE IX'S EFFECT ON THE PROPOSED PAYMENT PLANS

A. Stipend Programs

With Title IX's equal opportunity requirement and the overwhelming costs currently incurred by each individual university, the stipend program falls short of justly compensating student-athletes while maintaining the current intercollegiate athletic system. The Office of Civil Rights (OCR) noted in a 1998 policy interpretation that a "disparity" in the awarding of athletic scholarships "refers to the difference between the aggregate amount of money athletes of one sex received in one year, and the amount they would have received if their share of the entire annual budget for athletic scholarships had been awarded in proportion to their participation rates."[213] The OCR further stated that if there is an "unexplained disparity of more than [1%]" then "there will be a strong presumption that the school is in violation of the substantially proportionate requirement."[214] As the NCAA model currently stands, its stipend program would fall under financial aid.[215] Accordingly, the OCR would view any disparity in stipend payments between men's and women's programs greater than 1% as "clear evidence of a conscious decision by the school to provide an inequitable amount of scholarships to male and female student-athletes."[216] If universities chose to compensate male student-athletes

209. Samuel G. Freedman, *Win-Win Proposal for Student-Athetes*, ESPN, Nov. 15, 2013, http://espn.go.com/college-football/story/_/id/9863962/a-win-win-proposal-student-athletes. The funds collected within the account would primarily be royalties from merchandise sales. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. Dr. Mary Frances O'Shea, National Coordinator for Title IX Athletics, *Dear Colleague Letter: Bowling Green State University*, OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC., July 23, 1998, http://www2.ed.gov/about/office/list/ocr/does/bowlgrn.html [hereinafter July 1998 Letter].

214. *Id.*

215. All stipend proposals, including the NCAA's, involve integration of the program as an aspect of a student-athlete's financial aid. *See supra* Part II.A.

216. *See* July 1998 Letter, *supra* note 213.

they would undoubtedly be required to provide the same or substantially the same amount of compensation to their female student-athletes.[217] This alone would not violate Title IX on its face. As long as the compensation provided to student-athletes is awarded in proportion to their participation rates, the pay-for-play model may succeed.

However, accounting for the current financial status[218] of most Division I athletic programs, Title IX's requirement of proportional awards to both sexes would most likely significantly limit any implementation of the program. While a small portion of universities could potentially sustain these types of payments to both the men's and women's programs, the majority could not. It is estimated that for the 2011–2012 year, only twenty-two Division I athletic programs generated enough funds to cover athletics' expenses.[219] For example, the Rutgers University Athletics' Department "ran a $28 million deficit in 2012 and used university and student-fee money to balance its budget."[220] Rutgers projects that the implementation of a stipend system would add another half-million dollars to the deficit.[221] For an overwhelming majority of Division I athletic programs, providing a stipend to all student-athletes is simply unfeasible.

Moreover, any non-NCAA proposals which advocate limiting compensation to those student-athletes in revenue-producing sports would most likely run afoul of Title IX's mandate.[222] While a limit would clearly make the programs more economically viable, pursuant to Title IX and the OCR's policy interpretation, identical benefits would be mandatory.[223] According to NCAA rule 15.5.5.1, "there shall be a limit of 13 on the total number of [scholarships] in men's basketball at each institution."[224] Pursuant to rule 15.5.6.1, there "shall be an annual limit of 85 on the total number of [scholarships]" in men's football.[225] Thus, under a system in which only men's basketball and football received a stipend, the maximum number of male student-athletes eligible for a stipend is ninety-eight student-athletes. With that said, NCAA regulations allow for a maximum number of fifteen scholarships

217. Schott, *supra* note 173, at 49.

218. *See* USA TODAY SPORTS, *supra* note 8.

219. Steven Wieberg, Jodi Upton & Steve Berkowitz, *Texas Athletics Overwhelm Rivals in Revenue and Spending*, USA TODAY, May 15, 2012, http://usatoday30.usatoday.com/sports/college/story/2012-05-15/texas-athletics-spending-revenue/54960210/1.

220. Jerry Carino, *Athletes, Administrators Debate Scholarship Stipends*, USA TODAY ,Sept. 28, 2013, http://www.usatoday.com/story/sports/college/2013/09/28/athletes-administrators-debate-ncaa-scholarship-stipends/2890117/.

221. *Id.*

222. July 1998 Letter, *supra* note 213.

223. Schott, *supra* note 173, at 49.

224. NCAA DIVISION I MANUAL, *supra* note 14, § 15.5.5.1.

225. *Id.* § 15.5.6.1.

for women's basketball and a maximum of twenty scholarships for women's volleyball.[226] Thus, under the proposal, there would be a shortfall of sixty-three, or about 47%, of female student-athletes entitled to a stipend not receiving one. As previously noted, according to the OCR anything above 1% is "clear evidence of a conscious decision by the school to provide an inequitable amount of scholarships to male and female student-athletes." If a university sought to remain compliant with Title IX, it would be required to provide an additional sixty-three stipends to female student-athletes participating in programs outside of women's basketball and volleyball. Financially, if a $2,000 stipend is provided to all 196 student-athletes, the total cost of the program balloons to $392,000 in additional costs. For most universities, bearing close to $400,000 in additional costs is simply not feasible from an economic viewpoint.

B. Revenue Sharing

Unlike the stipend programs, the revenue-sharing models proposed would most likely fail to comport with two requirements set forth by Title IX. Under *Chalenor*, once a university accepts "private [funds]"[227] those funds "become public money, subject to Title IX's legal obligations in disbursement."[228] Thus, a university's acceptance of funds generated as a result of "contributions,"[229] "rights/licensing,"[230] and all other sources of revenue, including "game guarantees, . . . support from third-parties guaranteed to the school such as TV income, . . . and tournament/bowl game revenues from conferences,"[231] would most likely be subject to the requirements established in *Chalenor*. Once a university accepts private funds, the institution is legally obligated to disperse those funds pursuant to Title IX's requirements. Similar to the Eighth Circuit's finding in *Chalenor*, the Office of Civil Rights has expressed concern in the past that "private funds, . . . although neutral in principle, are likely subject to the same historical patterns that Title IX was enacted to address."[232] Legal

226. *Id.* §§ 15.5.5.2, 15.5.8.1(c).

227. Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048 (8th Cir. 2002).

228. *Id.*

229. For the purposes of this paper, the definition of "contributions" includes "amounts received directly from individuals, corporations, associations, foundations, clubs or other organizations established by donors." USA TODAY SPORTS, *supra* note 8.

230. For the purposes of this paper, the definition of "rights/licensing" includes "revenue for athletics from radio and television broadcasts, Internet and e-commerce rights received from institution negotiated contracts, the NCAA and conference revenue sharing arrangements; and revenue from corporate sponsorships, licensing, sale of advertisements, trademarks, and royalties." *Id.*

231. *Id.*

232. Buzuvis & Newhall, *supra* note 70, at 442–43 (2012) (quoting the July 1998 Letter); s*ee also* July 1998 Letter, *supra* note 213.

scholars point to the OCR's recognition that boys' sports generally occupy a favored position in society that results in stronger public support.[233] Thus, "if a school could simply channel support for boys' programs through private funds, Title IX's equal treatment mandate 'could routinely be undermined.'"[234] The OCR has made clear that the use of private funds, such as "booster club fundraising," to support an athletic program does not itself violate Title IX,[235] but schools that choose to accept such funds maintain their obligation to provide equal treatment in the aggregate.[236] It is clear, pursuant to *Chalenor* and the OCR's interpretations, that once a university makes the decision to accept private funding, they must still hold true to their obligations under Title IX.

Considering the four-part proposal, the first, third, and fourth sections of the model would most likely comply with Title IX since the model advocates for sex-neutral disbursement of funds.[237] The revenue-sharing program's second section, the division of revenue generated as a result of successful postseason play, would ultimately fail to satisfy Title IX under *Chalenor* and ultimately provide unequal treatment to student-athletes based on sex. While the section is facially sex-neutral, universities that experience success in Division I football bowl games and the Division I men's NCAA basketball tournament receive increasingly high levels of profit.[238] For example, the University of Louisville, "unquestionably the nation's wealthiest men's basketball program," generated an estimated $27 million in 2012,[239] while the University of Connecticut women's basketball team generated about $4.9 million the previous year.[240] The system effectively funnels substantially higher monetary compensation to a small percentage of male student-athletes—those who experience success in a bowl game or throughout the NCAA Division I basketball tournament—for their postseason success. Funds provided directly to a small portion of male-student athletes would run afoul of disbursing all private funds equally, pursuant to Title IX's requirements. As a

233. Buzuvis & Newhall, *supra* note 70, at 443; *see also* July 1998 Letter, *supra* note 213.

234. Buzuvis & Newhall, *supra* note 70, at 444; *see also* July 1998 Letter, *supra* note 213.

235. Daniels v. Sch. Bd. of Brevard County, Fla., 985 F. Supp. 1458, 1460–61 (M.D. Fla. 1997) (stating that schools must be held accountable for its compliance with private funding systems resulting in the inequitable treatment of athletics programs based on sex).

236. *Id.* at 1460.

237. *See supra* Part II.B.

238. For examples of this, *see generally* notes 1–9.

239. Igor Guryashkin, *Tipping the Scales*, ESPN MAG., Nov. 1, 2013, http://espn.go.com/mens-college-basketball/story/_/id/9912120/louisville-cardinals-move-acc-2014-only-make-more-money-espn-magazine.

240. Curtis Eichelberger, *Women Basketball Loses Money as Salaries Break College Budgets*, BLOOMBERG, Mar. 31, 2011, http://www.bloomberg.com/news/2011-04-01/women-s-basketball-teams-operate-in-red-as-salaries-break-college-budgets.html.

result, a university would, in effect, skirt its requirement of providing both sexes equal opportunity in athletic programs by providing one sex more than substantially proportionate opportunity for economic gain through the guise of outside funding. Under the guidance of the OCR letter and the Eighth Circuit's holding in *Chalenor*, the proposal's distribution plan premised on successful postseason play to *only* those athletes competing on teams which experience postseason success would most likely violate Title IX's equal treatment provisions and equal opportunity provisions.

Similarly, the "laundry money" proposal, a hybrid stipend-revenue sharing program, fails due to its limit on providing additional compensation derived from revenue brought in by the individual athletic programs. While the program advocates for a blanket payment to each female student-athlete, such funds would not excuse a university's obligation to disburse the private funds received equally. As stated above, if any portion of revenue generated went directly to the members of the program, the university would again fail to satisfy its requirement to provide both sexes equal treatment under Title IX.

C. NCAA Deregulation of Indirect Financial Endeavors: The "Free Market" System

Although both the deregulation and free-market models may appear facially sex-neutral, both models most likely violate Title IX's equal treatment provisions. With regards to deregulation, if the model is assessed through "comparing the availability, quality and kinds of benefits, opportunity, and treatment to members of both sexes,"[241] the model ultimately fails. As it is recognized, "boys' sports generally occupy a favored position in society that results in stronger public support."[242] This trend extends into the context of professional sports.[243] While monetary "benefits" within the model are not necessarily included within the current structure of Title IX,[244] the OCR has explicitly stated the list of categories included is not exhaustive.[245] Thus, monetary benefits, if the OCR made such a determination, could be included. Male student-athletes who participate in offseason professional leagues, sign endorsements, and collect fees for paid promotional activities, would most

241. Anderson, *supra* note 35, at 338.

242. Buzuvis & Newhall, *supra* note 70, at 443; *see also* July 1998 Letter, *supra* note 213.

243. For example, Boston Celtics forward Kevin Garnett, a former NBA most valuable player and defensive player of the year, earns roughly $21 million per year, while Indiana Fever forward Tamika Catchings, a former WNBA most valuable player, earns roughly $105,500 per year. *See* David Woods, *Equal Pay? Not on the Basketball Court*, USA TODAY, May 19, 2012, http://usatoday30.usatoday.com/sports/basketball/story/2012-05-19/nba-wnba-basketball-salary-disparity/55079608/1.

244. 1979 Policy Interpretation, *supra* note 50.

245. *Id.*

likely receive substantially higher monetary benefits when compared to their female counterparts.

Similar to the school board in *Daniels*, a university would most likely justify any financial discrepancies as a result of the "popularity" and "public support" of particular teams.[246] Thus, the universities could not be in violation of Title IX since they permitted all student-athletes the opportunity to participate in the system. However, the external factors present, similar to the "active booster organization" in *Daniels*, would not excuse a university from complying with Title IX's requirements. If a university is responsible for implementing, monitoring, or allowing such a model, the university has effectively acquiesced to such a system. As a result, it would therefore be responsible for the consequences. External factors do not excuse a university's "responsibility to ensure equal athletic opportunities in accordance with Title IX."[247] Furthermore, as long as the model is in place and accepted by a university, the university sends a clear message that women's intercollegiate athletic programs are not worth as much as men's intercollegiate athletic programs.

The free-market model only exacerbates the issues found within the deregulation model. Schools that "value winning and its economic benefits" would undoubtedly invest in those student-athletes they determine will generate the highest economic benefit. The current system implicates two sports: *men's* football and *men's* basketball.[248] Assuming the benefits of the free-market model come to fruition,[249] universities would still look to providing the highest monetary compensation to those potential student-athletes they view as the most profitable. The model would value student-athletes in two programs and essentially ignore the rest. A model that promotes creating potentially high monetary benefits in two exclusive sports would in effect create a "policy" that is "discriminatory in effect," create a disparity of a "substantial and unjustified nature," and create a disparity "substantial enough in and of [itself] to deny equality."[250]

D. Alternative IOC/Trust Fund Models

The viability of the alternative IOC/trust fund model ultimately depends on the level of involvement regarding the NCAA. Under the current proposals, the NCAA, not its member institutions, would ultimately be responsible for the

246. Daniels v. Sch. Bd. of Brevard County, Fla., 985 F. Supp. 1458, 1462 (M.D. Fla. 1997).
247. *Id.*
248. For examples of the focus on two sports, *see generally* notes 1–7.
249. For an explanation of the benefits alleged by the model, *see generally* notes 173–83.
250. *See* 1979 Policy Interpretation, *supra* note 50.

implementation and operation of the student-athlete's accounts.[251] If the individual universities themselves were responsible for the funds, the model would most likely violate Title IX's regulations regarding the use of private funds to support athletics programs.[252] However, if the NCAA took accountability for the model, the accounts and use of such accounts might not necessarily violate Title IX.

Under the Supreme Court's interpretation of Title IX in *Smith*, "coverage is not triggered when an entity merely benefits from federal funding."[253] The establishment of such trust fund accounts would most likely not alter the applicability of Title IX to the NCAA. Under the model, the NCAA would regulate the private funds entering each student-athlete's account while also regulating the private funds withdrawn from the account. The NCAA would continue to "only benefit economically from federal assistance" through its receipt of dues payments, while also monitoring and exercising oversight of private funds flowing to its student-athletes. The sole entity receiving and distributing funds is an entity, under *Smith*, currently not covered by Title IX. However, it must be noted that in its decision, the Supreme Court noted that such a "showing, without more, is insufficient to trigger Title IX's coverage."[254] Therefore, it is feasible the NCAA's implementation of such a system satisfies the "without more" qualification promulgated by the Supreme Court's ruling.

IV. CONCLUSION

Amid the continuous flow of controversies involving alleged improper benefits flowing to student-athletes, improper contact with sports agents, and debate over whether student-athletes should justifiably be compensated for their athletic performance, Title IX's obligations remain a constant. Although proposals for payments to student-athletes continue to evolve, none have effectively resolved the conflict between the plan itself and Title IX's obligations. Title IX, as it currently stands, directly or indirectly limits what the NCAA permits and what universities and colleges may ultimately implement. As the profits and revenue created through astronomically high agreements

251. For an explanation of how the proposal seeks to employ the NCAA within its model, *see generally* notes 196–212.

252. For an explanation of why the use of private funds creates an inherent issue with the model, *see generally* Part III.B.

253. *See* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468 (1999).

254. *Id.*

between the NCAA continue to grow, student-athletes deserve some form of compensation. How it is achieved has still yet to be determined.

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