

Briefing:

Title IX Athletics: Accommodating Interests and Abilities

U. S. Commission on Civil Rights

Friday, May 11, 2007

Washington, DC

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Concept Paper

Title IX Athletics: Accommodating Interests and Abilities

Title IX of the Higher Education Act prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance, including athletics. Since 1979, one way in which eligible educational institutions can show compliance with Title IX is by demonstrating that the institution's present program "fully and effectively" accommodates the "interests and abilities" of the sex that is underrepresented among intercollegiate athletes. The Office for Civil Rights (OCR) of the U.S. Department of Education (Department), responsible with enforcing Title IX, issued further guidance on this compliance option in March 2005. Under this guidance, an institution will be found in compliance with this option unless there exists a sport (s) for the underrepresented sex for which all three of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region. Thus, schools are not required to accommodate the interests and abilities of all their students or fulfill every request for the addition or elevation of particular sports, unless all three conditions are present. This guidance also included a model survey instrument to measure student interest in participating in intercollegiate varsity athletics. When this model survey indicates insufficient interest to field a varsity team, OCR will not exercise its discretion to conduct a compliance review of that institution's implementation of the three-part test. This guidance was issued at a time when critics of Title IX claimed that rigid compliance forced the cancellation of many educational programs or teams for men. This briefing will evaluate and identify ways of improving the effectiveness and efficiency of the Department of Education's enforcement of Title IX.

Scope: The Commission will seek information to address the following issues:

- Extent to which schools under OCR jurisdiction have used new guidance to demonstrate this option for compliance with Title IX
- Extent to which the new guidance has increased the degree or reduced the cost of compliance
- Data on interest and ability in intercollegiate athletics indicated by use of the model survey

Methodology: The Commission will host a briefing to address the above issues.

Speakers may include, but are not limited, to the following:

- Speaker from the Office for Civil Rights
- Speaker from National Collegiate Athletic Association
- Speaker from the National Women's Law Center
- Critic of Title IX regulations
- Athletic director of Division I school

The Commission may also issue interrogatories and document requests to the Office for Civil Rights. This briefing would last approximately two to three hours, with four to five speakers allotted 10 to 15 minutes each, and the remaining time allotted for questions and answers. Projected out-of-pocket costs would range from \$1,300 to \$2,200.

Panelists' Written Statements and Biographies

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Daniel A. Cohen, Esq.

Daniel A. Cohen is a Senior Associate with the law firm of Rogers & Hardin LLP in Atlanta.

Since 2005, Mr. Cohen has studied the legal implications of the OCR's 2005 Additional Clarification and its Model Survey. The article he co-authored regarding compliance with Prong Three of Title IX was published in The Vanderbilt Journal of Entertainment and Technology Law: Navigating into the New "Safe Harbor" - Model Interest Surveys as a New Tool for Title IX Compliance Programs, 8 Vand. J. Ent. & Tech. L. 1 (2005). His work in the area of Title IX has been cited in the USA Today, the NCAA News, the Chronicle of Higher Education and elsewhere.

Mr. Cohen received his undergraduate degree from Duke University and his law degree from the Vanderbilt University School of Law.

In addition to Title IX, Mr. Cohen's practice focuses on litigation and trial practice, including the areas of products liability, professional malpractice, and commercial litigation.

For more information, please visit www.rh-law.com/TitleIX.

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May 8, 2007

Mr. Kenneth L. Marcus
Staff Director
U.S. Commission on Civil Rights
624 Ninth Street, NW
Washington, DC 20425

Re: "Title IX Athletics: Accommodating Interests and Abilities"
U.S. Commission on Civil Rights

Dear Mr. Marcus:

This letter is written in response to your May 4, 2007 letter regarding the upcoming U.S. Commission on Civil Rights briefing on "Title IX Athletics: Accommodating Interests and Abilities." In your letter, you asked me to comment in writing on five specific issues. Furthermore, you requested my comments by May 8, so that they may be reviewed by the Commissioners prior to the May 11 briefing.

Due to the short timeframe for comment, my statements herein will be brief. Further information responsive to your letter may be found in the article that John J. Almond and I coauthored in The Vanderbilt Journal of Entertainment and Technology Law: Navigating into the New "Safe Harbor" - Model Interest Surveys as a New Tool for Title IX Compliance Programs, 8 Vand. J. Ent. & Tech. L. 1 (2005).

I look forward to expanding upon these comments during the May 11 briefing.

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Question No. 1: According to the Department of Education's (DOE's) March 17, 2005 guidance, if a college or university chooses prong three of the three-part test, it will be found to be in compliance with Title IX "unless there exists a sport(s) for the underrepresented sex for which all three of these conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region." The DOE guidance includes a Model Survey to measure student interests and abilities in intercollegiate varsity athletics. Please comment on strengths and weaknesses of DOE's new guidance, including those of the Model Survey.

The Additional Clarification provides a better-defined and more objective road map to compliance under Prong Three, as compared to prior guidance.

Its primary feature is a "Model Survey" that is designed to help schools measure the interest component of Prong Three's test. Historically, schools used a wide variety of surveys to attempt to measure the interests of their students. In 2003, pursuant to the OCR's Further Clarification and following the nationwide study of Title IX by the Secretary of Education's Commission on Opportunities in Athletics, the OCR commissioned expert statisticians at the NCES and the NISS to study the various survey mechanisms that schools had submitted to the OCR between 1992 and 2002 in support of their efforts at Prong Three compliance. As a result of this analysis, the statisticians designed a streamlined "Model Survey" based on the best practices and collective learning of the various schools over a decade of Title IX enforcement. At a minimum, the Model Survey is a helpful addition to the Title IX landscape as it is a better tool than the patchwork of surveys that schools had been using.

Furthermore, with the Model Survey as its centerpiece, the Additional Clarification reorganizes and focuses the OCR's pre-existing and vague Prong Three guidance to create a

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concise and practical road map to compliance with each element of Prong Three. Most notably, the OCR provides specific guidance for how schools should administer the Model Survey and states that, if a school properly follows the OCR's guidance in administering the Model Survey, then the OCR will defer to the Survey's results. Thus, the Model Survey carries a presumption of accuracy if it is properly administered according to the OCR's dictates.

The Additional Clarification also provides a straightforward, mathematical method for measuring Model Survey results – a new objective component for measuring compliance under Prong Three.

Of course, the Additional Clarification provides that schools retain flexibility in the ways that they can comply with Title IX. Thus, schools are free to continue to monitor other indications of interest for purposes of demonstrating Prong Three compliance. The Additional Clarification also provides guidance in this regard, outlining requirements for alternative survey mechanisms.

Conducting the Model Survey is the first, and potentially dispositive, step under the OCR's recommended approach to Prong Three compliance. If the Model Survey, or another interest-measuring mechanism, demonstrates that requisite interest exists, the Additional Clarification then provides further guidance on the assessment process that must take place to gauge whether there is sufficient ability to sustain an intercollegiate team in that sport.

Finally, the Additional Clarification clarifies a few issues of Title IX enforcement. For example, although the burden of proof in an OCR investigation has always been on the OCR, the

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OCR's prior guidance led to some confusion. See 8 Vand. J. Ent. & Tech. L. at 33 ns.134-135. That issue has now properly been put to rest.

For further information about the strengths of the Additional Clarification, I refer you to our article.

The Additional Clarification, however, is not without its weaknesses.

Much of the public criticism of the Additional Clarification relates to the fact that it permits the Model Survey to be distributed via email. Much of this criticism is unfounded when viewed in light of the OCR's requirements for Survey administration, but it nonetheless reflects an area of the Additional Clarification that could be improved upon.

The Additional Clarification requires that the Model Survey be administered "in a manner that is designed to generate high response rates." Additional Clarification at 7. The Additional Clarification then provides two examples of Model Survey distribution methods that are designed to generate high response rates. First, the OCR suggests that the Model Survey be administered in a way that requires all students to respond to it, such as by incorporating it into the mandatory class registration process. Second, the Additional Clarification also acknowledges that a school may administer the Model Survey to its students by "send[ing] an email to the entire target population that includes a link to the Model Survey." Id. If this email method is used, however, the OCR requires that "the school [have] accurate email addresses, [that] students have access to email, and [that] the school [take] reasonable steps to follow-up with students who do not respond." Id. If a school fails to take reasonable follow-up steps, its Model Survey results will not be deemed reliable by the OCR. Furthermore, the OCR will

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assume that nonresponses to the Model Survey are indicative of a lack of interest only "if all students have been given an easy opportunity to respond to the census, the purpose of the census has been made clear, and students have been informed that the school will take nonresponse as an indication of lack of interest." Id. at 6.

Although the follow-up requirements associated with an email distribution of the Model Survey must be read in the context of the other Additional Clarification safeguards that attempt to ensure reliability in the Model Survey results, the vagueness of the follow-up requirement has contributed to the criticism of the Additional Clarification. Although the OCR strives to allow schools flexibility in the administration of their Title IX programs, this is an area where more specific guidance might have been appropriate. Alternatively, it may be advisable for a school to employ a mandatory-response method of administration, rather than employing the email distribution method, so as to avoid this criticism.

Another criticism of the Additional Clarification is that it allows for Model Survey results to be dispositive with respect to the measurement of unmet interest. Although the Additional Clarification does not call for ignoring other indications of interest, that is how some have construed the Additional Clarification. The OCR's premise, however, seems to be that a properly-administered Survey that generates a high response rate will necessarily pick up most other potential indications of interest on campus. This seems to be a reasonable premise if the Survey indeed is properly administered and generates a high response rate. Nonetheless, the OCR may have been able to avoid much of this criticism if it had encouraged the consideration of other indications of interest in the Additional Clarification along with the Model Survey.

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Additionally, just as with prior guidance issued by the OCR and others, the Additional Clarification is vague in some areas. The OCR's continuing goal is to maintain institutions' flexibility and control over their athletic programs, but that continues to lead to some ambiguity under Prong Three with regards to the sufficiency of certain compliance efforts. See, e.g., 8 Vand. J. Ent. & Tech. L. at 25 n.105 & 26 n.110.

There may be other areas in which the Additional Clarification could be improved, and some of these are included in our article.

Question No. 2: Some key findings from the Model Survey and the ways in which (a) OCR and (b) colleges and universities have made use of the survey data.

Schools have not been publicly disclosing their use of the Model Survey. It appears that few schools to date have taken advantage of the Model Survey.

That is unfortunate because the OCR's new guidance may help a number of schools with their compliance efforts. As of the 2004-2005 school year, less than 15% of the Division I-A schools could objectively demonstrate their compliance with Title IX, according to Chronicle of Higher Education research.¹ Furthermore, approximately two-thirds of the schools investigated by the OCR between 1992 and 2002 attempted to rely on Prong Three for their compliance

¹ This statistic is measured by strict proportionality. Only 17 of 120 schools investigated by the Chronicle for the 2004-2005 school year could show that their ratio of female athletes met or exceeded their ratio of women within the student body. Once schools strive to achieve substantial proportionality – which is permitted under the law – they move into a more subjective area of compliance. Furthermore, compliance with Prong Two and Prong Three is entirely subjective under pre-2005 guidance. The foregoing is not meant to suggest that any schools are not in compliance with Title IX, but is merely intended to highlight the absence of demonstrable evidence available to schools under most methods for compliance with Title IX. Without the legal protection of a measurable Prong One safe harbor, such schools are exposed to the possibility of OCR investigations and litigation as to their subjective compliance efforts – with no guarantee that even their good faith attempts at compliance would be considered sufficient by OCR investigators or courts. The Additional Clarification provides additional guidance for obtaining compliance with the law and provides at least one objective measure for demonstrating compliance that the OCR will presume to be accurate.

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efforts. For schools that are not demonstrably in compliance with Prong One, and especially for those schools attempting to rely on Prong Three, the Additional Clarification provides guidance that could help them achieve and demonstrate compliance with Title IX and obtain assurance from the OCR as to when compliance has been achieved.

Question No. 3: The extent to which each of the three prongs are used by colleges and universities to demonstrate compliance with Title IX since 1979 till the Department of Education's new guidance of March 17, 2005, and the degree to which colleges and universities have shifted, if any, to the new guidance since that date.

According to the data supplied by the OCR to the National Center for Education Statistics, between 1992 and 2002, the OCR investigated 130 schools for Title IX compliance, of which only thirty-six schools were able to demonstrate compliance with Prong One and a mere eight with Prong Two. User's Guide at 3. Thus, approximately two-thirds of the schools investigated (86 out of 130) sought to demonstrate their compliance with Title IX under Prong Three. Id. Of these, approximately three-fourths of the institutions (67 out of 86) did so by means of a student interest survey. Id.

Further, according to the Chronicle of Higher Education, for the 2004-2005 school year, less than 15% of the Division I-A schools it investigated (17 out of 120) could demonstrate compliance with Title IX when measured by strict proportionality.

To my knowledge, colleges and universities have not shifted to any significant degree to the guidance offered in the OCR's 2005 Additional Clarification. For many of the schools currently relying on Prong Three, this may not be a wise decision. Such schools must measure and fully accommodate the athletic interests of the underrepresented gender in any event to

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comply with Prong Three. Through the Additional Clarification, such schools were given a better-defined and more objective method for measuring compliance and reaching a Prong Three safe harbor -- and gaining the OCR's deference that it had, indeed, been reached. Further, for those schools employing some survey mechanism to measure interest, there seem to be few reasons not to substitute the Model Survey, which was designed by expert statisticians based on the best practices and collective learning of the various schools over a decade of Title IX enforcement. Finally, such schools retain the flexibility to implement the Additional Clarification along side other compliance efforts, such as monitoring the other indicia of student interest outlined in the 1996 Clarification.

Question No. 4: If the new guidance has made it easier for colleges and universities to demonstrate compliance with Title IX compared to prong one and to prong two and if compliance with Title IX has generally improved over time, particularly since the new guidance's introduction.

I believe that the Additional Clarification has made it easier for colleges and universities to demonstrate compliance with Title IX as compared to Prong Two, which remains entirely subjective. Although demonstrating compliance with Prong One is more objective and straightforward, achieving Prong One compliance can be onerous because it often requires the addition or elimination of teams.

As compared to the pre-2005 guidance on Prong Three, the Additional Clarification has provided a more demonstrable and objective path to compliance, as discussed above and in our article. Under the Additional Clarification, schools now have an objective way to demonstrate their compliance with Prong Three and a roadmap for proving compliance with the other

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components of Prong Three. Although Prong Three remains subjective in many ways, it may be more feasible for many schools to comply with Prong Three under the Additional Clarification.

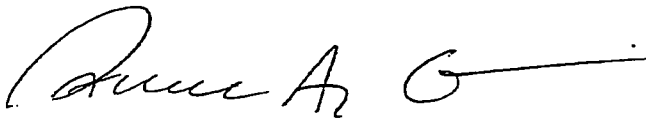
Question No. 5: If the cost of using the new guidance (such as staffing) to show compliance is the same, higher, or lower than that of using prong one or prong two for (a) OCR and (b) the institutions.

It is difficult to assess the costs of following the Additional Clarification as compared to compliance under Prong One or Prong Two, because each prong provides various ways of complying with the law. For example, a school could choose to add a new team to comply with any of the prongs, such as: (1) to improve its proportionality ratio under Prong One; (2) to expand opportunities for its female students to compete in varsity athletics under Prong Two; or (3) in response to a showing of unmet interest under Prong Three.

As discussed in our article, the costs to a Prong Three school of implementing a Model Survey should not be materially greater than other efforts they are required to take under any non-Model Survey effort to comply with the law. See, e.g., 8 Vand. J. Ent. & Tech. L. at 36-37.

I hope that these responses are helpful to the Commissioners as they prepare for the May 11 briefing. Please let me know if you have any questions about the matters contained herein or any other matters before May 11. Otherwise, I look forward to seeing you then.

Very truly yours,



Daniel A. Cohen

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June 1, 2007

Mr. Kenneth L. Marcus
Staff Director
U.S. Commission on Civil Rights
624 Ninth Street, NW
Washington, DC 20425

Re: "Title IX Athletics: Accommodating Interests and Abilities"
U.S. Commission on Civil Rights

Dear Mr. Marcus:

Thank you for the recent opportunity to address the U.S. Commission on Civil Rights at its May 11 briefing on "Title IX Athletics: Accommodating Interests and Abilities."

This letter is intended to supplement my pre-briefing statement in light of the discussion at the briefing regarding comparisons between the Additional Clarification and the 1996 Clarification.

The Additional Clarification and the 1996 Clarification are not inconsistent. Like the 1996 Clarification, the Additional Clarification provides guidance for how schools can measure the athletic interests of their students.

The 1996 Clarification assumes that schools will only use non-robust survey mechanisms to gauge the interests of their students. In that scenario, schools would have to monitor several other measures of interest in order to ensure that evidence of interest will not be overlooked. The Additional Clarification provides schools with an option of using a survey mechanism that, if properly administered, should prevent the interests of current or admitted students from being

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overlooked. Thus, most other ways of monitoring student interest, including those delineated in the 1996 Clarification, are unnecessary under the Additional Clarification – but they need not be ignored by schools or be considered to be inconsistent with the Model Survey approach.¹

With respect to Prong Three, the 1996 Clarification emphasizes that “institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements.” Those requirements include “that an institution’s assessment [of interest] should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, [but] OCR does not require elaborate scientific validation of assessments.” Moreover, “[t]hese assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum.”

In other words, the 1996 scheme for compliance assumes that a wide array of anecdotal evidence will need to be collected because only non-scientific questionnaires and the like will be used to gather direct evidence of interest. In this regard, the 1996 Clarification lists a number of factors that schools can monitor for evidence of unmet interest:

- [1.] requests by students and admitted students that a particular sport be added;
- [2.] requests that an existing club sport be elevated to intercollegiate team status;
- [3.] participation in particular club or intramural sports;

¹ Arthur L. Coleman, who served as deputy assistant secretary for civil rights in the department under President Clinton and helped write the 1996 Clarification, said “Broadly speaking, this [the 2005 Additional Clarification] tracks precisely with what OCR put out in 96 in terms of its clarification. The material shift here is less one about substantive legal standards than issues of evidence.” Welch Suggs, *New Policy Clarifies Title IX Rules for Colleges; Women’s Group Objects*, CHRON. HIGHER EDUC., April 1, 2005, <http://chronicle.com/weekly/v51/i30/30a04701.htm>.

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- [4.] interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- [5.] results of questionnaires of students and admitted students regarding interests in particular sports; and
- [6.] participation in particular interscholastic sports by admitted students.

The 1996 Clarification also calls for the monitoring of participation rates in local high schools and other indirect indicia of interest, but the Clarification itself minimizes the importance of such factors: "While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students."²

With respect to the six main factors outlined in the 1996 Clarification, the monitoring of at least three of them should be unnecessary if the school administers a robust interest survey that generates a 100% response rate. The fifth factor – questionnaires – essentially duplicates the function of a survey. And the first factor and part of the fourth factor³ relate to students expressing their interests, which is exactly what a well-administered survey is designed to gather.

The second factor from the 1996 Clarification is fully preserved in the Additional Clarification. The Additional Clarification states that the OCR will not presume Model Survey results to be controlling in the face of "other direct and very persuasive evidence of unmet

² The Additional Clarification does not speak to the inclusion or exclusion of such factors because they are outside of the requirements of the law – they do not pertain to the interests and abilities of current or admitted students.

³ The remaining parts of the fourth factor – "interviews with ... coaches, administrators and others" – provide only indirect evidence of the interests of current or admitted students. Such indirect evidence may be helpful in a school's analysis, but it may be considered unnecessary if the school has collected direct evidence of the interests of 100% of its students via the Model Survey.

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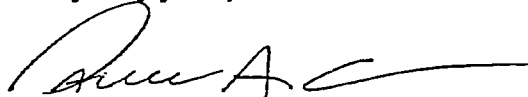
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interest," which expressly includes "a petition from an existing club team for elevation to varsity status."

Accordingly, the only material differences between the 1996 and 2005 guidance relate to the monitoring of participation in club or intramural sports by current students and participation in interscholastic sports by admitted students. These are important factors that schools may to continue to monitor regardless of whether they follow the Additional Clarification. But these factors, which were not dispositive under the 1996 Clarification, should be secondary to a well-administered survey.⁴ For example, one would assume that, if students participating on an intramural team wished to participate at the varsity level, they would say so when they register for classes and are required to take the Model Survey.

I hope that this additional information is helpful to the Commissioners, and thank you again for the opportunity to address them. Please let me know if you have any questions about the matters contained herein or any other matters in connection with the briefing.

Very truly yours,



Daniel A. Cohen

⁴ See, e.g., OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., RESPONSE TO THE SENATE COMMITTEE ON APPROPRIATIONS INTERCOLLEGIATE ATHLETICS: ADDITIONAL FACTORS CONSIDERED BY POST-SECONDARY INSTITUTIONS 8 (March 17, 2006):

"Although both surveys and additional factors may be used to measure interest and ability, we found almost no actual conflicts between the data from each of these assessment tools [in connection with the OCR's analysis of its case files for the use of surveys by schools between 1992 and 2002]. ... Specifically, we did note three cases in which the survey found unmet interest, but the additional factors did not, and a single case in which the survey did not find interest, but the additional factors did indicate interest. ... In the single instance in which the survey did not indicate sufficient interest, the survey was based on a very low response rate of less than 1%."

Jessica Gavora

Vice President
College Sports Council
and
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Jessica Gavora is a Washington, DC writer with clients including the former Speaker of the House Newt Gingrich and the College Sports Council. Previously, she was the senior speechwriter to Attorney General Alberto Gonzales. Under Attorney General John Ashcroft, Ms. Gavora was chief speechwriter and a senior policy advisor at the Department of Justice. She is also the author of *Tilting the Playing Field: Schools, Sports, Sex and Title IX*, published in May, 2002 by Encounter Books.

Prior to joining the Justice Department, Ms. Gavora was a Washington-based freelance political speechwriter and writer. Candidates and elected officials for whom Ms. Gavora has penned speeches are Senator and former presidential candidate Lamar Alexander, former Senator Spencer Abraham and presidential candidate Senator John McCain.

In addition to writing for a variety of governmental and nongovernmental clients, Ms. Gavora has written extensively on politics, culture and public policy under her own byline. Her articles have appeared in the *Wall Street Journal*, *The Los Angeles Times*, *The Washington Post*, *The Weekly Standard*, *USA Today*, *National Review*, *Policy Review* and *The Women's Quarterly*.

Prior to becoming a full-time writer, Ms. Gavora was the Director of the Play Fair Project of the Independent Women's Forum. She was also the editor of *Philanthropy* magazine, a quarterly publication devoted to the politics and policy of giving. From 1995-1996 she was the director of programs at the New Citizenship Project, a Washington, DC public policy group. From 1993-1995 she was an associate editor at *The Hotline*, a daily online political news report. She began her career as legislative assistant and later deputy press secretary to her home state senator, Frank Murkowski of Alaska.

Ms. Gavora received her masters degree in American foreign policy and international economics from the Johns Hopkins School of Advanced International Studies (SAIS) in 1993. She is a graduate of Marquette University with degrees in political science and journalism.

She was born in Fairbanks, Alaska and has eight brothers and sisters and fifteen nieces and nephews. She lives in Washington with her husband, daughter, and dog, Cosmo.

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Statement Before the United States Civil Rights Commission
May 11, 2007
Jessica Gavora

Thank you for the opportunity to be here. My name is Jessica Gavora. I am Vice President of the College Sports Council and the author of Tilting the Playing Field, a 2003 book on Title IX. I appreciate this opportunity to have my views heard.

It is gratifying to me, after more than ten years of studying, writing about and commenting on Title IX, that we are here today talking about the issue that is at the heart of Title IX in athletics, and that is interest.

In 35 years of the existence of this law, little serious attention has been paid to the subject of interest.

For over a decade now, Title IX compliance has been based on a very different standard: statistical proportionality. The triumph of statistical proportionality – the argument that, absent discrimination, men and women would play athletics at the same rate – has been achieved not by proving that men and women have identical interests – the data on participation and interest fall far short of that. It has been achieved by making the whole question of interest irrelevant to Title IX compliance.

As you know, statistical proportionality demands that schools manipulate their athletic programs so that their gender ratio matches that of their full-time, undergraduate student population. In this way, proportionality ignores student interest in sports in favor of an arbitrary numerical formula. No other opportunity in education – be it in the education or engineering departments, or in drama or dance programs – is apportioned this way. Even accommodations that are segregated by sex, like student housing, are apportioned in accordance with student interest.

And this brings me to the commission's first question, that of the strengths and weaknesses of the 2005 Model Survey. Its strength – perhaps its only strength – is that for the first time in a decade it reintroduces the notion that government should view women as thinking, discerning individuals capable of expressing and acting on their interests when judging an institution under Title IX.

The 2005 policy clarification was an attempt to respond to a long expressed desire on the part of well meaning college administrators for more specific guidance on how to comply with Prong Three – the interests test – of the so-call Three Part Test of Title IX compliance.

Prong Three asks that schools “demonstrate that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present [athletic] program.” For decades schools have complained that the government's guidance for demonstrating compliance under Prong Three has been vague and subjective. In 2006 the Clinton Department of Education promised to provide clarity but

never did. And in 2003 the President's Commission on Opportunity in Athletics unanimously adopted a resolution calling on the Office for Civil Rights to investigate ways for schools to show compliance under Prong Three through interest surveys.

And so in 2005 the Department of Education made good on these promises and provided guidance to allow schools to become more compliant with the law. But the reaction by the Model Test's critics has been curious to say the least.

Groups like the Women's Sports Foundation and the National Women's Law Center have long insisted that there are three equally valid ways to comply with Title IX, and that assessing the interests of women is in fact one of them. And yet their reaction to the Model Survey has been to refute interest as a measure of compliance on two fronts. They have argued, first, that women's interests cannot be discerned, and second, even when discerned, fulfilling the interests of women on campus is insufficient to comply with Title IX.

On the first objection, two prominent defenders of the Title IX status quo wrote that surveys can't gauge men's and women's relative interest in sports because "culturally, men are simply more likely than women to profess an interest in sport." Women, on the other hand, "are less likely to profess an interest in sports, even if they are interested!"

In other words, women are as interested in sports as men, they just can't bring themselves to admit it.

The critics' second objection to the Model Survey is that surveying current students' interest in athletics only serves to freeze a school's sports program in the status quo. The theory is that women who are interested in a particular sport will not attend an institution that does not already offer that sport.

There is some merit to this argument. But the remedies suggested by critics are so broad and ill-defined that they serve to return Prong Three to its previous, vague and unworkable status. The critics demand that in addition to the survey; schools also consult with local club sports, youth coaches, high schools, junior high schools and elementary schools as well as consider "national trends" in determining women's opportunities. The amorphousness and scope of this requirement serves to put Prong Three compliance once again out of reach of well-meaning administrators, and guarantees that their lawyers and Title IX consultants will continue to advise them to adhere to strict proportionality.

And here the role of the National Collegiate Athletic Administration deserves some scrutiny. Like many of the single issue critics of the Model Survey, the NCAA has long maintained that measuring and fulfilling interest is a valid method of compliance with Title IX. But the NCAA bears a burden that the National Women's Law Center does not: it exists to represent the interests of *all* collegiate athletes, not just female athletes. And yet it has objected to the government's attempt to provide the guidance its member institutions have long requested. And its objections have been expressed with the same vehemence and in identical language to the objections of the special interest groups. The

reason why, it turns out, is no mystery. On April 2, 2005 – just days after the Model Survey was announced – NCAA President Myles Brand made a remarkable admission to the Washington Post. Referring to the Model Survey, Brand said, “Whether that will be tested in court or some other way, we’re waiting to see what the Women’s Law Center and others might do. We’re supportive of their actions.”

Groups like the Women’s Sports Foundation and the NWLC have been clear in their expressions of support for the status quo in Title IX enforcement. Indeed, their only objection is that the statistical proportionality standard is not applied aggressively enough. This is their right as special interest groups. But what is the responsibility of the NCAA? In just the past year alone, hundreds of athletes – at Rutgers, James Madison, Ohio University, Butler, Clarion, and Slippery Rock – have lost their opportunity to compete in full or in part due to Title IX. Does the NCAA support this status quo?

Which brings me to the Commission’s second question: No school, to my knowledge, has used the Model Survey to demonstrate compliance with Title IX. They haven’t because the NCAA, which periodically examines its member institutions for their commitment to “gender equity” has told them expressly not to. And they haven’t because the interest groups which routinely sue colleges and universities under Title IX have publicly deemed the Model Survey an illegitimate and illegal tool, promising still more lawsuits for the brave administrator who dares use the survey.

But more important than the public relations and legal campaign that has been mounted against its use, the Model Survey is a very limited tool for schools seeking to demonstrate Title IX compliance for this reason: It depends on Prong Three and Prong Three is itself flawed.

Remember that Prong Three applies only in cases where schools have not reached statistical proportionality. For these schools, it requires that they only accommodate the interests of the “underrepresented sex” – in virtually all cases women. The unmet interest of men is not considered.

So if a school that has not reached statistical proportionality surveys its students and finds some unmet interest on the part of women and massive unmet interest on the part of men, it is obligated only to fulfill the women’s interest. Or if the same school feels that its current program doesn’t extinguish but equally accommodates the interests of both sexes, it is again obligated only to act on the unmet interest of women. What’s more, a school that is not proportional and has a women’s club team that requests varsity status – regardless of how many men’s teams request the same – must accommodate that interest and that interest only.

James Madison University is a case in point. Last fall, James Madison offered 28 athletic teams to its students – 13 for men and 15 for women. But it’s female student population was 61 percent and growing and its athletic rosters couldn’t keep pace. JMU was in no position to add women’s teams. But the Model Survey offered no protection for its existing teams. When two women’s club teams petitioned for varsity status, JMU was

forced to achieve statistical proportionality by cutting ten teams, seven for men, two for women and one co-ed team.

The College Sports Council has proposed a remedy for the absurd, senseless loss of opportunity that is occurring under Title IX today. It is a small change, not to the law but to the implementing regulations, that will return Title IX to its original, anti-discrimination purpose, protect the gains of women, and above all, reflect the interests of students in athletics when judging an institution on its adherence to the law.

A survey instrument, such as the Model Survey, could be modified in a clear, specific and achievable way to incorporate the interests of a school's prospective students. The College Board, for instance, collects data on athletic interests as part of the administration of the SAT. The survey could incorporate the data from all students who send their test results to a school.

Then, Prong Three should be modified from its current requirement that only the interests of the underrepresented sex be accommodated, to a requirement that schools *equally accommodate the interests of both sexes*. Under this change, the results of the survey become the "qualified pool" against which a new proportionality standard is measured. So if a school finds that 40 percent of its current and prospective students who are interested in athletics are women, it would apportion 40 percent of its opportunities to women. In this way, students who shouldn't be considered in a disparate impact determination of discrimination – such as older students, students with families, and students who simply lack the interest and ability to compete in sports – would rightly be excluded.

Members of the Commission, I could go on, but my time is expired. I will conclude by saying that speaking for both myself and the College Sports Council, we wholeheartedly support of the spirit and intention of Title IX. We believe that with the changes that I have just described, the law will be preserved and protected for new generations of American athletes, both men and women, girls and boys.

Thank you.

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Department of Education, Office for Civil Rights: Documents and Related Materials

US Department of Education, Office for Civil Rights, Additional Clarification of
Intercollegiate Athletics Policy: Three-Part Test—Part Three, March 17, 2005

Department of Education, Office for Civil Rights: Documents and Related Materials

1. US Department of Education, Office for Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three, March 17, 2005
2. National Center for Education Statistics, *User's Guide to Developing Student Interest Surveys Under Title IX*, March 2005
3. National Institute of Statistical Science, *Title IX Data Collection: Technical Manual for Developing the User's Guide*
4. US Department of Education, Office for Civil Rights Response to the Senate Committee on Appropriations—Intercollegiate Athletics: Additional Factors Considered by Post-Secondary Institutions, March 17, 2006

NCAA Data Analysis Research Network
Report on Recent Title IX Clarification

At its May 24-25, 2005 meeting, the NCAA Data Analysis Research Network (DARN) was asked to review a recent Department of Education Clarification related to Title IX which allows institutions to gauge the interests of female students by conducting an e-mail survey. The Clarification also allows schools to treat a lack of response to the survey as a lack of interest in playing additional sports.

The members of DARN reviewed the clarification without regard to political or ideological concerns; they were simply interested in assessing the survey methodology from a scientific perspective. They also did not review or comment on the survey instrument, itself. However, the members of DARN were unanimous in the opinion that the methodology for distributing and analyzing the survey and the responses as stated in the Clarification is scientifically unsound and inappropriate. Specific concerns raised by the group include:

1. Surveys conducted by e-mail are subject to poor response rates and significant response bias. This was seen as an inappropriate methodology to use for such a sensitive topic.
2. Assuming a non-response is akin to a response that the student is not interested in something is highly questionable. As an example of the flaws in this methodology, the members of the committee pointed out that one could envision the survey as written from the opposite perspective. That is, the respondents would be asked if they did not want to participate in a given sport. Would it then be appropriate to assume that non-respondents were all highly interested in participating? The committee members did not believe so, and felt this was the most compelling flaw in the method.
3. The members of DARN felt that surveying only current students would leave a large gap in knowledge related to future potential students for a given institution. When the NCAA developed a similar survey in the late 1980s, a great deal of attention was paid to identifying the population from which the institution draws potential students and making significant efforts to survey secondary school students in those areas. Without this population represented, all survey results related to interests of the student body are suspect.

For these reasons, the NCAA Data Analysis Research Network concurs with the resolution adopted by the Executive Committee and urges the NCAA research Committee to suggest to NCAA members that they decline use of the procedures set forth in the March 17, 2005, Additional Clarification, and urge the Department of Education and federal policymakers to rescind the Additional Clarification and to honor the Department's 2003 commitment to strongly enforce the standards of long-standing Title IX athletics policies.

NCAA EXECUTIVE COMMITTEE RESOLUTION

Whereas the United States Department of Education, without notice or opportunity for public input, issued an "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Prong Three," on March 17, 2005, which Clarification allows schools to gauge female students' interest in athletics under the third prong of the three-part test by conducting an e-mail survey and further allows schools to treat a lack of response to the survey as a lack of interest in playing additional sports;

Whereas the Additional Clarification is inconsistent with the 1996 Clarification and with basic principles of equity under Title IX because it, among other problems (a) permits schools to use surveys alone, rather than the factors set forth in the 1996 Clarification, as a means to assess female students' interest in sports; (b) conflicts with a key purpose of Title IX – to encourage women's interest in sports and eliminate stereotypes that discourage them from participating; (c) allows schools to restrict surveys to enrolled and admitted students, thereby permitting them to evade their legal obligation to measure interest broadly; (d) authorizes a flawed survey methodology; (e) shifts the burden to female students to show that they are entitled to equal opportunity; and (f) makes no provision for the Department of Education to monitor schools' implementation of the survey or its results;

Whereas for these reasons, the Additional Clarification provides the opportunity to evade the legal obligation to provide equal opportunity in sports and violates the Department's 2003 commitment to strongly enforce long-standing Title IX standards;

Now, therefore, be it RESOLVED that:

- (1) NCAA members are urged to decline use of the procedures set forth in the March 17, 2005 Additional Clarification and abide by the standards of the 1996 Clarification to evaluate women's interest in sports under the third prong of the three-part test, which standards anticipate the use of a multiplicity of tools and analyses to measure that interest;
- (2) The NCAA Executive Committee, on behalf of its members, NCAA members urges the Department of Education and federal policymakers to rescind the Additional Clarification and to honor the Department's 2003 commitment to strongly enforce the standards of long-standing Title IX athletics policies, including the 1996 Clarification.

The Honorable Margaret Spellings

May 6, 2005

Page No. 2

We are attaching a resolution passed by the NCAA Executive Committee on April 28, which we hope will be helpful to you in understanding the issues created for those of us on college campuses. We would welcome an opportunity to discuss ways that the NCAA may assist you in ensuring that Title IX meets its original intent to provide opportunities for the under-represented gender and not discriminate on the basis of sex.

Sincerely,

Sincerely,

Myles Brand
NCAA President

Carol A. Cartwright
Chair, NCAA Executive Committee
President, Kent State University

MB/CAC:ks

Attachment

cc: NCAA Committee on Women's Athletics
Selected NCAA Staff Members



May 6, 2005

VIA FACSIMILE

P.O. Box 6222
Indianapolis, Indiana 46206
Telephone: 317/917-6222

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The Honorable Margaret Spellings
Secretary, U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Secretary Spellings:

On behalf of the NCAA membership, we are writing in response to the recently announced Additional Clarification of Intercollegiate Athletics Policy: Three Part Test – Part Three.”

As we expect you know, the NCAA is a membership organization of 1,028 colleges and universities and governs intercollegiate athletics nationally. Providing positive educational experiences for student-athletes, male and female, is the mission of the NCAA and Title IX is critical to that goal.

We appreciate your commitment to Title IX and therefore would like to share with you concerns that were expressed by the NCAA Executive Committee and divisional boards, which are the NCAA leadership bodies composed of university presidents, at their April 28, 2005, meetings.

The presidents identified several components of the Additional Clarification that conflict with the goals of Title IX and that are contrary to sound research practices. Among our concerns, we believe that an Internet survey is a poor tool to determine interest, and it is unreasonable to expect a high rate of return since students are bombarded with Internet and e-mail surveys. In fact, a 10 percent return on such a survey would not be uncommon. That inadequacy is compounded by counting non-responders as among those uninterested in athletics participation.

In the past 33 years, since the passage of Title IX, we have seen significant progress in the numbers of women participating in intercollegiate athletics, but women still only have 42 percent of participation opportunities on our campuses, although they comprise 53 percent of student bodies on average and receive only 36 percent of athletics department finances. Had this new clarification been in effect in 1972, these numbers would be even lower than they are now as a result of historical biases against women in sports. It would be inappropriate to allow for anything that could stymie the growth of women's sports as we believe the new clarification might do.

National Collegiate Athletic Association

An association of over 1,200 members serving the student-athlete
Equal Opportunity/Affirmative Action Employer

compared with sports clubs and intramurals, both of which should be evaluated for equity separately.

In a perfect world, Title IX would not be necessary. There would be resources and will enough to do the right thing and meet everyone's needs. Social legislation exists, of course, because we do not live in that perfect world. Even with more than 35 years of experience and the examples of the several hundred thousand female student-athletes who have benefited from increased athletics participation for women, equity has yet to be achieved. NCAA and campus leaders, who are committed to equity for female and male students and are charged with athletics program administration, have uniformly expressed concerns about the 2005 Clarification. I hope these comments will result in better understanding of the weaknesses of the 2005 Clarification and why it should be withdrawn. In July 2003 after more than a year of work by the Commission on Opportunity in Athletics, Secretary of Education Rodney Paige announced that Title IX policies would not be changed and that Title IX would be more strongly enforced. Commitment to Title IX compliance by colleges and universities and strong enforcement by OCR are the steps that must be taken moving forward. Thank you for your attention to this important legislation.

3. The extent to which each of the three prongs are used by colleges and universities to demonstrate compliance with Title IX since 1979 till the Department of Education's new guidance of March 17, 2005, and the degree to which colleges and universities have shifted, if any, to the new guidance since that date.

I am not aware of any statistics kept on how individual colleges and universities choose to demonstrate compliance with Title IX other than those provided by OCR after OCR reviews are done. The most recent figures that I have seen, which were collected prior to the 2005 additional clarification, suggested that 67 percent of the OCR institutions reviewed were using prong three for compliance, 27 percent were using prong one and six percent were using prong two. It is important to note that institutions may change which prong they are using at any time depending on philosophy, history, demographics, conference sports sponsored, interest in the regional area, shifting enrollment, etc. Based on informal inquiries of NCAA members, it does not appear that colleges and universities have shifted to the new guidance as they remain concerned about the flawed survey approach and other related factors.

4. If the new guidance has made it easier for colleges and universities to demonstrate compliance with Title IX compared to prong one and to prong two and if compliance with Title IX has generally improved over time, particularly since the new guidance's introduction.

Most university presidents, chancellors and athletics administrators believe that the new guidance inappropriately has made it easier to comply with Title IX, and thus not truly comply with the spirit and intent of the law to provide equal opportunity for the under-represented sex. The new guidance is viewed as a flawed means of compliance for the reasons stated previously. In addition, OCR's Clarification acknowledges that the Model Survey narrows the scope of OCR's analyses for interests and abilities. My understanding of the creation of the three part test is that it was intended to provide institutions flexibility in meeting the goals of Title IX, but not to make one prong a means for easier compliance, especially when the results are not consistent with the true spirit of providing equal opportunity.

5. If the cost of using the new guidance (such as staffing) to show compliance is the same, higher, or lower than that of using prong one or prong two for (a) OCR and (b) the institutions.

I am not aware of any statistics that could answer this question nor can one accurately compare costs of the respective prongs. If the intent is to do a survey and not truly meet the interests of the under-represented gender which the new guidance allows, a survey could be a very inexpensive way of compliance while actually ignoring the intent of Title IX. In addition, the 2005 guidance allows for programs where interest has been identified to initially meet that interest by providing intramural or club teams for a few years to assess ability. Such an approach, which obviously is less expensive, violates Title IX which states that intercollegiate athletics experiences are not to be substituted by or

use of a survey method that does not meet accepted professional standards for conducting this type of study. In addition, students have consistently indicated that they rarely, if ever, respond to online surveys. Oftentimes such surveys are filed in SPAM folders and/or totally ignored. The NCAA leadership and its membership strongly support the 1996 Clarification which considers many factors in determining interest of the underrepresented sex and has urged the withdrawal of the 2005 additional clarification.

Under the 2005 guidance, even if there was a favorable response from the underrepresented sex indicating interest in sports not currently sponsored by the college or university, there would be many other conditions that would need to be present, including a demonstration of acceptable skill before an institution might add the identified sport team. Since the sport doesn't exist on the respective campus, there would be no coach to fairly evaluate skill level. Furthermore, this approach of sampling ignores the fact that athletics team members are recruited to a campus from regional or national pools of high school and community college students. Sampling the existing student population eliminates the input of students who potentially would have attended that university or college had their preferred sport been sponsored. The consistent and uniform opinion of college presidents, chancellors and athletics administrators is that the 2005 guidance is contrary to the original intent of Title IX in that it provides an incomplete means of measuring interest.

2. Some key findings from the Model Survey and the ways in which (a) OCR and (b) colleges and universities have made use of the survey data.

I am not aware of how OCR has used the survey data but I do know that very few universities or colleges have acknowledged using the Model Survey. The 2005 clarification is cumbersome, confusing and unprecedented in length, detail and method of dissemination. It covers one part of one program component of the 13 program components reviewed for compliance under Title IX, but exceeds the length of OCR's 166-page 1990 Title IX Athletics Investigator's Manual, which addresses all 13 program components. Furthermore, OCR warns institutions not to drop an existing, viable team if the Model Survey results show insufficient interest for that team, suggesting that such survey results are possible when a viable team exists, which raises questions about the Survey's reliability.

At various national meetings, NCAA members have been asked if they have used the 2005 clarification and almost no one has responded affirmatively. In one instance, a university administrator stated that she had used the survey not to measure unmet interest, but to get a sense of what sports might be most appropriate to add for the underrepresented sex in the future. In order to increase the potential for a student response, a \$10 gift certificate was offered to those responding. There was expressed concern that the gift certificate could be viewed as an inappropriate bribe and might not have produced honest responses. If 10,000 students (less than 50 percent of the total enrollment) responded, the survey process would have cost an additional \$100,000 for the gift certificates.

Shortly after the additional clarification was issued on March 17, 2005, the NCAA Executive Committee, which consists of university presidents and chancellors representing all three divisions of the NCAA, and NCAA President Myles Brand reviewed the 2005 DOE's new guidance and found it to be an inappropriate means of assessing interest and Title IX compliance. The Executive Committee and President Brand submitted a letter to Secretary of Education Margaret Spellings and issued a resolution distributed to the NCAA membership outlining the most glaring flaws of the 2005 clarification. Both the letter and resolution are attached to this statement. The Department of Education's previous clarification in 1996 acknowledged that surveys are to be one element of several measures that provide a thorough and complete evaluation of interest by women in sports participation. By contrast, the 2005 clarification proposes the survey as a sole method of measurement and is contrived to show that females are not interested in participation. These are strikingly different approaches, and the 2005 survey methodology permits institutional manipulation to prove disinterest — an approach contrary to the spirit and the 35-year history of Title IX.

While I would like to believe that all universities are committed to equal opportunity and Title IX compliance, a review of Equity in Athletics Disclosure Act (EADA) data shows this is not the case. There is much work to be done to address the existing inequities. The reality is that 35 years after passage of Title IX, women still only receive 43 percent of athletics participation opportunities, 38 percent of operating budgets and 33 percent of recruiting budgets. All this is despite the well-documented and burgeoning interest by women in sports since the passage of Title IX. At the high school level, participants have increased 10 fold and six fold at the college level as new opportunities have been provided and societal attitudes toward female participation in sports has improved. In 2005-06, there were close to three million female high school student-athletes and 180,000 collegiate female student-athletes. The pool of high school female student-athletes suggests that if more opportunities were provided at the collegiate level, there would be a larger number of interested participants.

The bottom line is this: Women are still the underrepresented gender in college sports and less funding is devoted to the support of women's programs. The spirit of Title IX with regard to athletics and other campus opportunities recognizes that participation has educational and life-developmental value for both men and women. The 2005 additional clarification provides an easy way for non-compliant institutions to claim compliance with prong three by merely administering an electronic survey that by its nature measures inattention or neglect as disinterest. The effect of this survey approach potentially would be to freeze participation opportunities at their current level or worse to roll back the progress made over the last 35 years.

One of the greatest weaknesses of this electronic survey approach is counting a non-response as a lack of interest. Researchers have repeatedly stated that a non-response is just that, a non-response, and should not be interpreted in any other way. Attached is a report from the NCAA Data Analysis Research Network, which consists of university faculty researchers throughout the country, identifying the flaws in the 2005 Clarification. The overall tenor of that report is that the 2005 Clarification allows for the

STATEMENT OF JUDITH M. SWEET
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
CONTRACTOR/CONSULTANT
FORMER SENIOR VICE-PRESIDENT FOR CHAMPIONSHIPS
AND EDUCATION SERVICES
BEFORE THE
CIVIL RIGHT'S COMMISSION
MAY 11, 2007

I am Judith Sweet, and I currently serve as an Independent Contractor and Consultant for the National Collegiate Athletic Association (NCAA). For the previous six years I was NCAA Senior Vice President for Championships and Education Services. On behalf of the National Collegiate Athletic Association and its more than 1,200 member colleges, universities, conferences and affiliated organizations, I am pleased to have the opportunity to provide the Commission with information about the impact of Title IX on intercollegiate athletics; comments about the application of the law, particularly Prong Three of the Three Part Test; and any other assistance wherever possible as you undertake your important review.

I have been involved in intercollegiate athletics and higher education for more than 30 years as an athletics director, faculty member and in leadership roles within the NCAA. During my tenure in the field of intercollegiate athletics, I have worked extensively on matters involving the growth of opportunities and advancement of both men and women in athletics. Through my work, I have seen first-hand the commitment of the NCAA and many universities to promote equity and consequently the resulting strides that have been made in the pursuit of gender equity on campuses and NCAA programs. I am pleased with the progress, excited about the future, but wary of efforts to undo more than three decades of work. The gap in opportunities and support remains significant for women and thus more needs to be done to ensure parity. The goals of Title IX are far from realized.

Following are the questions provided by the Civil Rights Commission for comment and my responses.

1. According to the Department of Education's (DOE's) March 17, 2005 guidance, if a college or university chooses prong three of the three-part test, it will be found to be in compliance with Title IX "unless there exists a sport(s) for the underrepresented sex for which all three of these conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region." The DOE guidance includes a Model Survey to measure student interests and abilities in intercollegiate varsity athletics. Please comment on strengths and weaknesses of DOE's new guidance, including those of the Model Survey.

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JUDITH M. SWEET
NCAA Independent Contractor and Consultant

Judy Sweet joined the NCAA as Vice President for Championships and Senior Woman Administrator in January 2001. In 2003, she was promoted to Senior Vice President for Championships and Education Services. Prior to her work with the NCAA, Judy served as Director of Athletics at the University of California, San Diego beginning in 1975, when she became one of the first women in the nation selected to direct a combined men's and women's intercollegiate athletics program, until 1999 when she returned to a faculty position in Social Sciences at UC San Diego. During her tenure as athletics director, the UCSD Athletics Program involved 23 varsity teams; from 1981 until 1999, UCSD athletics teams won 26 NCAA National Championships, 32 additional teams were National Finalists and 28 other teams had third place national finishes. In 1998, UCSD received the Sears Directors Cup for being the most successful athletics program in NCAA Division III. In September 2006, Judy returned to San Diego where she is doing consulting work and serving as an independent contractor for the NCAA.

A native of Milwaukee, Wisconsin, Judy is a graduate of the University of Wisconsin, Madison where she majored in Physical Education and Mathematics, and served as president of the Women's Recreation Association and national president of the Athletic and Recreation Federation of College Women. She earned a Master's of Science Degree from the University of Arizona, Tucson and a Master's of Business Administration Degree from National University, San Diego. Prior to her faculty appointment at UC San Diego in 1973, she taught and coached at the University of Arizona and Tulane University.

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Judy was elected to a two-year term as membership President of the NCAA in January 1991 and was Secretary-Treasurer of the NCAA from 1989 to 1991, becoming the first woman to serve in each of those positions. She was Division III Vice President, the presiding officer of that division, from 1986-88. Her presidential responsibilities included presiding over the NCAA Administrative Committee, Council, and Executive Committee, and at the NCAA Annual Convention. She chaired the NCAA Budget Committee and the Special Advisory Committee to Review Recommendations Regarding Distribution of Revenues. That committee was formed as a result of the successful negotiations with CBS Television personnel, which resulted in a seven-year television contract beginning in 1991, worth \$1 Billion. Judy served as a member of the Negotiating Committee for that TV contract also.

Judy's other NCAA Committee service was extensive, including the Subcommittee to Review Minority Opportunities in Intercollegiate Athletics, NCAA Foundation, and Gender Equity Task Force. She has served on various local, state, and national committees including the Board of Directors of the National Association of College Women Athletics Administrators (serving as president 2000-2001), the Board of Directors of the National Association of College Directors of Athletics and the Board of Trustees for The United States Sports Academy. She was a member of the United States Olympic Committee's Task Force on Minorities, and serves on the Board of Trustees of National University.

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Judy's biography appears in several editions of Who's Who, and in 1984 she was selected as an Outstanding Young Woman of America. In 1990 the Los Angeles Times selected her as the Top Southern California College Sports Executive of the 80's. In 1992 the National Association of College Women Athletic Administrators named Judy Administrator of the Year and she received the W. S. Bailey Award from the Touchdown Club of Auburn-Opelika as the nation's distinguished athletic administrator. She further was honored with a 1992 Giant Steps Award in Athletic Administration from the Center for the Study of Sport in Society. She has received three honorary doctorate degrees. In 1993 the California State Senate selected Judy as District 39 Woman of the Year and in 1995 she received a Big Ten Conference Centennial Award. In 1998 she received The Honda Award for Outstanding Achievement in Women's Collegiate Athletics. Judy was also selected 1998-99 NACDA/Continental Division III Athletic Director of the Year. In 2006 she was listed among the NCAA's Centennial Anniversary 100 Most Influential Student-Athletes and received the NACDA James J. Corbett Memorial Award, which is presented annually to the collegiate administrator who "through the years has most typified Corbett's devotion to intercollegiate athletics and worked unceasingly for its betterment." In October 2006 she also was named the first NACWAA Legacy Honoree.



Judith Sweet

Independent Contractor and Consultant
National Collegiate Athletic Association

¹ Available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html>.

² 20 U.S.C. §§ 1681-87 (1988).

³ United States Department of Health, Education and Welfare, Office for Civil Rights, *Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (December 11, 1979).

⁴ See *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996); *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 288 (2d Cir. 2004); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993); *Pederson v. La. State Univ.*, 213 F.3d 858, 880 (5th Cir. 2000); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046 (8th Cir. 2002); *Neal v. Bd. of Trs.*, 198 F.3d 763, 771 (9th Cir. 1999); *Roberts v. Colo. State Univ.*, 998 F.2d 824, 828-29 (10th Cir. 1993); see also *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 95-96 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005).

⁵ United States Department of Education, Office for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003).

⁶ *Cohen v. Brown Univ.*, 101 F.3d at 179; see also *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d at 295 (“Interest is often a function of experience and opportunity.”).

⁷ *Cohen v. Brown Univ.*, 101 F.3d at 179.

⁸ United States Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, Jan. 16, 1996, at 10, available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> (hereinafter “1996 Clarification”).

⁹ *Pederson v. Louisiana State Univ.*, 213 F.3d at 878.

¹⁰ *Barrett v. West Chester Univ. of Pennsylvania*, 2003 WL 22803477 (E.D. Pa. Nov. 12, 2003).

¹¹ *Id.* at *9 (citing NCAA guidelines).

¹² 2005 Clarification at p. 10.

¹³ *Id.*

¹⁴ 1996 Clarification at p. 11.

¹⁵ *Id.* at p. 10.

¹⁶ 2005 Clarification at p.6.

¹⁷ *Id.* at p. 6, note 10:

¹⁸ *Neal v. Bd. Of Trs.*, 198 F.3d 763, 768 & n.4 (9th Cir. 1999).

¹⁹ *Cohen v. Brown Univ.*, 101 F.3d at 180-81.

²⁰ 2005 Clarification at p. 7.

²¹ See, e.g., Carnegie Corporation, *The Role of Sports in Youth Development* 9 (March 1996); NFHS, *The Case for High School Activities* (2002) at 3, 9; The National Campaign to Prevent Teen Pregnancy, *Fact Sheet: Not Just Another Single Issue: Teen Pregnancy and Athletic Involvement* (July 2003); *The Women's Sports Foundation Report: Sport and Teen Pregnancy* (1998) at 5-7; The President's Council on Physical Fitness and Sports, *Physical Activity & Sports in the Lives of Girls* (Spring 1997); *Black Female Athletes Show Grad-Rate Gains*, The NCAA News (June 28, 1995).

²² U.S. General Accounting Office, No. 01-297, *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams*, March 2001.

²³ The College Sports Council (CSC), which focuses on protecting men's athletics opportunities, recently issued a study purporting to show an “alarming decline in men's college athletics opportunities.” College Sports Council Longitudinal Study of NCAA Participation Data, available at <http://savingsports.org/presentation/>. Examination of that study, however, demonstrates its numerous analytical and methodological flaws. See Cheslock, J. (forthcoming), *Intercollegiate Athletic Participation and Title IX*, East Meadow, New York: Women's Sports Foundation (2007).

²⁴ National Women's Law Center, *Debunking the Myths About Title IX and Athletics* (October 2006), available at <http://www.nwlc.org/pdf/DebunkingMyths.pdf>.

²⁵ *Id.*

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Title IX has opened the door for millions of women and girls to participate in sports. While fewer than 32,000 women participated in college sports prior to the enactment of Title IX, that number has expanded to more than 160,000 women today – over five times the pre-Title IX rate. Female participation in high school athletics has increased ten fold, from fewer than 300,000 to close to 3 million students.

These increased sports opportunities have provided immense benefits to a new generation of female athletes. Playing sports promotes responsible social behavior, greater academic success, and increased personal skills. Compared to their non-athletic peers, athletes are less likely to smoke or use drugs; have lower rates of sexual activity and teen pregnancy; have higher grades; and learn important life skills, including the ability to work with a team, perform under pressure, set goals, and take criticism.²¹

Moreover, these benefits for women have not come at the expense of men. Data show unequivocally that men's opportunities to participate in sports have grown alongside those of women.²² Arguments to the contrary simply cannot withstand analysis.²³

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What the data instead confirm is that women continue to be disadvantaged in every aspect of sports participation. Although women represent 53 percent of the students at Division I universities, for example, they continue to receive only 44 percent of intercollegiate athletics participation opportunities, 34 percent of athletics operating budgets, and 33 percent of the money spent on recruitment.²⁴ Indeed, in Division I, for every dollar being spent on women's sports, almost two dollars are spent on men's athletics.²⁵ At the high school level, girls represent only 42 percent of varsity athletes, and case law demonstrates the pervasive inequities that they face when they are allowed to play. Simply put, thirty-five years after the enactment of Title IX, the playing field is far from level for our nation's young female athletes.

* * *

In short, the Department's 2005 Clarification does a major disservice to the young women of this country. The harms it inflicts stand to stall or even reverse the progress that women have made under Title IX. Moreover, the Clarification also shortchanges schools, which will be vulnerable to legal liability if they implement methods of measuring women's interests – such as those authorized in the Clarification – that violate Title IX standards. The Department should rescind the Clarification and instead restate its commitment to enforcing the long-standing regulatory policies that truly reflect Title IX's goals and requirements. The nation's young women deserve no less.

purpose of Title IX – to encourage women’s interest in sports and eliminate stereotypes that discourage them from participating.¹⁸ It is particularly damaging for students in high school, where female students are likely to have had few or no sports opportunities that would inform their responses to an interest survey, and where students should be encouraged to try many different sports, not have their future opportunities limited by what they might have experienced or be interested in at that time.

It is also contrary to the requirement of *full* accommodation of female athletes’ interests and abilities. Opponents of the three-part test have argued that Prong Three should be read to require accommodation of the interests and abilities of female students based only on the relative levels of those interests in comparison to those of men. But this “relative interests” argument ignores the fact that a school relying on Prong Three to comply with the three-part test is, by definition, failing to offer female students equal opportunity compared to their male peers. It relies on the inaccurate and impermissible stereotype that women are inherently less interested in participation in athletics than their male counterparts. And as the First Circuit has noted, the argument “contravenes the purpose of the statute and the regulation”

because it does not permit an institution or a district court to remedy a gender-based disparity in athletics participation opportunities. Instead, this approach freezes that disparity by law, thereby disadvantaging further the underrepresented gender. Had Congress intended to entrench, rather than change, the status quo—with its historical emphasis on men’s participation opportunities to the detriment of women’s opportunities—it need not have gone to all the trouble of enacting Title IX.¹⁹

The 2005 Clarification Provides for Inadequate Oversight by the Department of Education.

Adding insult to injury, the 2005 Clarification does not require that the Office for Civil Rights monitor compliance to ensure that schools meet even the policy’s minimal requirements for survey use or interpret the results accurately. In fact, the 2005 Clarification explicitly states that “[w]here the Model Survey shows insufficient interest to field a varsity team, OCR will not conduct a compliance review of that institution’s implementation of the three-part test.”²⁰ In addition to drastically weakening the standards for compliance with Prong Three of the three-part test, therefore, the Clarification provides no mechanism for the Department – or anyone else, for that matter — to evaluate the impact of schools’ use of the model survey; to investigate the extent to which that survey has stalled or reduced women’s participation opportunities; or to assess the ways in which it is being implemented on campuses.

The 2005 Clarification Threatens to Perpetuate Further Discrimination Against Female Athletes

For the reasons set forth above, the 2005 Clarification creates a major loophole through which schools can evade their legal obligation to provide equal opportunity in athletics. This is deeply troubling, particularly because – despite the advances in women’s participation in sports since the enactment of Title IX – women remain second-class citizens on the playing field.

of the three-part test on the grounds that the survey, which achieved only a 39 percent response rate, was not a reliable means of measuring the institution's compliance with Title IX. The court noted that NCAA guidelines warn that response rates below 60 percent "would almost always be cause for concern because almost half of those selected to represent your school did not participate in the study," and because the results "could always be called into question and challenged for their representativeness."¹¹ By authorizing schools to treat non-responses as if they were in fact responses, however, the Clarification allows the schools to create the fiction that 100% of surveyed students have responded. This fiction should not be allowed to obscure the reality that the Clarification permits schools to deny athletics opportunities to women based on *actual* response rates that would likely be rejected by any court examining the evidence.

Equally troubling is the Clarification's authorization for schools to "presume that a student's self-assessment of lack of ability to compete at the intercollegiate varsity level in a particular sport is evidence of actual lack of ability."¹² This authorization shortchanges the significant number of students who do not recognize their own potential until a coach, parent or friend encourages them to try. Moreover, as the Clarification itself recognizes, "a student may have athletic skills, gained from experience in other sports, which are fundamental to the particular sport in which the student has expressed an interest."¹³ A high school swimmer may, for example, have the skills to participate on a collegiate crew team; a former soccer player may be able to compete in track. Under longstanding Department policies that predate the Clarification, schools were expected to seek the opinions of coaches and other experts in evaluating women's abilities to compete at a varsity level. But the 2005 Clarification relieves schools of any obligation to conduct this independent assessment.

The 2005 Clarification Impermissibly Shifts the Burden to Female Students to Show Their Interest in Equal Treatment.

Under the Department policies predating the 2005 Clarification, schools had the burden of showing – and the Office for Civil Rights the burden of rigorously evaluating claims – that, despite their failure to provide equal opportunities to their female students, schools were nonetheless fully accommodating women's interests and abilities. OCR, for example, required that all educational institutions undertake evaluations of interest "periodically so that the institution [could] identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex"¹⁴ – and required that an institution justify any assertion that students were not interested in playing sports offered in the region.¹⁵ Under the 2005 Clarification, however, schools that have implemented the model survey are presumed to have complied with Title IX, unless students produce "direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team."¹⁶ And although prior policies called for schools to consider sports offered in the communities from which they drew their students, the 2005 Clarification explicitly rejects the argument that "evidence that feeder high schools for the institution offer a particular interscholastic sport" is sufficient to sustain a female athlete's burden.¹⁷

This shift in the burdens – forcing women to prove that they are interested in and entitled to equal treatment – is an inversion of basic civil rights principles. It also conflicts with a key

Clarification effectively requires women to show that they can fill a new team by relying entirely on students within their schools' current student bodies – a requirement that is not imposed on men's teams.

Recognizing these realities, and as noted above, prior Department policies have long required schools seeking to comply with Prong Three to look beyond their campuses to identify the participation opportunities offered by other colleges and universities or by high schools and recreation leagues in areas from which the school draws its students. To do otherwise in assessing whether women's interests and abilities have been fully satisfied, as authorized by the 2005 Clarification, vitiates the third prong of the test and perpetuates the cycle of discrimination. Indeed, as the Fifth Circuit Court of Appeals has stated in rejecting an argument very like that embraced in the 2005 Clarification:

“The heart of this contention is that an institution with no coach, no facilities, no varsity team, no scholarships, and no recruiting in a given sport must have on campus enough national-caliber athletes to field a competitive varsity team in that sport before a court can find sufficient interest and abilities to exist. It should go without saying that adopting this criteria would eliminate an effective accommodation claim by any plaintiff, at any time.”⁹

The 2005 Clarification Authorizes a Deeply Flawed Survey Methodology.

My colleagues on the panel will address the methodological flaws in the survey authorized by the 2005 Clarification in more detail. I would like to focus on two particularly problematic aspects of the survey approach the Department has endorsed: the authorization to schools to (a) interpret a lack of response to the survey as evidence of lack of interest; and (b) presume that a young woman's self-assessment of a lack of ability to compete reflects an actual lack of ability.

Given the low rate of response to surveys in general, and the glitches often associated with e-mail communications, the authorization for schools to treat a failure to respond to the survey as a response affirmatively indicating lack of interest in additional sports opportunities is likely to lead schools to significantly underestimate the level of interest that exists on their campuses. There are numerous reasons – entirely unrelated to their interest in participating in sports – that students may fail to respond to a survey. Students may not have access to – or regularly use – university e-mail. Students may not receive an e-mailed survey if the e-mail gets caught in a spam filter, or they may delete an e-mail that looks like it might carry a virus. They may be too busy with other academic or extracurricular commitments to respond. Indeed, even if the e-mail accompanying the on-line survey states that failure to respond will be treated as evidence of lack of interest, students may delete the e-mail without reading this warning. To treat non-response as evidence of lack of interest is methodologically unsound and unfair to young women.

It also violates basic principles governing acceptable survey response rates. In one case,¹⁰ for example, a court rejected survey evidence used to argue compliance with Prong Three

“[T]here exists the danger that, rather than providing a true measure of women’s interest in sports, statistical evidence purporting to reflect women’s interest instead provides only a measure of the very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports.”⁷

Thus, basing women’s future opportunities on their responses to surveys that measure their prior lack of exposure will only perpetuate the cycle of discrimination in sports to which they have been, and continue to be, subjected. It is for these reasons that Department of Education policies that predate the 2005 Clarification require that schools seeking to show that they have satisfied the interests of their female students evaluate a host of additional factors, including:

- Requests by students and admitted students that a particular sport be added;
- Requests that an existing club sport be elevated to intercollegiate team status;
- Participation in particular club or intramural sports;
- Interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- Results of questionnaires of students and admitted students regarding interests in particular sports;
- Participation in particular interscholastic sports by admitted students; and
- Participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the school draws its students.⁸

The Department’s decision to eliminate schools’ obligation to consider these important criteria is a major disservice to female students and violates Title IX’s fundamental purpose of eradicating the discrimination to which women have consistently been subject in athletics and in other aspects of their education.

The 2005 Clarification Impermissibly Allows Schools to Restrict Their Surveys to Enrolled and Admitted Students.

The 2005 Clarification explicitly authorizes schools to survey only their enrolled and admitted students in evaluating whether they have met the requirements of the third prong of the three-part test. But this approach ignores the reality that students interested in a sport not offered by a school are unlikely to attend that school. By failing to require schools to look beyond their own campuses — to, for example, high school, community, and recreational programs in the areas from which a school typically draws its students — the Clarification allows schools to evade their legal obligation to look broadly at indicia of women’s interest in sports. Instead, the policy rewards schools with a presumption of compliance for wearing blinders — that is, for restricting their sports offerings and then claiming that they are satisfying the interests of those who are content with those restricted offerings.

The Clarification also ignores the ways in which schools typically recruit for men’s teams. Most colleges assess prospective players regionally or nationally and recruit them with scholarship offers or non-financial benefits to apply to and attend an institution. The 2005

- Where the members of one sex have been and are underrepresented among intercollegiate athletes, show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; *or*
- 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, demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.³

Frequent attacks on the three-part test have been resoundingly rejected; the test has been uniformly upheld by the nine federal appellate courts to have considered it⁴ and uniformly applied by prior Administrations. In fact, in July 2003, this Department of Education reaffirmed its commitment to applying the test and long-standing Department interpretations of it, rejecting – in the wake of a massive public outcry – recommendations made by a Department Commission on Opportunity in Athletics that would have dramatically undermined women’s rights to equal opportunity in sports.⁵

Despite this commitment, the Department’s 2005 Clarification violates long-standing and fundamental principles underlying the Department’s regulatory policies, as well as the law itself. The Clarification allows schools that are not meeting either the first or the second prong of the three-part test to show that they are nonetheless in compliance with Title IX by doing nothing more than sending a “model” e-mail survey to their female students asking about their interest in additional sports opportunities. The Department will presume that schools comply with Title IX if they administer this survey and find insufficient interest to support additional opportunities for women—even if schools get very low response rates—unless female students can provide “direct and very persuasive evidence” to the contrary. For the reasons I set forth below, this policy change effectively eviscerates the third prong’s requirement that schools show full and effective accommodation of their female students’ athletic interests.

The 2005 Clarification Violates Basic Principles of Equal Opportunity

The 2005 Clarification Impermissibly Allows Schools to Rely on Surveys Alone to Measure Compliance.

The 2005 Clarification permits schools to rely exclusively on the results of a survey to their female students to evaluate whether they have satisfied their obligation to provide equal athletics opportunities to these students. But as courts have consistently recognized, interest cannot be measured apart from opportunity. “Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience.”⁶ As a result, surveys are likely only to provide a measure of the discrimination that has limited, and continues to limit, sports opportunities for women and girls. As the First Circuit stated in its seminal decision in *Cohen v. Brown University*,

**Statement of Jocelyn Samuels
Vice President for Education and Employment
National Women's Law Center**

**United States Commission on Civil Rights
Briefing on "Title IX Athletics: Accommodating Interest and Abilities"
May 11, 2007**

I am Jocelyn Samuels, the Vice President for Education and Employment at the National Women's Law Center in Washington, D.C. I appreciate the opportunity to appear before you today to discuss Title IX's requirement that the athletics interests and abilities of male and female students be equally accommodated.

Founded in the year that Title IX was passed, the National Women's Law Center has been at the forefront of virtually every major effort to secure and defend women's legal rights, particularly with regard to participation in athletics. The Center filed the first comprehensive Title IX challenge to discrimination in intercollegiate athletics; has participated in most of the subsequent federal appellate cases to consider the application of Title IX to athletics; and has filed amicus briefs or been counsel in every Supreme Court case involving Title IX. Of particular relevance here, the Center was a key participant in the efforts that led to issuance of the three-part test that has for close to 30 years governed assessments of school compliance with Title IX's participation requirements.

I would like to focus my remarks this morning on the significant and damaging flaws in the Department of Education's "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three"¹ (hereinafter "2005 Clarification") issued without notice or opportunity for public comment on March 17, 2005. The 2005 Clarification conflicts with longstanding Department of Education policy, violates basic principles of equality under the law, and threatens to reverse the enormous progress women and girls have made in sports since the enactment of Title IX. The National Women's Law Center continues to call on the Department to rescind this harmful and unlawful Clarification.

As you know, Title IX of the Education Amendments of 1972² bars sex discrimination in federally funded education programs and activities and requires that schools provide equal sports participation opportunities to their male and female students. For almost three decades, the Department of Education's regulatory policies have provided three independent ways – the "three-part test" – for educational institutions to show that they are meeting this requirement. Specifically, a school can demonstrate compliance if it can:

- Demonstrate that intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollment; *or*



Jocelyn Samuels

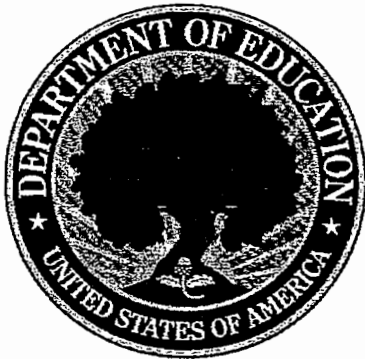
Vice President for Education and Employment
National Women's Law Center

Jocelyn Samuels

Jocelyn Samuels is Vice President for Education and Employment at the National Women=s Law Center, where she supervises an active litigation docket of Title IX cases.

She spearheads the Center=s efforts to preserve Title IX athletics policies and other regulations without change; to ensure that young women are treated fairly in career education programs; to challenge policies and practices that block women=s access to non-traditional courses such as math and science; and to pursue gender equity in all aspects of education.

Prior to joining the Center, Ms. Samuels was Labor Counsel to Senator Edward M. Kennedy, the Chair of the Senate Committee on Health, Education, Labor and Pensions. She also worked for a decade as a senior policy attorney at the Equal Employment Opportunity Commission, where she specialized in issues of sex and race discrimination. Ms. Samuels received her law degree from Columbia University, and her bachelor=s degree from Middlebury College.



**U.S. Department of Education
Office for Civil Rights**

**ADDITIONAL CLARIFICATION OF
INTERCOLLEGIATE ATHLETICS
POLICY: THREE-PART TEST –
PART THREE**

U.S. Department of Education
Margaret Spellings
Secretary

Office for Civil Rights
James F. Manning
Delegated the Authority of Assistant Secretary for Civil Rights

March 17, 2005

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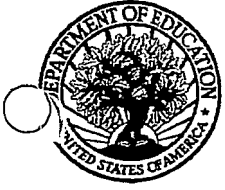
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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 17, 2005

Dear Colleague:

On behalf of the Office for Civil Rights (OCR) of the U.S. Department of Education (Department), and as a follow-up to OCR's commitment to providing schools with technical assistance on Title IX of the Education Amendments of 1972 (Title IX), I am sending you this "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three" (Additional Clarification). Accompanying the Additional Clarification is a "User's Guide to Developing Student Interest Surveys Under Title IX" (User's Guide) and a related technical report. The Additional Clarification outlines specific factors that guide OCR's analysis of the third option for compliance with the "three-part test," a test used to assess whether institutions are effectively accommodating the interests and abilities of male and female student athletes under Title IX. The User's Guide contains a model survey instrument to measure student interest in participating in intercollegiate varsity athletics.

As you know, OCR enforces Title IX, an anti-discrimination statute, which prohibits discrimination on the basis of sex in education programs or activities by recipients of federal financial assistance. Specifically, OCR investigates complaints of such discrimination and may, at its discretion, conduct compliance reviews. The Department's regulation implementing Title IX, published in 1975, in part, requires recipients to provide equal athletic opportunity for members of both sexes and to effectively accommodate the interests and abilities of their male and female students to participate in intercollegiate athletics. In the Intercollegiate Athletics Policy Interpretation published in 1979 (Policy Interpretation), the Department established a three-part test that OCR will apply to determine whether an institution is effectively accommodating student athletic interests and abilities. An institution is in compliance with the three-part test if it has met any one of the following three parts of the test: (1) the percent of male and female athletes is substantially proportionate to the percent of male and female students enrolled at the school; or (2) the school has a history and continuing practice of expanding participation opportunities for the underrepresented sex; or (3) the school is fully and effectively accommodating the interests and abilities of the underrepresented sex.

OCR has pledged to provide further guidance on recipients' obligations under the three-part test, which was described only in very general terms in the Policy Interpretation, and to further help institutions appreciate the flexibility of the test. Based on OCR's experience investigating complaints and conducting compliance reviews involving the three-part test, OCR believes that institutions may benefit from further specific guidance on part three.

Today, in response, OCR issues this Additional Clarification to explain some of the factors OCR will consider when investigating a recipient's program in order to make a Title IX compliance determination under the third compliance option of the three-part test. The Additional Clarification reflects OCR's many years of experience and expertise in administering the three-part test, which is grounded in the Department's long-standing legal authority under Title IX and its implementing regulation to eliminate discrimination on the basis of sex in education programs and activities receiving federal financial assistance.

Under the third compliance option, an educational institution is in compliance with Title IX's mandate to provide equal athletic participation opportunities if, despite the underrepresentation of one sex in the intercollegiate athletics program, the institution is fully and effectively accommodating the athletic interests and abilities of its students who are underrepresented in its current varsity athletic program offerings. An institution will be found in compliance with part three unless there exists a sport(s) for the underrepresented sex for which *all* three of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region. Thus, schools are not required to accommodate the interests and abilities of all their students or fulfill every request for the addition or elevation of particular sports, unless all three conditions are present. In this analysis, the burden of proof is on OCR (in the case of an OCR investigation or compliance review), or on students (in the case of a complaint filed with the institution under its Title IX grievance procedures), to show by a preponderance of the evidence that the institution is not in compliance with part three.

Many institutions have used questionnaires or surveys to measure student athletic interest as part of their assessment under part three. To assist institutions, this Additional Clarification is being issued with a User's Guide prepared by the National Center for Education Statistics (NCES), as well as a detailed technical report prepared by the National Institute of Statistical Sciences (NISS). These documents were prepared after careful analysis of 132 of OCR's cases involving 130 colleges and universities from 1992 to 2002. They evaluate both the effective and problematic aspects of survey instruments. OCR intends this combined document to serve as a guide to facilitate compliance with part three of the three-part test.

Based on the analysis of the OCR cases and other information, the User's Guide provides a web-based prototype survey (the "Model Survey") that, if administered consistent with the recommendations in the User's Guide, institutions can rely on as an acceptable method to measure students' interests in participating in sports. When the Model Survey is properly administered to all full-time undergraduate students, or to all such students of the underrepresented sex, results that show insufficient interest to support an additional varsity team for the underrepresented sex will create a presumption of compliance with part three of the three-part test and the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities. The presumption of compliance can only be overcome if OCR finds direct and very persuasive evidence of unmet interest

sufficient to sustain a varsity team, such as the recent elimination of a viable team for the underrepresented sex or a recent, broad-based petition from an existing club team for elevation to varsity status. Where the Model Survey shows insufficient interest to field a varsity team, OCR will not exercise its discretion to conduct a compliance review of that institution's implementation of the three-part test.

Although more than two-thirds of the institutions involved in the 132 cases complied with the three-part test using part three, OCR believes that some institutions may be uncertain about the factors OCR considers under part three, and they may mistakenly believe that part three offers less than a completely safe harbor. Therefore, for colleges and universities seeking to achieve Title IX compliance using part three, OCR intends that the Additional Clarification and User's Guide serve to facilitate an institution's determination of whether it is in compliance with part three of the three-part test. A recipient may choose to use this information to assess its own athletic programs and then take appropriate steps to ensure that its athletic programs will be operated in compliance with the Title IX regulatory requirements.

Despite the focus on part three, OCR strongly reiterates that each part of the three-part test is an equally sufficient and separate method of complying with the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities. In essence, each part of the three-part test is a safe harbor. OCR will continue to determine that a school has met its obligations to provide nondiscriminatory participation opportunities in athletics so long as OCR finds that the school has satisfied any one of the three options for compliance under the three-part test. Schools are also reminded that nothing in Title IX or the three-part test requires the cutting or reduction of opportunities for the overrepresented sex, and OCR has pledged to seek remedies that do not involve the elimination of opportunities.

OCR hopes the Additional Clarification and User's Guide will help reinforce the flexibility of the three-part test and will facilitate application of part three for those schools that choose to use it to ensure Title IX compliance. OCR welcomes requests for individualized technical assistance and is prepared to join with institutions in assisting them to address their particular situations.

Thank you for your continuing interest in this subject.

Sincerely,

James F. Manning
Delegated the Authority of the
Assistant Secretary for Civil Rights

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ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST — PART THREE

BACKGROUND

The Office for Civil Rights (OCR) of the U.S. Department of Education (Department) enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, an anti-discrimination statute, which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds.¹ The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs. In part, the regulation requires schools to “provide equal athletic opportunity for members of both sexes.” 34 C.F.R. § 106.41(c). In determining whether equal opportunities are available, the regulation provides that OCR will consider, among other factors, whether the selection of sports and levels of competition effectively accommodate the interests and abilities of students of both sexes.

To provide further clarification of the Title IX regulatory requirements, the Department published the Intercollegiate Athletics Policy Interpretation (Policy Interpretation) in the *Federal Register* on December 11, 1979 (44 Fed. Reg. 71,413 (1979)).² The Policy Interpretation provides that, as part of determining whether an institution is effectively accommodating the interests and abilities of male and female athletes, institutions must provide the opportunity both for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules that equally reflect their abilities.³ The Policy Interpretation permits three alternate ways of assessing whether institutions are providing nondiscriminatory opportunities to participate in intercollegiate athletics. In essence, each part of the three-part test is a safe harbor, and no part is favored by OCR. The three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs. OCR does not preapprove or review compliance with these standards by every institution. OCR investigates complaints of discrimination and may, at its discretion, conduct compliance reviews.⁴

The Policy Interpretation specifically delineates the following three-part test and stipulates that compliance will be assessed in any one of the following ways:

¹ OCR does not enforce the Fourteenth Amendment to the U.S. Constitution. Furthermore, because the scope of the Equal Protection Clause of the Fourteenth Amendment may differ from the scope of the Title IX statute, this Additional Clarification does not regulate or implement constitutional requirements or constitute advice about the Constitution.

² The regulation implementing Title IX and the Policy Interpretation were originally published by the former Department of Health, Education, and Welfare, and were later adopted by the Department of Education, established in 1980.

³ This document does not address competitive team schedules that equally reflect student abilities.

⁴ There is a private right of action under Title IX, so that individuals may take legal action directly against the colleges or universities.

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as provided 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.

44 Fed. Reg. at 71,418.

On June 27, 2002, Secretary of Education Rod Paige created the Secretary's Commission on Opportunities in Athletics to investigate whether additional guidance on the Title IX requirements regarding intercollegiate athletics was needed and to provide recommendations on how to improve application of the current standards. The Commission's report, "Open to All: Title IX at Thirty," presented on February 26, 2003, found broad support throughout the country for the goals and spirit of Title IX.

Soon thereafter, in July 2003, OCR issued the Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (2003 Clarification). It made clear that the elimination of teams is a disfavored practice and that, in negotiating compliance agreements, OCR will seek remedies that do not involve the elimination of opportunities. That policy remains in effect and is emphasized in this Additional Clarification.

In order to ensure that schools have a clear understanding of their options for compliance, OCR also promised in the 2003 Clarification to provide further information to help educational institutions appreciate the flexibility of the law, to explain that each part of the test is a viable and separate means of compliance, and to provide technical assistance to assist schools in complying with Title IX. Of the 130 institutions OCR investigated under the three-part test from 1992 to 2002, approximately two-thirds came into compliance with part three of the test. Based on OCR's experience investigating the three-part test and the fact that OCR has not investigated the vast majority of recipient institutions, OCR believes that institutions may be uncertain about the factors OCR considers under part three, and may be unaware that they may choose to assess the interests and abilities of their students through a variety of flexible nondiscriminatory methods.

ADDITIONAL CLARIFICATION AND NCES USER'S GUIDE

This Additional Clarification, User's Guide to Developing Student Interest Surveys Under Title IX (User's Guide), and related technical report are resources to assist institutions in meeting their compliance obligations. Taken together, they serve to clarify many of the factors OCR will consider under part three, and to facilitate compliance with part three for those schools that choose to comply with that part of the test. The User's Guide was prepared by the National Center for Education Statistics (NCES), and the technical report was prepared by the National Institute of Statistical Sciences (NISS). These documents analyze 132 OCR complaints and compliance reviews involving 130 colleges and universities from 1992 to 2002. They discuss the effective and problematic elements of 52 survey instruments used in OCR cases⁵ and five survey instruments used by other institutions. Based on that analysis, the User's Guide provides a prototype survey ("Model Survey") to measure student interest under part three. The User's Guide summarizes the information in the technical report that is most relevant to the practical concerns of institutions considering the use of a survey. The technical report provides the statistical analysis that is the basis for the User's Guide and Model Survey.

Although the Additional Clarification, User's Guide, and related technical report focus on part three of the three-part test, they are not intended to discourage compliance with the other parts of the test. Instead, they are designed to offer guidance to those schools that choose to comply with part three. Institutions have flexibility and choice regarding how they will provide nondiscriminatory participation opportunities, and each part of the three-part test is an equally sufficient means of compliance.

This combined document is designed specifically for intercollegiate athletics. However, these general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by the Title IX implementing regulation.

THREE-PART TEST — PART THREE: IS THE INSTITUTION FULLY AND EFFECTIVELY ACCOMMODATING THE INTERESTS AND ABILITIES OF THE UNDERREPRESENTED SEX?

Under part three of the three-part test, an institution may provide proportionally fewer athletic participation opportunities to one sex, as compared to its enrollment rate, if the interests and abilities of the enrolled and admitted students of the underrepresented sex are being fully and effectively accommodated by the institution's current varsity athletics program.⁶ Merely showing that there is disproportionality in the athletic opportunities provided to male and female athletes is not evidence of unmet interests and abilities of

⁵ The focus of the analysis is on the use of surveys. However, the institutions investigated by OCR may have used other means to assess interest in addition to surveys.

⁶ When determining whether an institution is fully and effectively accommodating the interests and abilities of its students of the underrepresented sex, OCR considers the interests and abilities of currently enrolled students, as well as students who have been admitted. References to the interests and abilities of "students" or "undergraduates" throughout this document are intended to include only enrolled students and admitted students.

the underrepresented sex. There must be actual evidence of unmet interests and abilities among the underrepresented sex. The burden of proof is on OCR (in the case of an OCR investigation or compliance review), or on students (in the case of a complaint filed with the school under its Title IX grievance procedures), to show by a preponderance of the evidence that the institution is not in compliance with part three.

The part three analysis centers on whether there are concrete and viable interests among the underrepresented sex that should be accommodated by the institution's athletic program. OCR has explained that an institution will be found in compliance with part three unless there exists a sport(s) for the underrepresented sex for which *all* three of the following conditions are met:

- a) unmet interest sufficient to sustain a varsity team in the sport(s);
- b) sufficient ability to sustain an intercollegiate team in the sport(s); and
- c) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region.

If the school decides to comply with part three of the three-part test, the assessment of each of the above three conditions is an essential prerequisite for determining a school's Title IX obligation to create a new intercollegiate varsity team or elevate an existing club team to varsity status.

When one or more of these conditions is absent, a school is in compliance with part three. It follows that schools are not required to accommodate the interests and abilities of all their students of the underrepresented sex or to fulfill every request for additions of new varsity teams or elevations of particular club sports to varsity status. However, when each condition is present, a school is under an obligation to accommodate the particular interests and abilities of its students of the underrepresented sex – not the interests and abilities of the general population – if the institution elects to comply with part three.⁷ Moreover, the school must accommodate these interests and abilities within a reasonable period of time.

As explained in the Policy Interpretation, OCR requires that the assessment of students' interests and abilities use "methods [which] are responsive to the expressed interests of students capable of intercollegiate competitions who are members of an underrepresented sex." 44 Fed. Reg. at 71,417. However, part three imposes no obligation on an institution to generate interest among its students of the underrepresented sex.

Schools choosing to comply with part three of the three-part test may continue to provide more athletic opportunities for the overrepresented sex than for the underrepresented sex,

⁷ When a school chooses to comply with part one of the three-part test, it is not required to accommodate the specific interests of all of its students of the underrepresented sex. An institution is in compliance with part one if it provides participation opportunities for male and female students at rates that are substantially proportionate to the rates of their respective enrollments. Under part one, an institution has discretion in selecting which sports to put in place; it does not necessarily need to provide a sport because there is higher interest in that sport than in another sport. OCR does not consider unfilled slots when determining the number of participation opportunities.

or even to add more opportunities for the overrepresented sex. Part three does not impose any limitations on the number of opportunities a school may add for the overrepresented sex or the amount of interest it may accommodate for that sex, provided the school is fully and effectively accommodating the interests and abilities of the underrepresented sex. Nothing in Title IX or the three-part test requires the cutting or reduction of opportunities for the overrepresented sex. In the event of a finding of noncompliance, OCR seeks remedies that do not involve the elimination of opportunities.

A. Assessment of Interest Sufficient to Sustain a Varsity Team

Under the Policy Interpretation, institutions have discretion and flexibility in choosing the nondiscriminatory methods to determine the athletic interests and abilities of the underrepresented sex. OCR has never required elaborate scientific validation of assessments. Schools may continue to use a variety of straightforward and inexpensive techniques, consistent with the standards set forth herein.

1. Model Survey and Proper Implementation to Assess Interest Sufficient to Sustain a Varsity Team

One method schools may use to measure student interest is the web-based Model Survey provided in the User's Guide. NCES's expert statisticians carefully designed the web-based Model Survey, after extensive analysis of the 57 survey instruments, to effectively measure student interest in a simple, straightforward manner. The Model Survey is an unbiased, standardized methodology that maximizes the possibilities of obtaining correct information and facilitating responses. It effectively captures information on interest, experience, and self-assessment of ability across multiple sports, while not unnecessarily complicating responses with superfluous or confusing questions. Since part two, like part three of the three-part test, involves the assessment of the interests and abilities of the underrepresented sex, the Model Survey may also be used by schools to help them comply with part two.

The User's Guide also provides specific guidance on the proper implementation of the Model Survey to measure student interest sufficient to sustain a varsity team. It recommends that institutions conduct a census, meaning that the survey is provided to all undergraduate students, or to all such students of the underrepresented sex. This contrasts with a sample survey, which is administered to only a subset of students from the target population. The User's Guide concludes that a census is superior to a sample survey in almost every respect for purposes of assessing student interest under part three of the three-part test. Using a census, rather than a sample survey, avoids several complex issues associated with sample surveys, including the selection of the sampling mechanism, selection of the sample size, and calculation of sampling error.⁸

⁸ National Center for Education Statistics, U.S. Department of Education, User's Guide to Developing Student Interest Surveys Under Title IX 10 (2005).

The User's Guide states that schools may assume that nonresponse to the census indicates an actual lack of interest if all students have been given an easy opportunity to respond to the census, the purpose of the census has been made clear, and students have been informed that the school will take nonresponse as an indication of lack of interest.⁹

The User's Guide also emphasizes that the census need only be conducted periodically to permit institutions to identify developing interests of the underrepresented sex in a timely and responsive manner.

2. Conduct a Census Using the Model Survey Consistent With the User's Guide

OCR will presume that the Model Survey is an accurate measure of student interest, absent other direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team,¹⁰ if an institution administers the Model Survey in a manner consistent with the following recommendations in the User's Guide. First, the Model Survey must be administered periodically to permit schools to identify developing interests.

Second, an institution properly administers the Model Survey if it conducts a census whereby the Model Survey is provided to all full-time undergraduates, or to all such students of the underrepresented sex.¹¹ The regulation requires that institutions provide equal athletic opportunity for members of both sexes and effectively accommodate the interests and abilities of members of both sexes. OCR, consistent with the User's Guide, expects that the Model Survey ideally will be administered to students of both sexes. By doing so, a school can learn the degree to which unmet demand exists among male and female students, and use this information to help ensure obligations under the regulation continue to be met as the institution plans the future of its athletic program. It avoids any implication that the school is concerned only with the needs of the underrepresented sex and eliminates the need to restrict access to the survey to only a subset of the undergraduate student body, easing administration.

If an institution conducts a sample survey, rather than a census, OCR will not presume that Model Survey results indicating lack of interest are evidence of actual lack of interest, and the institution will not benefit from the presumption.

Third, schools must administer the census in a manner that is designed to generate high response rates, and students must have an easy opportunity to respond to it. Thus, schools may either require students to complete the census or provide the census in a context in which most students will complete it. For instance, a school may want to

⁹ Id. at 12.

¹⁰ Direct evidence is actual evidence that is not circumstantial. A recent broad-based petition from an existing club team for elevation to varsity status is direct evidence of interest in that sport by students on the club team. On the other hand, evidence that feeder high schools for the institution offer a particular interscholastic sport is circumstantial, not direct, evidence of interest by students at the institution.

¹¹ Schools are not required to meet the athletic interests of potential, part-time, or graduate students.

administer the Model Survey as part of the registration process whereby students must complete or actively bypass the Model Survey to register for courses. Alternatively, a school may send an email to the entire target population that includes a link to the Model Survey, provided the school has accurate email addresses, students have access to email, and the school takes reasonable steps to follow-up with students who do not respond. In either approach, students must also be advised of the purpose of the Model Survey and that a nonresponse to the Model Survey will indicate to the school that the student is not interested in additional varsity athletic opportunities. Although rates of nonresponse may be high with the email procedure, under these conditions, OCR will interpret such nonresponse as a lack of interest.¹²

Fourth, schools must include in the census at least the full list of sports recommended in the Model Survey. That list includes all varsity sports, including "emerging sports," currently recognized by the three national intercollegiate athletic associations to which most schools belong.¹³ The Department will periodically modify the sports identified on the Model Survey to reflect any changes in varsity sports. Unless the Department notifies schools of any changes in the Model Survey, schools may presume that it accurately reflects all varsity sports currently recognized by these three national intercollegiate athletic associations.

When a school conducts a census using the Model Survey consistent with the User's Guide, OCR will presume that Model Survey results indicating lack of interest sufficient to sustain a varsity team are evidence of such actual lack of interest, and an institution will therefore be determined to be in compliance with part three of the three-part test. The presumption that the results are an accurate measure of student interest can only be overcome if OCR finds direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team, such as the recent elimination of a viable varsity team for the underrepresented sex or a recent, broad-based petition from an existing club team for elevation to varsity status. Where the Model Survey shows insufficient interest to field a varsity team, OCR will not conduct a compliance review of that institution's implementation of the three-part test.¹⁴

Whether or not schools use the Model Survey consistent with the recommendations in the User's Guide, schools cannot use the failure to express interest during a census or survey to eliminate a current and viable intercollegiate team for the underrepresented sex. Students participating on a viable intercollegiate team have expressed interest in

¹² NCES, User's Guide, at 12.

¹³ The three associations are the National Collegiate Athletic Association (NCAA), the National Association of Intercollegiate Athletics (NAIA), and the National Junior College Athletic Association (NJCAA). Institutions may also be members of additional athletic associations, which may recognize other varsity sports that are not currently recognized by the NCAA, NAIA, or NJCAA. Schools may add additional varsity sports to the census if they so choose, provided the census, at a minimum, includes all the sports identified on the Model Survey.

¹⁴ Compliance reviews are initiated by OCR at its discretion, but OCR is required by regulation to investigate complaints of discrimination.

intercollegiate participation by active participation, and census or survey results, including those of the Model Survey, may not be used to contradict that expressed interest.

3. Conduct a Census Other Than the Model Survey Consistent With the User's Guide

If a school uses a census other than the Model Survey, OCR will presume that the census results accurately measure student interest sufficient to sustain a varsity team under part three if OCR finds that the census is of equivalent reliability to the Model Survey and is administered consistent with the conditions articulated in section two above. OCR evaluates any such census for reliability and compliance with these conditions by examining the following concerns raised in the User's Guide:

- contents of the survey;
- target population that is surveyed;
- response rates; and
- frequency of conducting the survey.

4. Other Means to Assess Interest Sufficient to Sustain a Varsity Team When a School Does Not Use the Model Survey or an Equivalent Census

OCR emphasizes that compliance with part three does not require use of the Model Survey or any other survey. Institutions continue to have discretion and flexibility when determining the athletic interests and abilities of students, and may do so through a variety of nondiscriminatory methods of their choosing that need not be elaborate or expensive as long as the process complies with the requirements of the Policy Interpretation. While surveys like the Model Survey provide a standard method by which to collect information on students' athletic-participation interests, experiences, and self-assessment of ability, surveys of this kind are only one method by which a school may obtain data on its students' interests. OCR is not mandating the use of this specific prototype or requiring that individual schools conduct elaborate scientific validation or assessment of student interest. Consequently, should a school already employ an effective set of procedures to assess student interest, OCR does not require the school to alter its assessment process to incorporate the Model Survey or any other survey.

When a school chooses not to use a survey, uses a survey other than the Model Survey that is not equivalent to the Model Survey, conducts a sample survey rather than a census, or does not otherwise administer the Model Survey consistent with the recommendations in the User's Guide, OCR will not presume that survey results (if any) alone are adequate to measure student interest under part three. Instead, OCR will look to a broader range of factors drawn from previous OCR guidance on the three-part test in determining whether the school has accurately measured student interest. Specifically, OCR will consider the following factors when assessing student interest under part three:

- requests for the addition of a varsity team or elevation of an existing club sport to intercollegiate varsity status;
- participation in club or intramural sports;
- participation rates in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students; and
- intercollegiate varsity participation rates, as identified by national and regional intercollegiate sports governing bodies, in the institution's normal competitive region.

OCR also finds a recent broad-based petition to create and participate in a varsity team or elevate a club team to varsity status to be indicative of interest. Schools may wish to develop policies and procedures for accepting, handling and responding to such requests, and widely disseminate such policies and procedures to existing and newly admitted students, as well as coaches and other employees. The procedures available for requesting the addition or elevation of teams also play a role in compliance with part two of the three-part test, and effective implementation of these policies and procedures may facilitate compliance with part two, as well as part three. Since recipients are required to designate at least one employee to coordinate their Title IX responsibilities, recipients may wish to consider whether the processing of requests for the addition or elevation of teams should be part of those procedures or the responsibilities of their Title IX coordinators. (See 34 C.F.R. § 106.8.)

By participating on a club or intramural team, students have already expressed interest in a particular sport, though not necessarily in participation at the intercollegiate varsity level. Consequently, schools may wish to regularly monitor their club and intramural sports — including, but not limited to, participation rates and the extent to which the team engages in varsity competition — as part of their assessment of student interest.

B. Assessment of Sufficient Ability to Sustain an Intercollegiate Team

Because athletic directors and coaches have unique expertise when assessing athletic ability, their assessments will be presumed to be valid, provided the methods used to assess ability are adequate and evaluate whether the students have sufficient ability to sustain an intercollegiate varsity team.

OCR recognizes that students interested in a particular sport may have a broad range of athletic abilities. Schools are not required to create a varsity team or elevate a club team to intercollegiate varsity status unless there are a sufficient number of interested students that have the ability to sustain an intercollegiate varsity team. When OCR is required to make this determination, it may consider such factors as the following:

- the athletic experience and achievement — in interscholastic, club or intramural competition — of underrepresented students interested in playing the sport;
- participation in other sports, intercollegiate or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered;

- self-assessment of ability to compete in a particular interscholastic varsity sport;
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team;
- tryouts in the particular sport in which there is an interest;
- other direct observations of participation in the particular sport being considered; and
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students have the potential to sustain a varsity team.

When measuring students' athletic abilities, surveys, including the Model Survey, are generally limited to measuring a student's athletic experiences and self-assessment of ability. Although a student's experience in a particular sport may be a good indicator of ability, it does not necessarily reflect the student's ability to compete on a team at the higher level required of intercollegiate athletes. In particular, a survey such as the Model Survey does not capture information on the level of performance or competition of a team or a particular student. Conversely, a lack of experience or limited experience in a particular sport does not necessarily indicate the inability to compete in a particular sport at the intercollegiate level. For example, a student may have athletic skills, gained from experience in other sports, which are fundamental to the particular sport in which the student has expressed an interest.

If a school chooses to use the Model Survey or an equivalent survey, OCR will presume that a student's self-assessment of lack of ability to compete at the intercollegiate varsity level in a particular sport is evidence of actual lack of ability.

If an institution has a team that currently or previously competed at the club or intramural level, OCR will consider the competitive experience of the team, as well as the opinions of coaches and others within the institution that have observed or otherwise have knowledge of the team members' athletic abilities.

Because OCR considers participation in club and intramural sports to be an important indicator of interest and ability, schools that are unsure whether the interests and abilities they have measured will be sufficient to sustain a new varsity team are permitted – though not required – to create a club or intramural team to further assess those interests and abilities. We refer here, not to lack of confidence in the Model Survey or other results, but to whether the accurately measured interests and self-assessed abilities are sufficient to sustain a new varsity team. Just as an institution might conduct tryouts or hold organizational meetings after a survey or other initial assessment shows the potential interest and ability to create a new varsity team, an institution has the option to field a club or intramural team for a reasonable period of time to further assess the depth and breadth of the interests and abilities of the participating athletes. However, this option must be exercised as only a part of the assessment process, using standards that apply equally to male and female athletes. Once a school completes the assessment process by concluding that there is sufficient interest and ability to support a new varsity team, the school is under an obligation to create a varsity team within a reasonable period of time.

C. Assessment of Sufficient Number of Interested and Able Participants to Sustain a Team

To trigger an institution's obligation to create a team for the underrepresented sex under part three of the three-part test, the number of interested students with ability must be sufficient to sustain an intercollegiate team in that sport. Each of the various intercollegiate sports has a minimum number of athletes needed to compete in a contest. While it is theoretically possible to have teams with only these minimum numbers of athletes, OCR recognizes that the reality of how sports are played involves practical factors that schools must take into consideration in setting the minimum number of participants needed for a particular sport. Athletic directors and coaches for a particular sport will generally have the experience with the mechanics and realities of operating a team to determine the impact of these factors and decide the number of students needed to establish teams by sport. In general, OCR defers to decisions of the athletic directors and coaches. As a frame of reference, OCR may consider the average size of teams in a particular sport, a number that will typically vary by institution, sport, sex, and competitive region. When evaluating the minimum number of athletes needed, OCR may consider factors such as:

- rate of substitutions, caused by factors such as intensity of play or injury;
- variety of skill sets required for competition; and
- effective practices for skill development.

In particular, some sports require a higher rate of substitutions, both in intercollegiate competition and in practice because, for example, they involve a higher intensity of play or have higher frequency rates of injury than other sports. Some team sports may require an athlete in a certain playing position to develop a particular set of athletic skills that it may not be necessary for other team members to develop to the same degree of proficiency. For example, a baseball or softball pitcher, to be successful, must develop athletic skills very different from those of the catcher. Similarly, the skill set needed to play offensive positions in football are different from those in defensive positions. Additional players may be needed for purposes of practice and skill development. To have effective practice to simulate regulation play, a basketball team, for example, may need twice the number of participants than are permitted on the court at once during varsity competition. OCR may consider these factors when evaluating the minimum number of athletes needed to sustain a particular team.

D. Determining Whether There Is a Reasonable Expectation of Intercollegiate Competition for the Team

In addition to the requirement that students have an interest in athletics and sufficient ability to sustain a team, there must be a reasonable expectation of intercollegiate competition for the team in the institution's normal competitive region. OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete.

Institutions are not required to create an intercollegiate varsity team or elevate teams to varsity status absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive region. However, institutions may be required by the Title IX regulation to encourage the development of such competition as part of a resolution agreement or remedy.

If an institution's normal competitive region includes an area outside its own geographic area, OCR will not require the creation of a particular sport if, due to climate or topography, it would not be possible as a practical matter for students at the institution to practice that sport. For example, Institution A's normal competitive region includes the Rocky Mountains, although Institution A is located in the Plains. Students at Institution A are interested in and able to compete in skiing. Due to the geographic area in which Institution A is located, there are no mountains on which students at Institution A could practice. Thus, in order to prepare for competition, the skiing team would have to travel to the Rocky Mountains for each practice. Therefore, OCR would not require the school to create a ski team.

E. Implementation

When a school has sufficient unmet interest and ability in a sport to sustain an intercollegiate team in that sport, and a reasonable expectation of intercollegiate competition for a team in that sport within the school's normal competitive region, the school is under an obligation to create a varsity team in that sport or elevate the club team to varsity status, if it elects to comply with part three of the three-part test. Moreover, the school must accommodate those interests and abilities within a reasonable period of time.¹⁵ Thus, schools may wish to use the results of their assessment under part three, including the Model Survey, to inform and support budget decision-making.

OCR recognizes that, for practical and financial reasons, a school may be unable to immediately create a new varsity team or elevate a team to varsity status. When determining whether the period of time to create or upgrade a team is reasonable, OCR will account for the steps necessary to establish the varsity team, which will vary by sport and by school and may include obtaining necessary approval and funding to establish the team, building or upgrading facilities, obtaining varsity level coach(es), and acquiring necessary equipment and supplies. If a school must construct or renovate facilities for the varsity team, it may immediately accommodate the interests and abilities of the underrepresented sex by providing temporary facilities.

¹⁵ The addition of a new varsity team necessarily will increase the number of varsity athletes at the school, and the development of a new team may require a school to spread scholarships for these new varsity athletes over as much as four years. If a school takes such action, OCR will consider the creation of a new team to be a nondiscriminatory factor justifying the award of fewer scholarships in the first few years of the newly established team than would be necessary to create substantial proportionality between male and female athletes.

CONCLUSION

OCR intends that the Additional Clarification and User's Guide will serve to facilitate compliance with part three of the three-part test for those institutions that choose to use part three to ensure Title IX compliance. Although the focus of this combined document is on part three, OCR reiterates that each part of the three-part test is an equally sufficient and separate method of complying with the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities, and institutions maintain flexibility and control over their athletic programs.

Department of Education, Office for Civil Rights: Documents and Related Materials

National Center for Education Statistics, *User's Guide to Developing Student Interest Surveys Under Title IX*, March 2005



National Center for
Education Statistics

U.S. Department of Education
Institute of Education Sciences
NCES 2005-173

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NCES 2005-173

User's Guide to Developing Student Interest Surveys Under Title IX

March 2005

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March 2005

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Suggested Citation

U.S. Department of Education, National Center for Education Statistics. (2005). *User's Guide to Developing Student Interest Surveys Under Title IX* (NCES 2005-173). Washington, DC: National Center for Education Statistics.

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USER'S GUIDE TO DEVELOPING

STUDENT INTEREST SURVEYS UNDER TITLE IX

The purpose of this report, prepared by the National Center for Education Statistics (NCES) for the Office for Civil Rights of the U.S. Department of Education, is to provide a guide for conducting a survey of student interest in order to satisfy Part 3 the Three-Part Test established in the 1979 Policy Interpretation of the intercollegiate athletic provisions of Title IX of the Higher Education Act of 1972.

Introduction to Title IX

Title IX (20 U.S.C. §§ 1681-1688), enacted in 1972, addresses issues of gender discrimination in colleges and universities. Specifically, it states that

“...no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...” (20 U.S.C. § 1681 (a)).

In 1975, the former U.S. Department of Health, Education, and Welfare issued regulations implementing Title IX (34 CFR Part 106). The regulations pertaining to athletics require that a recipient which sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes (34 CFR 106.41(c)).

Enforcement of Title IX is primarily the responsibility of the Office for Civil Rights (OCR) of the U.S. Department of Education. Courts, however, have resolved some cases. The associated body of case law has addressed legal issues ranging from the standing of plaintiffs to whether Title IX violates the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

The Three-Part Test

Postsecondary educational institutions may be required to demonstrate compliance with Title IX in response to either specific complaints or OCR's compliance reviews.

The 1979 Policy Interpretation of Title IX established, among other things, three means by which institutions can demonstrate compliance with the interests and abilities factor, which is one of the factors for determining equivalence in athletic benefits and opportunities. Collectively, these are known as the “Three-Part Test” or, alternatively, as the “Three-Prong Test.” An institution may demonstrate compliance in any one of the following ways (44 Fed. Reg. 71,418 Dec. 11, 1979):

1. Demonstrate that intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; *or*

2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; *or*
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above [in Part 2], demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

The Title IX Commission and the Assistant Secretary's letter

On June 27, 2002, then Secretary of Education Rod Paige created the Commission on Opportunity in Athletics to investigate whether further guidance on Title IX requirements regarding intercollegiate athletics was needed. On February 26, 2003, the 15-member Commission issued its final report entitled "*Open to All*": *Title IX at Thirty*.

In response to the Commission's report, on July 11, 2003, OCR issued a Dear Colleague letter providing further clarification on the intercollegiate athletics policy guidance regarding Title IX compliance. The letter reaffirmed that each of the three parts was a valid means of compliance and that "institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas." Further, OCR encouraged schools to request individualized assistance from OCR to meet the requirements of Title IX. OCR also indicated that it would share information on successful approaches with the broader scholastic community.

Background on This User's Guide

Pursuant to the July 11, 2003 clarification letter, OCR desired assistance in providing technical guidance to schools on meeting the requirements of Title IX. At OCR's request, NCES produced this guide and commissioned a related technical report by the National Institute of Statistical Sciences (NISS). The intent of this report is to provide guidance on conducting a survey of student interest with respect to Part 3 of the Three-Part Test.

To lay the foundation for the guide, NISS conducted an historical analysis of the use of surveys for Part 3 within the legal and regulatory context of OCR. The history of the use of surveys to comply with Title IX provides a context for identifying good existing practices as well as desirable improvements. To conduct this analysis, OCR provided files to NCES of the 132 cases of possible noncompliance with Title IX that OCR investigated during the period of 1992–2002. These cases involved 130 colleges and universities in 43 states. Such cases either resulted from complaints or arose from compliance reviews conducted by OCR; all were resolved.

In order to ascertain the unique needs of institutions attempting to demonstrate Title IX compliance using Part 3, the files were examined with two general questions in mind. The first was the degree to which the institutions in the OCR Title IX compliance case files, and the subset of those institutions that used Part 3, were similar to the universe of postsecondary institutions that offer intercollegiate sports programs. To the extent that the

institutions in the OCR case files are similar to the larger universe of institutions, it is easier to generalize from their history.

The second question was with regard to the specific survey practices that were used by those institutions that employed a survey. For instance, what kind of data collection process was used? How did institutions ask about student interest in various sports? How was nonresponse handled? NISS examined the survey instruments that have been employed to date and considered the technical challenges to conducting a survey that will be both easy to implement and adequate to ascertaining whether the interests and abilities of the underrepresented sex have been effectively accommodated.

Once the analyses were conducted, it was possible to develop suggestions for an improved process for conducting a Part 3 interest survey. The next sections of this report summarize the analysis of the OCR case files. The final section of this report provides guidance on how to conduct a Part 3 interest survey. It includes procedures that represent the best of the practices found in the OCR case files and further improvements. The practices that are recommended in this guide do not, in some particulars, meet the standards that would govern the collection and analysis of data by a federal statistical agency such as NCES. The goal was to identify and provide guidance on ways to improve practice within the context of compliance with Part 3 of the Three-Part Test.

This User's Guide draws extensively from a technical report, *Title IX Data Collection: Technical Manual for Developing the User's Guide* (Karr, A.F., and Sanil, A.P., 2005), that is provided as a companion to this User's Guide. The technical report was prepared for NCES by the National Institute of Statistical Sciences, a highly respected independent research institute. This User's Guide presents the information in the technical report that is most relevant to the practical concerns of institutions considering the use of a survey to comply with Title IX.

The OCR Case Files

Findings on institutional differences and similarities

There were 130 unique institutions in the OCR case files ("OCR institutions"). The cases were initiated and resolved during the years from 1992 to 2002. Of these, 95 were the subject of a complaint and 35 were the subject of an OCR-initiated compliance review.

About two-thirds of the 130 OCR institutions opted to use Part 3 (n = 86) rather than Parts 1 or 2 (n = 44) to comply with Title IX. There were so few attempts to comply using Part 2 (n = 8) that separate analysis of Part 2 cases was not conducted. About three-fourths of the 86 institutions that achieved compliance using Part 3 did so by means of a student interest survey (n = 67). The remainder achieved compliance with Part 3 in some other manner (n = 19).

In order to gain a sense of how representative the 130 OCR institutions are, they were compared to a base population of 1,723 institutions that include every institution that is a member of at least one of the intercollegiate athletic organizations: the National

Collegiate Athletic Association (NCAA), the National Association of Intercollegiate Athletics (NAIA), and the National Junior College Athletic Association (NJCAA).

The comparisons were made using 14 different characteristics. These are divided into three groups. The first group, Institutional Characteristics, consists of Sector, Geographical Region, Urbanicity; Carnegie Classification, Selectivity, In-State Cost, and Out-of-State Cost. The second group, Student Body Demographics, consists of Enrollment, Percent Female, Percent Black, and Percent Out-of-State. The third group, Athletic Program Characteristics, contains Association Membership, Football, and Number of Sports. Complete details describing the full set of characteristics and a complete set of tables displaying the results summarized here are given in the accompanying technical report.

Although the OCR cases consist of institutions of all types located in 43 states, there are some differences between them and the comparison population. OCR cases tend to involve large state colleges and universities (including doctoral universities) that are highly involved in intercollegiate sports. More specifically, relative to the comparison institutions, they are more likely to have football as one of their conference membership sports, are more likely to participate in all four major conference sports (i.e., baseball, football, basketball, and track), and are more likely to belong only to the NCAA than to one of the smaller sports associations. In addition, they are more likely to be located in the Southeast and the Far West than are the comparison institutions.

The OCR institutions that used Part 3 to achieve compliance, compared to Part 1 and Part 2 users, are more likely to be public, 2-year institutions and to have a greater percentage of female students and Black students. They are also more likely to be small, less expensive, and located in the Southeast. In contrast, they are less likely to be doctoral universities, belong to the NCAA, participate in conference sports, and to have out-of-state students than those institutions that opted to use Parts 1 or 2.

About three-fourths of the institutions that achieved compliance using Part 3 did so by means of a student interest survey ($n = 67$).¹ The differences among institutions using Part 3 that employed an interest survey and those that did not are few and are detailed in the technical report.

Finally, there is some evidence that use of Part 3 and the use of surveys to achieve Part 3 compliance have increased over time.

In summary, the OCR institutions tend to be those that educate large numbers of undergraduates. However, the OCR institutions that used Part 3, including those that used a student interest survey, tend to be smaller institutions that are not as involved at the

¹ Following the completion of the NISS analysis, OCR provided documentation showing that 10 of the 29 institutions identified as not having surveys in the NISS report had, in fact, used a survey. However, copies of the survey instruments used were not available for analysis. The numbers in this guide have been adjusted to reflect the change in these 10 cases.

most competitive levels of intercollegiate athletics. We have no way of ascertaining why institutions that use Part 3 differ from those that do not. There is no reason, however, from a statistical and measurement perspective, for student interest surveys to be more appropriate for one type of institution than another.

Current Survey Practices

In this section, we summarize the information obtained from the 52 OCR files containing survey instruments.² This information was used as the foundation for the guidance we provide in the last section on how to conduct a Part 3 interest survey.

The 52 instruments were classified along 20 categorical dimensions.

The first set of dimensions consists of the following properties of the survey itself:

- Whether the case is the result of a complaint against the institution or routine monitoring activities of OCR.
- The target population, which may consist of the entire student body, only females, or some other group. This is the group whose interests and abilities the survey purports to describe.
- The sampling mechanism, which indicates whether there is explicit selection of a subset of the target population or whether the survey is meant to be a census, that is, completed by all students.
- The degree of proactivity in conducting the survey. This is the extent to which the institution exerted effort to secure a reasonable response rate.

The second set of dimensions consists largely of characteristics of the survey instrument. Most of these are the presence or absence of specific kinds of questions:

- Age: are respondents asked their age?
- Class: are respondents asked which class (i.e., freshman, ...) they are a member of?
- Gender: are respondents asked their gender?
- Spectator interest: are respondents asked about their interest as spectators, either in person or via television or radio, of athletic events?
- Attitudes about athletics: are respondents asked explicitly about their attitudes regarding athletics in general or intercollegiate athletics?
- Opinion about the institution's athletic programs: are respondents asked explicitly for opinions regarding whether the institution's athletic programs address their needs (as opposed to implicit questions associated with whether their personal interests and abilities are satisfied)?
- Identifying information: are respondents asked for information that identifies them?
- Ability: are respondents asked explicitly about their athletic ability?

² There were a total of 15 OCR case files that did not contain an instrument despite being recorded as having carried out a survey.

- Recruiting: are respondents asked whether they had been recruited as athletes by a postsecondary institution?

The third set of dimensions is the global characteristics of the instrument:

- Caveats and benefits: are questions regarding intercollegiate athletics accompanied by a statement of the potential disadvantages (for example, time spent in practice or missed classes) and advantages (for example, financial aid)?
- Reasons for the survey: are respondents told why the survey is being conducted?
- Statement of confidentiality: are respondents promised explicitly that their responses will be kept confidential?

The final set of dimensions concerns how athletic interest, experience, and ability are represented in the survey instrument.

- For interest, representation of sports (i.e., type of sports activity)
- For interest, number of levels (i.e., amount of interest)
- For experience, representation of sports
- For experience, number of levels.

In examining these surveys, it was found that close to two-thirds (44 of the 67) were administered in response to a complaint being filed. Detailed data were available on three-fourths of these surveys (52 of the 67). Of the institutions with available surveys, a majority included the entire student body in its purview rather than some other group (e.g., campus visitors or applicants for admission). Also noteworthy is that a majority of these surveys included all students rather than just women, as might be expected from the language in Part 3 of the Three-Part Test, which refers only to the interests of the underrepresented sex as being relevant to compliance. Nearly two-thirds of these surveys used a census approach, which attempted to ascertain the responses of all students rather than those of only a sample of students.

As best as could be determined, few if any institutions made an effort to obtain high response rates. The typical institution simply distributed the questionnaires in a central place. Only a few provided incentives for students to complete the survey or provided any indication that they attempted to contact nonrespondents in order to induce them to complete the survey.

A majority of institutions included questions on student age, class (freshman, sophomore, etc.), and gender. More than three-fourths did not ask respondents to provide identifying information.

Most did not ask about student interest as athletic spectators, or their attitude towards intercollegiate athletics in general. Less than one-half of the surveys included a question about their institution's athletic program, and less than 20 percent (10 of 52) of survey instruments contained direct questions about whether interests as spectators are being met. One example of a direct question about interests being met is the following:

“Are your desires for participation in [recreational, intramural, intercollegiate, club] sports met at XXX?”

Less than one-third of the 52 institutions explicitly asked respondents to rate their athletic abilities. Many institutions asked about previous high school experience or previous collegiate experience as a surrogate for asking about athletic ability.

Only a few institutions asked students whether or not they had been recruited as athletes. Less than one-third reported that students were told the purpose of the survey. Less than 20 percent of surveys promised student confidentiality to potential respondents.

Given the purpose of the study, every survey contained some question or questions concerning student interest. There are two separate issues: (1) how were individual sports represented, and (2) how many levels of interest were offered to respondents as part of the question wording.

The most substantive of the differences among the survey instruments are in how they operationalize these concepts. These differences are of two kinds. The first is how sports are represented, which occurs in the instruments three ways:

- By fixed entries (e.g., archery, baseball, basketball, ...) in the “Sport” column.
- By blank entries in the “Sport” column, in which respondents are asked to write in the names of sports for which they wish to provide information.
- By blank entries in the “Sport” column, into which respondents are to place numerical codes for sports of interest, which are listed somewhere in the instrument.

Nearly two-thirds of surveys provided fixed entries for individual sports as a way of representing them in the questionnaire.

The second difference is the number of levels provided to respondents as response categories, which ranges from one (“some interest”) to ten levels. The dominant practice is to offer simply one (non-zero) level of interest for respondents, treating this as a yes/no question. In contrast to the limited variation in questions about interest, questions about previous experience varied widely. There was no predominant pattern of question wording and type, even though every survey contained questions about previous experience. Similarly, the number of levels of experience varied widely, suggesting an absence of a standardized format for response.

Several (15 of 52), albeit a minority, of the instruments contained statements of caveats and benefits associated with participation in intercollegiate athletics. The following statement appeared in several of the instruments:

“Intercollegiate athletics usually requires athletes to devote 20 hours of practice each week during the season. The athlete is expected to follow an individual regimen of training during the off-season. Many intercollegiate athletes receive financial awards that cover all or a portion of school expenses. Athletes are

required to travel and occasionally miss classes. They are given access to academic support services, including tutoring, counseling and study tables.”

It is inherent in Part 3 surveys that questions of interest and ability need to be asked of respondents with respect to many different sports. A number of surveys struggled with this problem unsuccessfully, in that they did not use a format that both maximized the possibilities of obtaining correct information and facilitated responses because it was easy to use. Some of the questionable procedures include insufficient definition of the number of levels of interest, unnecessary forced-choice response categories, and insufficient space for free-form responses. In addition, surveys that use only free-form responses may lead to underreporting of levels of interest in sports that do not immediately occur to respondents as they are filling out the questionnaire.

Many questions included on these surveys appeared to be irrelevant to the purpose of Title IX, including questions about race and ethnicity and student living arrangements. Eliminating superfluous questions would improve these survey instruments.

A major problem with these surveys is that response rates reported by the OCR institutions are typically low. One-half of these institutions reported the data needed to compute their survey response rates; the range varied from 8 percent to 70 percent. Coupled with the problem of low response rates is the lack of attention to questions of nonresponse bias. While it is a reasonable conjecture that most student nonresponse is due to the lack of interest in athletics on the part of those students, there is no evidence that any institution sought to test this view or, alternatively, that they informed students that nonresponse would be interpreted as lack of interest.

On a positive note, while some of the question wording is awkward, there was little or no attempt to slant the responses on the part of the 52 survey institutions by biasing question wording.

In order to see whether student athletic interest surveys have been done more generally, an Internet search for additional survey instruments identified a number of institutions that reported such surveys, including five for which survey instruments were obtained. They are similar to the surveys conducted by the OCR institutions in that they were used to survey the student body rather than applicants, they tend to be complete censuses rather than based on samples, they use questions about experience as surrogates for questions of ability, they do not take steps to deal with any nonresponse problem they may have faced, and they include a question on gender.

A major difference between these five surveys and the instruments used by the OCR institutions is that four of the five were conducted using the Web. In part, this reflects the evolution of survey technology, since these surveys were conducted between the years 2000 and 2004, while the surveys conducted by OCR institutions were carried out between 1992 and 2002 at the latest. However, the additional surveys failed to exploit the full potential of Web interactivity and of Web technology that excuses respondents from unnecessary responses and can help guarantee respondents' confidentiality.

In summary, the 52 surveys conducted by OCR institutions and the five Internet surveys exhibit a mixture of strengths and weakness. Lack of explicit bias is one of the great strengths of these instruments, as is the tendency of more recent surveys to explicitly use the Web for their data collection process. One weakness of many of these instruments is that their representation of interest, ability, and experience across many sports is often confused and unnecessarily complex, while another weakness is the inclusion of irrelevant information on the questionnaire. The most serious problem, though, is the inattention to low response rates. A complete discussion and summary of these issues is contained in the technical report.

How to Conduct a Survey of Student Interest

A survey instrument and data collection process that improves on current practice by utilizing the newest Internet technologies and adopting procedures that will generate high response rates is presented below. It avoids many of the problems found in the examination of current practice and seeks to simplify the process for institutions that might wish to comply with Part 3 of the Three-Part Test by means of a student interest survey.

The technical requirements of such a survey, which is designed to measure whether the “interests and abilities of the members of that underrepresented sex have been fully and effectively accommodated by the present program,” indicate that certain choices will make it easier to conform to legal requirements as well as the technical requirements of surveys. All of the criteria for doing so are set out in the technical report.

Problem formulation

In order to simplify the presentation, attention is restricted to a single sport not currently offered at the varsity level for women. We assume that women are the underrepresented sex. An institution employing Part 3 is attempting to determine, using data collected from a student survey, whether the interests and abilities of women have been fully and effectively accommodated by the present program.

An operational formulation of the problem is as follows: There are a minimal number of team members necessary to “field” a team in the given sport. The institution must specify this number. It depends on the sport and possibly contextual factors. For instance, a basketball team cannot play with fewer than five players, but this is not the minimal number of players needed for basketball. Instead, the minimal number is presumably in the range 10–15. NCAA or other association rules may provide other bounds for the number of players, but prevailing values in the conference to which the institution belongs are also relevant.

There is, conceptually, some number of women students who possess the interest and ability to compete in the sport at the varsity level. If that number were known with certainty, then determination of compliance by OCR would be straightforward:

- If the number of women with interest and ability is equal to or greater than the minimum number of players required to field a team, then the institution must take additional steps that could lead to offering the sport at the varsity level.

- If the number of women with interest and ability is less than the minimum number of players required to field a team, then the institution does not have to take steps to offer that sport.

It is the "known with certainty" qualification in this formulation that creates challenges for a survey. In particular, it raises questions about the target population to be surveyed, whether a census or sample is to be used, how frequently the survey should be conducted, and most importantly, how to deal with the problem of students not responding to the survey and the possible bias introduced by such nonresponse.

Target population

The ideal implementation of this kind of survey should fix the population to be surveyed to be the entire undergraduate student body. Even though compliance with Title IX for intercollegiate athletics is restricted to accommodating the interests of full-time undergraduates of the underrepresented sex, a survey of the entire undergraduate population can provide institutions with evidence related to the degree to which unmet demand differs for males versus females and full-time versus part-time students; it avoids the suggestion that the institution is concerned only with the needs of the underrepresented sex and eliminates the need to restrict access to the survey to only a subset of the undergraduate body. Even though the entire undergraduate student body is surveyed, the determination of the number with interest and ability for purposes of compliance with Part 3 should be restricted to full-time students of the underrepresented sex.

An alternative to surveying the entire student population is to survey a catchment population consisting of both the entire student population and potential applicants. However, the use of a catchment population is very problematic. The size of the catchment area is dependent on the student population served by a specific institution. The catchment area might be local for a rural community college, national for a small state college, and international for large 4-year and doctoral institutions. Even if definable, such a large target population is almost surely unreachable in any meaningful way and thus is not recommended here.

Census versus sample

There are two alternative possibilities for selecting cases. The first would be to conduct a census whereby all undergraduates are asked to provide information regarding whether their interests and abilities are accommodated by the present program. The second possibility would be to conduct a sample survey: only a subset of students is asked to provide information regarding whether the present program accommodates their interests and abilities.

While a census is a larger scale undertaking than a sample survey, it is superior in almost every respect for Part 3 interest surveys. Using a census avoids several difficult issues associated with sample surveys: selection of the sampling mechanism, selection of the sample size, and calculation of sampling error. In fact, a majority of the OCR institutions using a survey attempted to conduct a census. For those OCR cases not using a census approach, a few institutions selected a random sample while others used a non-random

purposive sample of what the institution took to be an interested population, such as students in physical education classes. For technical reasons, if an institution intends to select a sample, it is necessary to select an extremely large sample in order to get a precise estimate of interested students of the underrepresented sex. Further, even with technically sophisticated sampling and analysis procedures, the compliance implications of sample estimates are unclear. For instance, how is an institution to handle the margin of error in a sample survey that generates an estimate of 15 interested and able women (with a margin of error of ± 3) in a sport that requires 18 people to form a team? In contrast, the implications of a census in which 15 women identify interest and ability in a sport that requires 18 are clear – the institution has determined that there are an insufficient number of interested females on campus to field that sport. Thus, the recommended data collection strategy is to conduct a census (i.e., to survey all students) rather than to select a sample of respondents.

Periodicity

How frequently should a survey of student interests be conducted? Since most cases of survey use in the OCR files were in response to complaints being filed, there is little case history to indicate how frequently an institution acting proactively should administer a survey. A survey of the entire undergraduate student body that generates high response rates and demonstrates that the interests of the underrepresented sex are fully accommodated might serve for several years if the demographics of the undergraduate population at the institution are stable and if there are no complaints from the underrepresented sex with regard to a lack of athletic opportunities. In contrast, an institution with rapidly changing demographics, or whose previous survey detected levels of student interest and ability in particular sports that were close to the minimum number of players required to field a team, or an institution receiving complaints with regard to unmet needs should consider more frequent surveys.

Excluding students

With respect to varsity participation, part-time students and members of the overrepresented sex should not be included in the calculation of the number of students in the underrepresented sex who have interest and ability. Should institutions exclude seniors from the calculation of this number if the survey is conducted at a point in time when it is too late for the seniors who have completed the survey to participate in the sport in which they have expressed interest and ability? The inclusion of seniors in the calculation of this number is recommended, particularly for those institutions that do not plan to implement an annual survey. The inclusion of seniors provides the best estimate for future years of the number of students in the underrepresented sex who have the interest and ability, and acknowledges the reality that creating a new sports team at the intercollegiate level may be a multiyear process.

Confidentiality

When asking for any personal or potentially individually identifiable data, protecting the respondents' confidentiality is essential to obtaining high quality data and to achieving acceptable response rates. The recommendation to use e-mail and the Internet to improve on current practices may seem to some as increasing the risks of violating confidentiality. However, by utilizing the newest Internet technologies, there are readily available

alternatives (such as one-way hashed keys) that make it possible to track who has responded, while at the same time protecting the confidentiality of their responses. One such alternative would be to embed an encrypted ID within the link to the URL of the data collection instrument. The encrypted ID would be severed from the response itself and used in the database file containing respondents' e-mail addresses to mark that a response had been received. The software would then use the encrypted ID to record that a person has responded without being able to link to that person's response. This strategy allows an institution to track responses, conduct nonresponse follow-up and to protect against multiple responses by a single individual. For example, the institution could use the database with encrypted IDs and e-mail address (but no individual responses to survey items) to send e-mail messages to nonrespondents.

Nonresponse

The final issue is the question of nonresponse. Most OCR institutions that included surveys either did not report their response rates or reported them as low. None explicitly considered any kind of nonresponse bias analysis to determine whether those students who did not respond to the survey differed in interests and abilities from those who responded.

In general, institutions have treated nonresponse as indicating no interest in future sports participation. This assumption is defensible if all students have been given an easy opportunity to respond to the survey, the purpose of the survey has been made clear, and students have been informed that the institution will take nonresponse as an indication of lack of interest.

The procedures for conducting an analysis of nonresponse bias and generating statistically valid adjustments to the original data based on such an analysis are complicated and beyond the capacity of some institutions. Thus we conclude that the best method for dealing with nonresponse is to generate high enough response rates that nonresponse can safely be ignored for the purposes of Title IX compliance. A web-based survey instrument, which is described in detail below, can accomplish that goal, either by being made mandatory or by being provided in a context in which most students will complete it. For instance, a web-based survey that students have to complete or actively by-pass to access the web screens that allow them to register for courses is likely to produce very high response rates. Another possibility is for institutions to send an e-mail to all students that describes the purpose of the survey, includes a link to the web-based survey, and includes a disclaimer that states that if a student does not respond to the survey, the institution will understand that the student is not interested in additional athletic participation. Although rates of nonresponse may be high with this procedure, nonresponse is interpretable as a lack of interest.

In addition, a data collection instrument suitable for gathering information regarding whether "interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program" with minimal respondent effort is best implemented on the Web. This allows effective implementation of skips and other selection devices through which a respondent can go to a list of sports and choose those that the respondent wishes to respond to in detail.

The prototype

Our proposed survey instrument, a prototype, consists of eight screens. Not all respondents need to proceed through all eight screens.

Screen 1 introduces the survey and informs respondents of the purposes of the census, provides an explicit confidentiality statement, and provides an explanation of the structure of the instrument.

Screen 2 requests four items of demographic information—age, year in school, gender, and whether the student is full-time. The dropdown boxes and radio buttons constrain responses to those allowed by the institution conducting the census.

Screen 3 explains the next set of questions—on athletic experience, participation, and ability. It allows respondents with no interest in future participation in athletics to so indicate and complete the instrument without having to view any of the other screens.

Screen 4 of the proposed instrument is reached only by respondents who wish to enter information concerning athletic experience, interests, and abilities. It lists the responses that will be allowed when the information is requested (on screen 6), and contains a neutral statement of the burdens and benefits associated with participation in intercollegiate athletics. A more sophisticated version of the instrument might contain hyperlinks to definitions of various terms.

Screen 5 allows respondents who wish to enter information concerning athletic experience, interests, and abilities to *select the sports for which they wish to provide information*. The purpose of this is to reduce the size and complexity of screen 6, on which the information is actually entered. Only those sports selected on screen 5 are listed on screen 6. The NCAA administers championships in 23 sports for its member institutions. In addition, it recognizes 7 “emerging sports” that are intended to provide additional athletics opportunities to female student-athletes. The number of intercollegiate sports sanctioned by the NAIA and NJCAA is smaller. We recommend listing all the NCAA championship and “emerging sports” on screen 5.

Screen 6 is where actual information regarding experience, current participation, interest in future participation, and self-assessed ability is entered. These four categories appear side-by-side, which is sensible conceptually and psychometrically but was not done in any of the 57 survey instruments in the OCR case files. The allowable responses, which are constrained by radio buttons that also prevent multiple responses, are as follows:

- For experience at the high school level, “Recreational,” “Intramural,” “Club,” “Junior Varsity” and “Varsity.”
- For current participation, “Recreational,” “Intramural,” “Club” and “Varsity.”
- For interest in future participation at the institution: “Recreational,” “Intramural,” “Club” and “Varsity.”
- For ability: “Yes, I have the ability” and “No, I would need to develop the ability.”

The reason for inclusion of four separate categories is that a determination of interest and ability is related to the pattern of response across these categories. For example, to determine the number of students of the underrepresented sex with interest and ability in a varsity sport, the students to be counted could be those who express an interest in future participation at the varsity level, indicate that they have the ability to do so, and have current or high school experience beyond the recreational level.

Although not shown in screen 6, hyperlinks could be used to provide access to definitions of these terms (or any other terms, for example, sports with which not all respondents may be familiar). Placing the definitions in a separate window avoids impeding the flow of the survey instrument.

Screen 7 offers respondents the opportunity for comments or other feedback, asks them to click a button to record their responses, and thanks them for participating.

Screen 8 is a pop-up screen that appears only for full-time students of the underrepresented sex who have expressed an interest and ability to participate at a higher level. It lists the sport(s) in which the student has indicated an ability and interest in future participation, and asks the student to provide contact information if the student wishes to be contacted by the athletics department or some other organization in the university with respect to her interests. The student can exit this screen without providing the requested information by indicating that she does not wish to be contacted.

This prototype web-based data collection instrument has the following properties:

- Simplicity;
- Explicit explanation of reasons for the data collection;
- Explicit confidentiality statement;
- Opportunity for global “no interest or ability” response;
- Opportunity to filter sports for which detail is provided;
- Nonprejudicial wording of items;
- Inclusion of all of experience, current participation, interest in future participation, and ability; and
- Fixed-form responses.

Screen 1: Initial screen of the prototype data collection instrument, containing the purposes of the survey, a confidentiality statement, and an explanation of the structure of the instrument.

Assessment of Athletic Interests and Abilities: Introduction - Mozilla Firefox

file:///e:/Alan/NISS/NCES/OCR2004/MinimalInstrument/TMP1kgbdbk3g9.htm

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XXX University

Assessment of Students' Athletic Interests and Abilities

January 2005

Purpose: This data collection is being conducted to determine the extent to which the athletic interests and abilities of students at XXX University are being met by the current offerings of recreational, intramural, club and intercollegiate athletics. The information, which is being requested from all students, will be used by the university for evaluation, research and planning purposes.

Confidentiality Statement: All responses are strictly confidential. No personal identifying information is collected, and while we do ask for some demographic information, this information cannot be used to identify you.

Structure: You will be asked first for demographic information (your age, gender, year in school and whether you are a full-time or part-time student), and then you will be asked questions pertaining to your athletic interests, experience and ability. Finally, you will have the opportunity to provide comments or other feedback. The entire process takes less than 10 minutes. Please click on the button below when you are ready to proceed.

[Click to Proceed](#)

Done

SOURCE: NISS-produced prototype.

Screen 2: Second screen of the prototype data collection instrument, in which respondents provide four items of demographic and student status information. This example shows a respondent who is 20 years old, female, a junior, and a full-time student.

The screenshot shows a web browser window with the title "Assessment of Athletic Interests and Abilities: Demographic Information - Mozilla Firefox". The address bar contains the URL "file:///E:/Alan/NISS/NCES/CCR2004/ProposedSurvey/Instrument/TPPW6Uzdb7IG3.htm". The browser's menu bar includes "File", "Edit", "View", "Bookmarks", "Tools", and "Help". The page content is as follows:

XXX University
Assessment of Students' Athletic Interests and Abilities

Demographic Information

Please provide the following demographic information. When you have entered the information, click the button to proceed.

Your age:

Your gender: Female Male

Your year at XXX:

Your student status: Full-time Part-time

SOURCE: NISS-produced prototype.

Screen 3: Third screen of the prototype data collection instrument, on which respondents with no experience, current participation, or interest in future participation can so indicate and complete the process.

Assessment of Athletic Interests and Abilities: Sports Introduction - Mozilla Firefox

file:///e:/Alan/NISS/NCES/OCR2004/MinimalInstrument/TMP/qc53bk3rw.htm

XXX University
Assessment of Students' Athletic Interests and Abilities

Information about Athletic Experience, Interests and Abilities

You will next be asked to provide information about your athletic experience, current participation in athletic activities, interests in future participation and athletic abilities.

If you have no experience, current participation, or interests in future participation, please check the box below, and click the "Click to Complete Survey" button. Your response will be recorded, and you will have completed the survey. We thank you for your cooperation.

I have no athletic experience, current participation or interest in future participation.

[Click to Complete Survey](#)

If you do wish to report experience, current participation, interests in future participation or abilities, click the "Click to Continue" button below to proceed.

[Click to Continue](#)

Done

SOURCE: NISS-produced prototype.

Screen 4: Fourth screen of the prototype data collection instrument, which is reached only by respondents who wish to enter information concerning athletic experience, interests, and abilities.

Assessment of Athletic Interests and Abilities: Sports Explanation - Mozilla Firefox

file:///E:/NISS/NCES/OCR2004/MinimalInstrument/data-sportsintro2-minime

XXX University

Assessment of Students' Athletic Interests and Abilities

Information about Athletic Experience, Interests and Abilities

For the sports that you choose on the next screen, you will be asked to provide information about your athletic experience, current participation, interests in future participation and abilities. The format in which the information is to be entered is:

- **Experience:** At what level did you participate in this sport in high school? Responses from which you may choose are "Recreational," "Intramural," "Club", "Junior Varsity" and "Varsity."
- **Current Participation:** At what level are you participating in this sport at XXX? Responses from which you may choose are "Recreational," "Intramural," "Club" and "Varsity."
- **Interest in Future Participation:** At what level do you wish participate in this sport at XXX? Responses from which you may choose are "Recreational," "Intramural," "Club" and "Varsity."
- **Ability:** Do you believe that you have the ability to participate at the level at which you indicated interest? Responses from which you may choose are "Yes, I have the ability" and "No, I would need to develop the ability."

Because of the large number of sports, please check the boxes below for those sports for which you wish to provide information about your athletic experience, current participation, interests in future participation, and abilities. When you have done so, click the button to proceed. *You will be able to enter information only for those sports that you have checked.*

Before you proceed, you should be aware that participation in intercollegiate athletics imposes burdens on student-athletes, but also creates opportunities. For example, intercollegiate athletics usually requires athletes to devote 20 hours of practice each week during the season, as well as individual regimens of training during the off-season. Athletes are required to travel and occasionally miss classes. On the other hand, many intercollegiate athletes receive financial awards that cover all or a portion of school expenses. They are also given access to academic support services, including tutoring, counseling and study tables, that are not available to other students. Of course, how these burdens and opportunities balance against one another is a matter of personal circumstances and judgment.

Done

SOURCE: NISS-produced prototype.

Screen 5: Fifth screen of the prototype data collection instrument, which is reached only by respondents who wish to enter information concerning athletic experience, interests, and abilities. Here, respondents select the sports for which they wish to provide information. The list is illustrative, consisting of the 23 sports in which the NCAA conducts championships and 7 "emerging sports." The respondent illustrated here has chosen basketball, lacrosse, and volleyball, which appear in screen 6.

Assessment of Athletic Interests and Abilities: Sports Selection - Mozilla Firefox

File:///E:/Alary/NISS/NCES/OCR2004/MinimalInstrument/TMP/qwabr00.h

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XXX University

Assessment of Students' Athletic Interests and Abilities

Information about Athletic Experience, Interests and Abilities

Because of the large number of sports, and since any one person is unlikely to have experience, current participation, or interest in future participation in more than a few, please check the boxes below for those sports for which you wish to provide information about your athletic experience, current participation, interest in future participation, and abilities. When you have done so, click the button to continue. *You will be asked to enter information only for those sports that you have checked.*

Sport	Sport	Sport
<input type="checkbox"/> Archery	<input type="checkbox"/> Golf	<input type="checkbox"/> Squash
<input type="checkbox"/> Badminton	<input type="checkbox"/> Gymnastics	<input type="checkbox"/> Swimming and Diving
<input type="checkbox"/> Baseball	<input type="checkbox"/> Ice Hockey	<input type="checkbox"/> Synchronized Swimming
<input checked="" type="checkbox"/> Basketball	<input checked="" type="checkbox"/> Lacrosse	<input type="checkbox"/> Team Handball
<input type="checkbox"/> Bowling	<input type="checkbox"/> Rifle	<input type="checkbox"/> Tennis
<input type="checkbox"/> Cross Country	<input type="checkbox"/> Rowing	<input type="checkbox"/> Indoor Track and Field
<input type="checkbox"/> Equestrian	<input type="checkbox"/> Rugby	<input type="checkbox"/> Outdoor Track and Field
<input type="checkbox"/> Fencing	<input type="checkbox"/> Skiing	<input checked="" type="checkbox"/> Volleyball
<input type="checkbox"/> Field Hockey	<input type="checkbox"/> Soccer	<input type="checkbox"/> Water Polo
<input type="checkbox"/> Football	<input type="checkbox"/> Softball	<input type="checkbox"/> Wrestling

Done

SOURCE: NISS-produced prototype.

Screen 6: Sixth screen of the prototype instrument, on which respondents enter information concerning experience, current participation, interest in future participation, and ability *only for those sports selected on screen 5.*

Assessment of Athletic Interests and Abilities: Sports Detail - Mozilla Firefox

file:///E:/NISS/NICE/OCR2004/MinimalInstrument/data-sportsdetail-ordinal.html

XXX University

Assessment of Students' Athletic Interests and Abilities

Information about Athletic Experience, Interests and Abilities

The sports listed below are those you selected on the previous screen.

- If the list is not correct, please use your browser's back button to return to the previous screen and modify your choices.
- If the list is correct, please fill in all applicable responses. You do not need to respond to every question, and missing responses will be treated as (depending on category) "No Experience," "No Current Participation," "No Interest in Future Participation" and for Ability, "Not applicable." When you have completed all answers that you wish to complete, click the button to record your responses and proceed to the final part of the survey.

Sport	Experience: At what level did you participate in this sport in high school?	Current Participation: At what level are you participating in this sport at XXX?	Interest in Future Participation: At what level do you wish to participate in this sport at XXX?	Ability: Do you believe that you have the ability to participate at the level at which you indicated interest?
Basketball	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Junior Varsity <input type="radio"/> Varsity	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Yes, I have the ability <input type="radio"/> No, I would need to develop the ability
Lacrosse	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Junior Varsity <input type="radio"/> Varsity	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Yes, I have the ability <input type="radio"/> No, I would need to develop the ability
Volleyball	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Junior Varsity <input type="radio"/> Varsity	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Yes, I have the ability <input type="radio"/> No, I would need to develop the ability

[Click to Proceed](#)

SOURCE: NISS-produced prototype.

Screen 7: Seventh and potentially final screen of the prototype data collection instrument, which offers respondents the opportunity to provide comments or other feedback, or to request being contacted by the athletic department. Only respondents who check the box are taken to screen 8.

The screenshot shows a Mozilla Firefox browser window with the title "Assessment of Athletic Interests and Abilities: Completion - Mozilla Firefox". The address bar contains the file path: "file:///e:/Alan/NISS/NCES/OCR2004/MinimalInstrument/TMPySk1nbobyk...". The main content area displays the following text:

XXX University
Assessment of Students' Athletic Interests and Abilities

If you *do not* wish to provide comments or other feedback, simply click the "Click to Record Responses" button.

If you do wish to provide comments, please enter them in the box below, and then click the "Click to Record Responses" button.

Some students who have indicated interest and ability in one or more sports will be taken to one final screen, on which they may request to be contacted by the athletic department regarding these interests. If you expressed interest but do not wish to be contacted, check the box below.

Check here if you do not wish to be contacted.

[Click to Record Responses](#)

Thank you very much for your cooperation and support!

Done

SOURCE: NISS-produced prototype.

Screen 8: Eighth and final screen of the data collection instrument, reached only by respondents who expressed interest and ability in specific sports, to ask whether they wish to be contacted by the athletic department and if so, to provide contact information.

Assessment of Athletic Interests and Abilities: Demographic Information - Mozilla Firefox

File:///E:/Alan/NISS/NCES/OCR2004/MinimalInstrument/TMP7gxdeba17.htm

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XXX University

Assessment of Students' Athletic Interests and Abilities

Request to Be Contacted by Athletic Department

You have indicated interest and ability in one or more sports, as summarized below:

Age:	20
Gender:	Female
Year in school:	Junior
Status:	Full-time
Sport(s):	Lacrosse
	Experience = Varsity
	Current Participation = Intramural
	Interest in Further Participation = Intercollegiate
	Ability = "Yes, I have the ability"

If you would like to be contacted by the athletic department regarding these interests, please fill in the information below, and then click the "Click to Submit Request" button. This request is optional; your responses have already been recorded. Thank you.

Name:	<input type="text"/>
E-mail address:	<input type="text"/>
Telephone:	<input type="text"/>

[Click to Submit Request](#)

Done

SOURCE: NISS-produced prototype.

Technical Details

The above screens are static HTML prototypes. There are at least two paths to create the software for a full-blown implementation.

The first of these is commercial tools for web surveys. The extent to which commercial products support functionality such as confidentiality-preserving nonresponse follow-up is not clear. They may also involve significant hardware and software overheads that are really not necessary in the setting of this chapter.

The second path is to create CGI or Java or Visual Basic scripts that

- Allow movement from each screen to the next, including dynamic generation of all screens other than the initial one in screen 1; and
- Record responses (see additional discussion below).

Implementation of these scripts, together with appropriate security and support, would be a straightforward programming task.

The screens and scripts would be customized with such items as

- The institution's name;
- Details of wording, with defaults provided that can be edited as necessary;
- The list of sports on screen 5; and
- The sport-dependent responses on screen 6.

Storage of responses is straightforward. Other than the free-form text response on screen 7, the instrument generates only a small number of data items for each respondent:

- Four items of demographic information from screen 2;
- One Yes/No global "no athletic interest, current participation, or interest in future participation" from screen 3;
- K Yes/No responses for each sport from screen 5, where K is the number of sports listed there; and
- At most $4K$ categorical responses from screen 6, one each for experience, current participation, interest in participation in the future, and ability.

The total number of items is $5K + 5$. To illustrate, for the 30 sports shown in the example in figure 5, the survey generates 155 items.

There are, of course, constraints on the item values. First, the instrument itself permits only predefined responses to all items (other than on screen 7). This guarantees that responses are interpretable and analyzable. Second, if the value of the global Yes/No response on screen 3 is "No," then the remaining $5K$ responses are empty. Similarly if the screen 5 response for a sport is "No," meaning that it is not listed on screen 6, then its four items associated with screen 6 are empty.

Finally, the software could store the data in a comma-separated-variable (CSV) file, with one (5K + 5) item line for each response. Since no identifying information is stored, confidentiality of responses is guaranteed. The CSV data file can then be read and manipulated by tools ranging from Microsoft Excel to more powerful statistical packages such as SAS, SPSS, STATA, or S-Plus.

The results from screen 8, the pop-up for students meeting the criteria of interest and ability, can be sent directly to a designated e-mail address without being stored in the CSV file, thereby insuring that the analytic file contains no personally identifiable information.

Once the data are collected, analysis is quite straightforward. The numbers are simply tabulated and compared to the levels of interest needed to field various varsity teams in particular sports. If the number is less than the minimum, no additional effort is necessary, and if the number is equal to or greater, then the institution must take additional steps that could lead to offering particular sports at the varsity level.

Additional Steps

The purpose of this guide is limited to providing guidance on conducting and interpreting an interest survey. However, institutions should be aware that although findings from a survey can indicate that there are unmet interests and there may be sufficient numbers and ability to field a new sport, additional steps would be necessary before such a sport could be offered. We provide here a brief example of what an institution might do next with survey results. For intercollegiate athletics, OCR enforcement of Title IX is generally related to interest, ability, and competitive opportunity with the institution's competitive region (or sports conference). Within this context, suppose an institution in which women were the underrepresented sex conducted a survey that disclosed that the number of women expressing both interest and ability to play lacrosse at the varsity level was greater than the number of women necessary to field a lacrosse team. If there is competitive opportunity for women's lacrosse by virtue of it being a varsity sport within the institution's conference, or failing that, a varsity sport at other colleges within the institution's competitive region, a next step might be for the institution to call a meeting of women students to see if there is enough interest to field a team. A desirable practice in obtaining attendance at the meeting would involve both direct contact with those women who had self-identified and provided contact information through the survey, as well as advertising the meeting through flyers or announcements in the campus paper. Given sufficient turnout, coaches could then conduct tryouts to evaluate the ability of prospective athletes. An evaluation of ability through a tryout would take precedence over a student's self-appraisal of ability on a survey. Details and authoritative guidance are provided in OCR's own policy guidelines that are distributed with this guide.

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Title IX Data Collection: Technical Manual for Developing the User's Guide

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Technical Report Number 150
February 2005

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Introduction

The purpose of this report, undertaken at the behest of the Office for Civil Rights (OCR) of the U.S. Department of Education, is to develop a user's guide for conducting student interest and ability surveys in order to satisfy Part 3 of Title IX that are based on scientifically accepted survey practice.

Chapter 1 of the report provides concise background on Title IX (section 1.2), the "Three-Part Test" (section 1.2) for demonstrating compliance, and the responses to the Title IX Commission (section 1.3) that provided the impetus for producing this manual.

Chapter 2 summarizes the data on which chapters 3 and 4 are based. It provides background information for ascertaining the representativeness of understanding institutional differences between **OCR** cases and a national set of **COMPARISON** institutions, between **OCR** cases that resulted from a **COMPLIANCE** review and those that were the result of a **COMPLAINT** that was filed, between those **OCR** institutions that have used **PART 3** as opposed to **PARTS 1 AND 2**, between those **PART 3** institutions that have used a **SURVEY** and **NO SURVEY** institutions. The differences are represented by means of fourteen characteristics having to do with the nature and scale of each institution, the demographics of its student body, and its athletic programs. There are a total of 56 comparisons. This chapter highlights selected differences among these sets of institutions. The complete set of tables is located in appendix C.

Chapter 3 is a review and analysis of the 52 data collection instruments contained in the OCR files. In section 3.1, these instruments are categorized along 21 dimensions, which range from the target population to the presence or absence of particular kinds of questions to the representation of sports and levels of interest, experience or ability. Section 3.2 discusses notable items from the individual data collections. Most of these are notable because they are problematic or simply baffling, but a few seem to be quite effective. The chapter concludes in section 3.3, with discussion of a number of issues that are generic to virtually all of the surveys.

Chapter 4 describes a small number of data collections regarding students' athletic experience, interest and ability that have been located by means of searches of the World Wide Web. Although most of these are web-based, none of them is dramatically better than the data collection instruments discussed in chapter 3.

Finally, chapter 5 describes a recommended procedure for Part 3-stimulated data collection, including a web-based data collection instrument and procedures for principled statistical analysis of the data. The prototype instrument uses web-associated interactivity to avoid the pitfalls exhibited by the data collection instruments reviewed in chapters 3 and 4. In particular, a compact, comprehensible representation of "sports across levels" of experience, interest and ability is provided. Chapter 5 contains detailed advice as to how to conduct a scientifically valid data collection that will satisfy the requirement of Part 3.

Chapter 5: Implementation of Part 3 Data Collections

In this chapter we describe a process for implementation of data collection when Part 3 of the “Three-Part Test” is employed.

For clarity, we focus on one very specific problem. Attention is restricted to a single sport not currently offered at the intercollegiate (varsity) level by the institution, and we assume—*solely for concreteness*—that women are the underrepresented sex. The problem is to determine (see section 1.2) “whether the interests and abilities of [women] have been fully and effectively accommodated by the present program [for that sport],” *on the basis of data collected from women students.*

We formulate the problem conceptually and mathematically in section 5.1. Sections 5.2 through 5.5 address key steps in the procedure of solving it: specifying the process (section 5.2), data collection process (section 5.3), web-based data collection (section 5.4) and data analysis (section 5.5). A number of precautions imposed by the entire process are discussed in section 5.6, and section 5.7 discusses issues arising prior to and following the data collection process. Each principal component of the chapter contains three particular items:

Practice among SURVEY Institutions, a summary of how that component was addressed by the 57 SURVEY institutions. Most of this information is also in chapter 3, but including it here makes this chapter more self-contained.

Recommendation for Improvement, which would improve SURVEY institution practice without imposing large barriers in terms of information technology or statistical sophistication.

High-Quality Recommendation, describing an approach that satisfies the NCES statistical standards and other important criteria.

5.1 Problem Formulation

As stated in the introduction to this chapter, we restrict attention to a single sport not currently offered at the intercollegiate level, and assume that women are the underrepresented sex. We focus on an institution employing Part 3 that is attempting to determine, using data collected from women students, whether the interests and abilities of women have been “fully and effectively accommodated by the present program.” The alternative is that the interests and abilities of women can be accommodated only by offering the sport at the intercollegiate level.

We now describe an operational formulation of the problem. Let M (for minimum) be the minimal number of team members necessary to “field” a team in the given sport. This number must be specified by the institution. It depends on the sport and possibly contextual factors. For instance, a basketball team cannot play with fewer than five players, but this is not the value of M for basketball, which is presumably in the range 10-15. NCAA or other association rules may provide information about how large M might

be (M cannot exceed maximum allowable team sizes), but prevailing values in the conference to which the institution belongs are also relevant.

There is, conceptually, some number N^+ of women students who, given the current offerings of the institution, possess the interest and ability to compete in the sport at the intercollegiate level. If N^+ were known with certainty, then determination of compliance by OCR would be straightforward:

- If $N^+ \geq M$, and if other OCR-determined criteria are fulfilled, then the institution must offer the sport at the intercollegiate level. These criteria are complex, and discussed in section 5.7.
- If $N^+ < M$, then the interests and abilities of women have been accommodated by the present program.

It is the “conceptually” and “known with certainty” qualifications in this initial formulation that create several significant difficulties.

The first difficulty is that the definitions of interest and ability are subjective. How to assess them for the purposes of Part 3 is discussed in section 5.4.

The second difficulty is that exact determination of N^+ may be impossible. As discussed in chapter 3, most institutions that have demonstrated Title IX compliance using Part 3 have done so using data collections that conceptually are censuses but yield very low response rates. In the samples, retaining our one-sport/women-underrepresented setting, only a—randomly or otherwise—selected subset of women were asked whether their interests and abilities are accommodated by the present program. Even absent other problems that we discuss momentarily, rather than obtain exact knowledge of N^+ , the institution may be forced either to construct a statistical estimator \hat{N}^+ or to regard N^+ as random and calculate its distribution given the observed data. Then, the simple decision criterion stated above is no longer valid; alternatives are discussed in section 5.5.

But, there are further complications. By far the most difficult-to-deal-with of these is that in almost all cases, the number of respondents—those who are asked to complete the data collection instrument who actually do so—is only a fraction, and possibly a rather small fraction. Non-response is a problem in its own right, because it changes both the form and the properties of the estimator \hat{N}^+ .

Another problem is *non-response bias*: the prevalence of interested and able students in the sample who do not respond may differ from the prevalence of interested and able students in the sample who do respond. Indeed, in the setting of Part 3, non-response bias seems almost inevitable: uninterested students are less likely to respond than interested students. Dealing with non-response bias is discussed in section 5.5.3.

There are additional issues when only a sample of the target population is asked to provide information, because the sampling process introduces additional randomness and uncertainty. Sampling is avoidable, however, while non-response bias is not.

A third difficulty is that the data collection process itself may influence the results. This issue was alluded to in chapter 3, in connection with whether data collection instruments accurately or inaccurately depict the benefits and obligations associated with intercollegiate sports. The prototype instrument in section 5.4.1 is specifically intended not to influence the data it generates.

Given these difficulties, an ideal Part 3 implementation would proceed as follows:

1. The target population for purposes of Title IX compliance consists of full-time women undergraduate students.
2. The data collection protocol is a census: all members of the target population are asked for information. In fact, as discussed in section 5.2, we recommend that all students, both female and male, be part of the data collection.
3. Data collection is web-based.
4. Because non-response may be inevitable, telephone-based follow-up of non-respondents may be conducted at a level that supports necessary non-response bias analyses.
5. Data analysis is restricted to responses from the data analysis population, and consists of combining the responses and the non-response bias analysis in a principled statistical manner to produce an estimator \hat{N}^+ and to calculate the distribution of this estimator.
6. The decision criterion employed by OCR is to calculate the conditional probability that \hat{N}^+ (or, in Bayesian formulations, N^+ itself) exceeds the minimum team size M given the observed data from both the census and the non-response bias sample. If this probability exceeds a pre-determined threshold, and if other criteria are satisfied, then OCR would determine that the institution must offer the sport at the intercollegiate level. Otherwise, the determination would be that the interests and abilities of women are accommodated by the present program.

Sections 5.2-5.5 describe various parts of this process in more detail.

5.2 Process Specification

Here we discuss selection of the data collection population, the data collection protocol and the data analysis population.

Data Collection Population. As also mentioned in section 3.1, selection of the data collection population presents both conceptual and logistical issues. For a number of reasons, collecting data only from members of the underrepresented sex is not feasible. Consequently, there are only two defensible choices:

- The entire student population;
- A “catchment” population consisting of both the entire student population and a set of actual or potential applicants.

If the data collection population is the entire student population, then while there are response rate and other issues, at least the population is well-defined and in principle accessible.

Legal cases, however, have implied that the data collection should be larger—for example, a set of potential applicants. This would happen if applicants believed that the institution was not able to satisfy their athletic interests and abilities, and therefore chose either not to apply or to decline offers of admission. The “potential applicant/catchment” population is very problematic. It depends on the nature of the institution, and ranges from quite local to the entire nation or beyond, for institutions with international students. Even if definable, such a large data collection population is almost surely unreachable in any meaningful manner. Attempts to do so described in the OCR files are weak at best. They include requesting information from participants in campus tours or (local) high school administrators. Either of these approaches raises more problems than it solves.

Moreover, the statistical implications of employing a catchment population are effectively impossible to characterize. Even the population size is not known, which prevents calculation of response rates, and non-response bias analyses are simply infeasible.

A data collection population of applicants is better defined but not easier to sample. The same is true of surrogates, such as campus tour participants.

If the data collection population is entire student population, then some issues remain. For example, does “student” mean “full-time student?” Must students be enrolled currently? Given that the purpose of the data collection is to determine whether a sport must be offered to women at the intercollegiate level, perhaps the most sensible definition would be students who are eligible for intercollegiate athletic participation as determined by the athletic association (for example, the NCAA) to which the institution belongs and the institution itself. However, this is not likely to be feasible if criteria such as academic standing are involved.

Practice among SURVEY Institutions: As discussed in section 3.1 (see table 3.4), most of the 52 INSTRUMENT institutions treated the entire student body as the data collection population.

Recommendation for Improvement: The data collection population should be the entire population of full-time students.

High Quality Recommendation: The data collection population should be the entire student population eligible for intercollegiate athletic participation.

Data Collection Protocol. Again, there are two choices:

- A *census*: all members of the data collection population are asked to provide information regarding whether their interests and abilities are accommodated by the present program.
- A *sample survey*: only a subset of members of the data collection population are asked to provide information regarding whether their interests and abilities are accommodated by the present program.

Our use of these terms is consistent with that of the federal statistical agencies. While a census is a larger scale undertaking than a sample survey, it is superior in almost every respect. If response could be mandated, then N^+ would be known with certainty, and the “simple” decision criterion described above is applicable. Moreover, none of the complicated methodology for dealing with non-response bias outlined in section 5.5.3 is necessary. In reality, however, mandating a response may not be feasible.

Perhaps most important, employing a census avoids two difficult issues associated with sample surveys: selection of the sampling mechanism and selection of the sample size. In the OCR surveys described in chapter 3, two classes of sampling mechanisms are employed widely:

- Simple random samples, in which those asked to provide data are selected randomly from the data collection population, in such a way that all members of the population have equal probability of being in the sample. This method has the advantage of simplifying analysis of the data, but has other shortcomings discussed below.
- Targeted non-random samples. The “target” in this case is generally a sub-population of what we have termed “the target population” thought to be likely to contain students with athletic ability and interest. The principal example is enrollees in health or physical education courses.

Intermediate methods, such as randomly selected courses, are present as well in the surveys discussed in chapter 3. These surveys also, however, include some simply indefensible sampling methods, whose statistical properties cannot be adequately described. The most egregious example is placing survey forms in a place where students might simply pick them up.

The statistical implications of such samples are virtually impossible to characterize. In particular, non-response bias analyses are not possible. For this reason we recommend that such samples not be employed.

Given the ready availability of electronic means of data collection (see section 5.4), simple random samples seem unnecessary. Another reason to avoid them is that small sample sizes may not be feasible. To illustrate why this is true, let P be the size of the target population, and suppose that the sample size is S . Then roughly, each student in the sample represents P/S students in the target population. Let N_S^+ be the number of positive

responses (interested and able to participate at the intercollegiate level in the given sport) in the sample. Recalling that the goal is to estimate the number N^+ of students in the target population interested and able to participate at the intercollegiate level in the given sport and ignoring non-response, the estimated value of N^+ is

$$\hat{N}^+ = N_s^+ + \frac{N_s^+}{S} (P - S).$$

To explain briefly (more complicated expressions appear in section 5.5), the N_s^+ sampled students who responded positively are known with certainty to be interested and able. The fraction of students sampled who responded positively, N_s^+ / S , is assumed to be the same as the fraction of the $P - S$ unsampled students who are interested and able, so the estimated number of such students is just the product of these two terms.

If S is small, then every positive response in the survey has a large effect on \hat{N}^+ . At the extreme, if P/S exceeds the minimum team size M , then a single positive response in the sample produces an estimated value of N^+ that exceeds M ! Of course, there is also high variability in the estimate, but still this is a clear problem. But unless P/S is large, the advantages of a sample are negated. Therefore, arguments in favor of a sample are not convincing.

One issue, discussed briefly in chapters 3 and 4, is the use of incentives to promote responses to the census. At an extreme, the institution might *require* response, for example, linking completion to registration status or refusing to provide grade reports to those who had not responded. Even though measures this extreme may be seen by some to have negative consequences such as heavy handedness, decreased data quality in the form of frivolous or inaccurate responses is a more important issue, in part because there are no models or tools to characterize effects on data quality. This problem would be particularly problematic with a data collection instrument of the type described in section 5.4.1. Checking the global “no athletic experience, current participation or interest in future participation” box on screen 3 there (see figure 5.3) becomes the simplest way to fulfill the requirement. The clear consequence of this behavior is an underestimate of N^+ .

Practice among SURVEY Institutions: As shown in table 3.5, most of the INSTRUMENT conceptualized the data collection as a census. However, the term “census” is used in chapter 3 in a much looser sense than in this chapter, to mean the absence of a discernible, explicit sampling mechanism.

Recommendation for Improvement: The data collection protocol should be a census, in the strict sense that every member of the data collection population is contacted individually (for example, by e-mail) and requested to respond.

High Quality Recommendation: The data collection protocol should be a census in the strict sense that every member of the data collection population is contacted individually and requested to respond.

Data Analysis Population. By “data analysis population” we mean that part of the data collection population whose data will be used for purposes of determining compliance with Title IX. For the specific setting of this chapter, only females—the assumed underrepresented sex—belong to the data analysis population. OCR has stated that fourth-year and beyond students (assuming a traditional four-year curriculum) should also be excluded from the data analysis population. The data collection instrument in section 5.4.1 requests both gender and year, and so supports either choice of data analysis population. The analysis procedures in section 5.5 are valid in either of these cases.

Practice among SURVEY Institutions: The OCR files contain few to no details regarding statistical analyses of the data. Moreover, there are cases in the files where the data collection population contained both females and males, but respondents were not asked to provide their gender.

Recommendation for Improvement: The data analysis population should consist of all full-time first-, second- and third-year students of the underrepresented sex.

High Quality Recommendation: The data analysis population should consist of all full-time first-, second- and third-year students of the underrepresented sex who meet all criteria for participation in intercollegiate athletics.

5.3 Data Collection Process

Here we discuss principal steps in an electronic data collection process centered on a web-based collection instrument of the type described in section 5.4. We assume that recommendations in section 5.2 are implemented: the data collection population is the entire student population, and the data collection protocol is a census.

Prior to any of the steps described below, the data collection instrument and software must be in place; the former is described in section 5.4.1 and the latter in section 5.4.2.

The initial step is to compile a database of e-mail addresses and telephone numbers (for non-response follow-up; see section 5.5.3) of all members of the data collection population. We assume that all students are required to have e-mail addresses at the institution.

The second step is to send an e-mail message to each member of the data collection population, requesting that she or he complete the data collection instrument. In addition to the request to provide the data, this message should contain:

- A link to the URL of the data collection instrument;
- Embedded within the link, a unique, encrypted ID that allows the software to record that a person has responded without being able to link to that person’s

response (see below). This strategy also precludes multiple responses by one individual.

Non-response follow-up is likely to be necessary. In principle, using the encrypted ID, the institution could monitor responses in such a way that it can determine who has responded without being able to link responses to respondents, and could send e-mail messages to non-respondents. This may not be desirable, however, and a non-response bias analysis may be the only feasible form of follow-up. The NCES standard of a response rate of 85 percent for a census not used as a sampling frame (U.S.DOE, 2003) does not seem likely to be met in the absence of follow-up.

If the response rate falls below 85 percent, then the NCES statistical standards (U.S. DOE, 2003) call for a *non-response bias analysis*, which is described in section 5.5.2. The purpose of the non-response bias analysis is to determine whether the likelihood of response depends on the value of the response. In this case, there is reason to suspect that it does: those with interest and ability are more likely to respond.

The non-response bias analysis consists of a data collection phase and an analysis phase. In the former, a random sample of non-respondents to the census is contacted and their responses ascertained. The data collection phase of the non-response bias analysis would ordinarily be done by telephone.

As discussed in section 5.2, “requiring” a response in a strong sense (that failure to respond places a student somehow “not in good standing”) may not be possible. Nevertheless, there may be methods beyond follow-up that increase response. These include:

- Embedding the survey in a process—registration is the clear and perhaps only example—that every student must perform. This was somewhat successful in some of the OCR cases. The web-based instrument in section 5.4.1 could be linked in a natural way to web-based registration, and could inherit the confidentiality protections and mechanisms for preventing multiple responses associated with the registration process.
- Positive mechanisms: for instance, one survey in chapter 4 offers a tee shirt said to be worth \$10 to respondents. Alone these seem unlikely to be effective at a scale at which they are feasible economically. Moreover, their effects on non-response bias are difficult to characterize.
- Public relations activities, including statements by institution leaders about the importance of responding.

Practice among SURVEY Institutions: The proactivity characteristic reported in table 3.6 measures, albeit qualitatively, the extent to which SURVEY instruments were proactive in attempting to increase response rates. This table shows little evidence of proactivity.

Recommendation for Improvement: The data collection process should be web-based, using e-mail and, if necessary to follow up on non-response, telephone as a means of

contacting members of the data collection population. Linking the data collection to registration should be considered.

High-Quality Recommendation: The data collection should be web-based, using e-mail to initiate the process. Linking the data collection to registration should be considered. Means such as those described in section 5.5 should be in place to deal with low response rates.

5.4 Web-Based Data Collection

In this section, drawing on chapters 3 and 4, we sketch the structure of a data collection instrument that would accomplish the necessary objectives (collection of information regarding whether “interests and abilities of the members of that [underrepresented] sex have been fully and effectively accommodated by the present program.”) with minimal effort. The instrument is web-based, allowing effective implementation of skips and other selection devices. For example, a respondent can choose from a larger list of sports the subset for which she wishes to respond in detail.

Web-based instruments are absent entirely from the SURVEY institution instruments discussed in chapter 3, which is understandable because most of the OCR cases preceded widespread use of the web and e-mail. By contrast, they dominate in the more recent instruments in chapter 4. Alternative modes of data collection appearing in the instruments in chapters 3 and 4 include paper forms (mailed, distributed in classes, or “left for the taking”) and one telephone survey.

Section 5.4.1 describes the instrument itself; the software necessary to create it and store data is discussed in section 5.4.1.

5.4.1 Data Collection Instrument

The proposed data collection instrument consists of seven screens, which are shown in figures 5.1-5.7, together with one additional screen, shown in figure 5.8, to which only respondents in the *data analysis population* who indicated interest and ability are taken.

This instrument requests little more information than absolutely necessary to determine compliance with Title IX. Requests for large amounts of superfluous information are a concern because they lower response rates. However, compared to some of the instruments in chapter 3, this instrument is quite minimal.

We now describe the screens one-by-one. Not all respondents need to proceed through all seven (or eight) screens.

Screen 1, shown in figure 5.1, is an introductory screen, on which respondents are informed of the purposes of the data collection and provided an explicit confidentiality statement as well as an explanation of the structure of the instrument.

Screen 2, shown in figure 5.2, requests four items of demographic information—age, gender, year in school and student status. The dropdown boxes and radio buttons constrain responses to those allowed by the institution conducting the census.

Screen 3, shown in figure 5.3, explains the next set of questions—on athletic experience, participation and ability. It allows respondents with no experience, current participation or interest in future participation to so indicate and complete the instrument without having to view any of the other screens.

Screen 4 of the proposed instrument, shown in figure 5.4, is reached only by respondents who wish to enter information concerning athletic experience, interests and abilities. It lists the responses that will be allowed when the information is requested (on screen 6), and contains a neutral statement of the burdens and benefits associated with participation in intercollegiate athletics. A more sophisticated version of the instrument might contain hyperlinks to definitions of various terms.

Screen 5, shown in figure 5.5, allows respondents who wish to enter information concerning athletic experience, interests and abilities to *select the sports for which they wish to provide information*. The purpose of this is to reduce the size and complexity of screen 6, on which the information is actually entered. Only those sports selected on screen 5 are listed on screen 6. The list of sports in figure 5.5 is illustrative, consisting of twenty-three sports in which the NCAA conducts championships and seven NCAA-identified “emerging sports.”³ Reflecting the considerations noted in section 5.7, sports for which Title IX non-compliance is not feasible because of the absence of competitive opportunities would not need to be included on this screen.

Screen 6, shown in figure 5.6, is where actual information regarding experience, current participation, interest in future participation and ability is entered. These four categories appear side-by-side, which is sensible conceptually and psychometrically, but was not done in any of the 57 data collection instruments reviewed in chapters 3 and 4. The allowable responses, which are constrained by radio buttons that also prevent multiple responses, are as follows:

- For experience at the high school level, “Recreational,” “Intramural,” “Club,” “Junior Varsity” and “Varsity”;
- For current participation, “Recreational,” “Intramural,” “Club” and “Intercollegiate”;
- For interest in future participation at the institution: “Recreational,” “Intramural,” “Club” and “Intercollegiate”;
- For ability: “Yes, I have the ability” and “No, I would need to develop the ability”.

The reason for inclusion of four separate categories is that, as discussed further in section 5.5.1, a positive response is defined in terms of at least three and possibly all four.

³ See www2.ncaa.org/sports/general_information/emerging_sports.html.

For some purposes, the number of allowable responses might be reduced. If the sole concern were interest in intercollegiate participation, and assuming that an intercollegiate team does not exist currently, "Intercollegiate" could be eliminated from current participation (as could any others that do not apply), and all but "Intercollegiate" could be eliminated from interest in future participation. Because this screen would be generated dynamically, using information from screen 5, the sets of allowable responses can be sport-dependent.

Although not shown in figure 5.6, hyperlinks could be used to provide access to definitions of these terms (or any other terms, for example, sports with which not all respondents may be familiar). Placing the definitions in a separate window avoids impeding the flow of the data collection instrument.

Screen 6 does not implement default responses, but it could. It does state clearly how item non-responses will be treated.

Screen 7, shown in figure 5.7, is for most respondents the final screen of the instrument. It offers the opportunity for comments or other feedback, asks them to click a button to record their responses, and thanks them for participating. It also informs those who have responded positively about interest and ability that unless they check the "Check here if you do not wish to be contacted" box, they will be taken to one more screen (screen 8), on which they will be asked for contact information.

Screen 8, shown in figure 5.8, is a screen reached only by respondents who are members of the data analysis population (in the example in this chapter, full-time female students who are freshmen, sophomores or juniors) who indicate interest and ability in one or more sports not currently offered at the intercollegiate level. (The language on both this screen and screen 7 is less precise, because no clear purpose is served by complete details.) On this screen, such respondents may request to be contacted by the athletic department regarding their interests. It summarizes their responses and asks for contact information—name, e-mail address and telephone number. This information could either be stored in a CSV file separate from the main data, or forwarded by e-mail to the appropriate office in the institution.

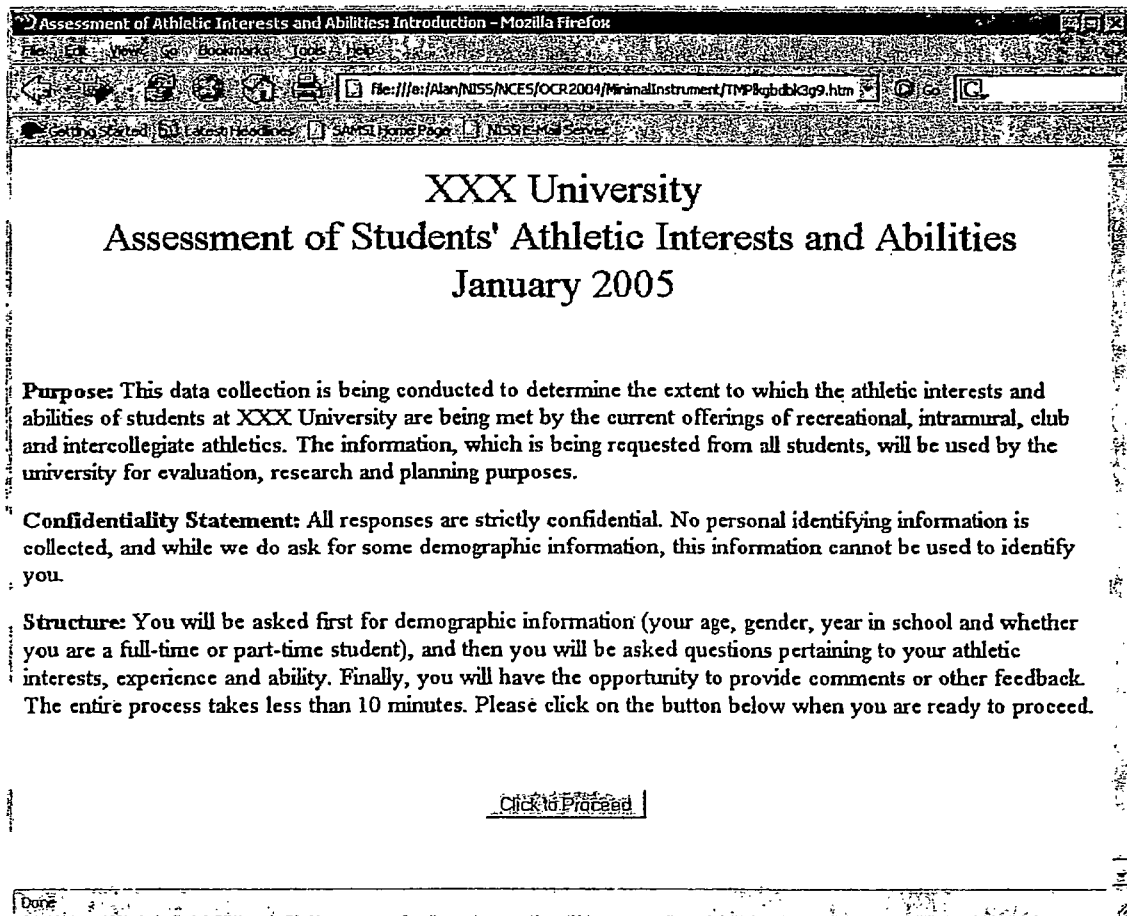
Practice among SURVEY Institutions: As noted above, no SURVEY institution employed web-based data collection.

Recommendation for Improvement: For extremely narrow surveys (one sport, for example) respondents might be asked simply to respond to an e-mail message. Simplified web-instruments (for instance, with less protection for confidentiality) are possible, but should state explicitly their shortcomings relative to the high-quality recommendation. Although, as stated in section 5.6, we believe that if failure to respond (at the item level) is treated as a "no interest" or "no ability" response, the instrument should state so in some difficult-to-ignore manner.

High-Quality Recommendation: The web-based data collection instrument should have the same properties as the prototype described here:

- Simplicity;
- Explicit explanation of reasons for the data collection;
- Explicit confidentiality statement;
- Opportunity for global “no interest or ability” response;
- Opportunity to filter sports for which detail is provided;
- Non-prejudicial wording of items;
- Inclusion of all of experience, current participation, interest in future participation and ability;
- Fixed-form responses.

Figure 5.1: Initial screen of the prototype data collection instrument, containing the purpose of the data collection, a confidentiality statement and an explanation of the structure of the instrument.



SOURCE: NISS-produced prototype.

Figure 5.2: Second screen of the prototype data collection instrument, in which respondents provide four items of demographic and student status information. This example shows a respondent who is 20 years old, female, a junior and a full-time student.

Assessment of Athletic Interests and Abilities: Demographic Information - Mozilla Firefox

File:///E:/Alan/NISS/NCES/OCR2004/ProposedSurveyInstrument/TPWeb020b7103.htm

XXX University

Assessment of Students' Athletic Interests and Abilities

Demographic Information

Please provide the following demographic information. When you have entered the information, click the button to proceed.

Your age:

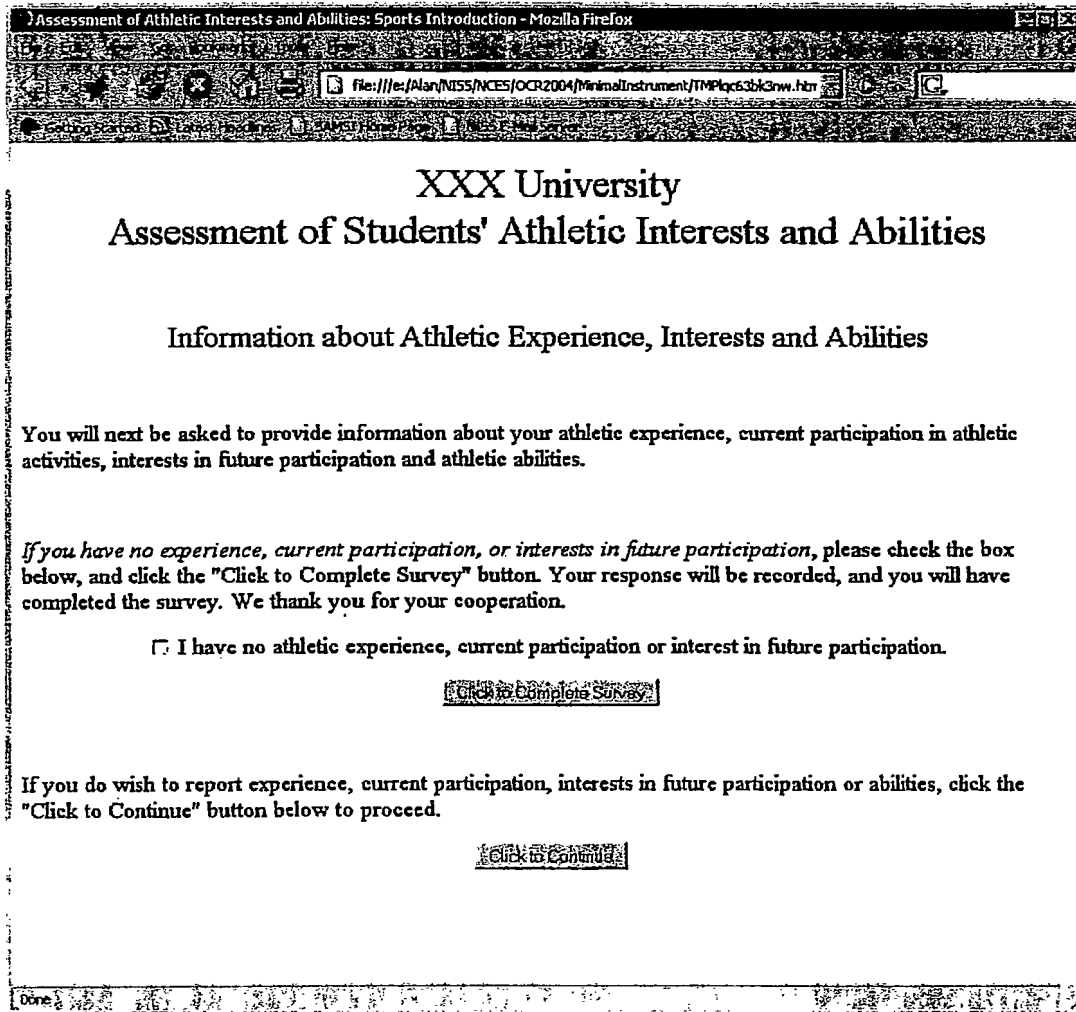
Your gender: Female Male

Your year at XXX:

Your student status: Full-time Part-time

SOURCE: NISS-produced prototype.

Figure 5.3: Third screen of the prototype data collection instrument, on which respondents with no experience, current participation or interest in future participation can so indicate and complete the process.



SOURCE: NISS-produced prototype.

Figure 5.4: Fourth screen of the prototype data collection instrument, which is reached only by respondents who wish to enter information concerning athletic experience, interests and abilities.

Assessment of Athletic Interests and Abilities: Sports Explanation - Mozilla Firefox

file:///E:/NISS/NCES/OCR2004/MinimalInstrument/data-sportsintro2-minime

XXX University

Assessment of Students' Athletic Interests and Abilities

Information about Athletic Experience, Interests and Abilities

For the sports that you choose on the next screen, you will be asked to provide information about your athletic experience, current participation, interests in future participation and abilities. The format in which the information is to be entered is:

- **Experience:** At what level did you participate in this sport in high school? Responses from which you may choose are "Recreational," "Intramural," "Club," "Junior Varsity" and "Varsity."
- **Current Participation:** At what level are you participating in this sport at XXX? Responses from which you may choose are "Recreational," "Intramural," "Club" and "Varsity."
- **Interest in Future Participation:** At what level do you wish participate in this sport at XXX? Responses from which you may choose are "Recreational," "Intramural," "Club" and "Varsity."
- **Ability:** Do you believe that you have the ability to participate at the level at which you indicated interest? Responses from which you may choose are "Yes, I have the ability" and "No, I would need to develop the ability."

Because of the large number of sports, please check the boxes below for those sports for which you wish to provide information about your athletic experience, current participation, interests in future participation, and abilities. When you have done so, click the button to proceed. *You will be able to enter information only for those sports that you have checked.*

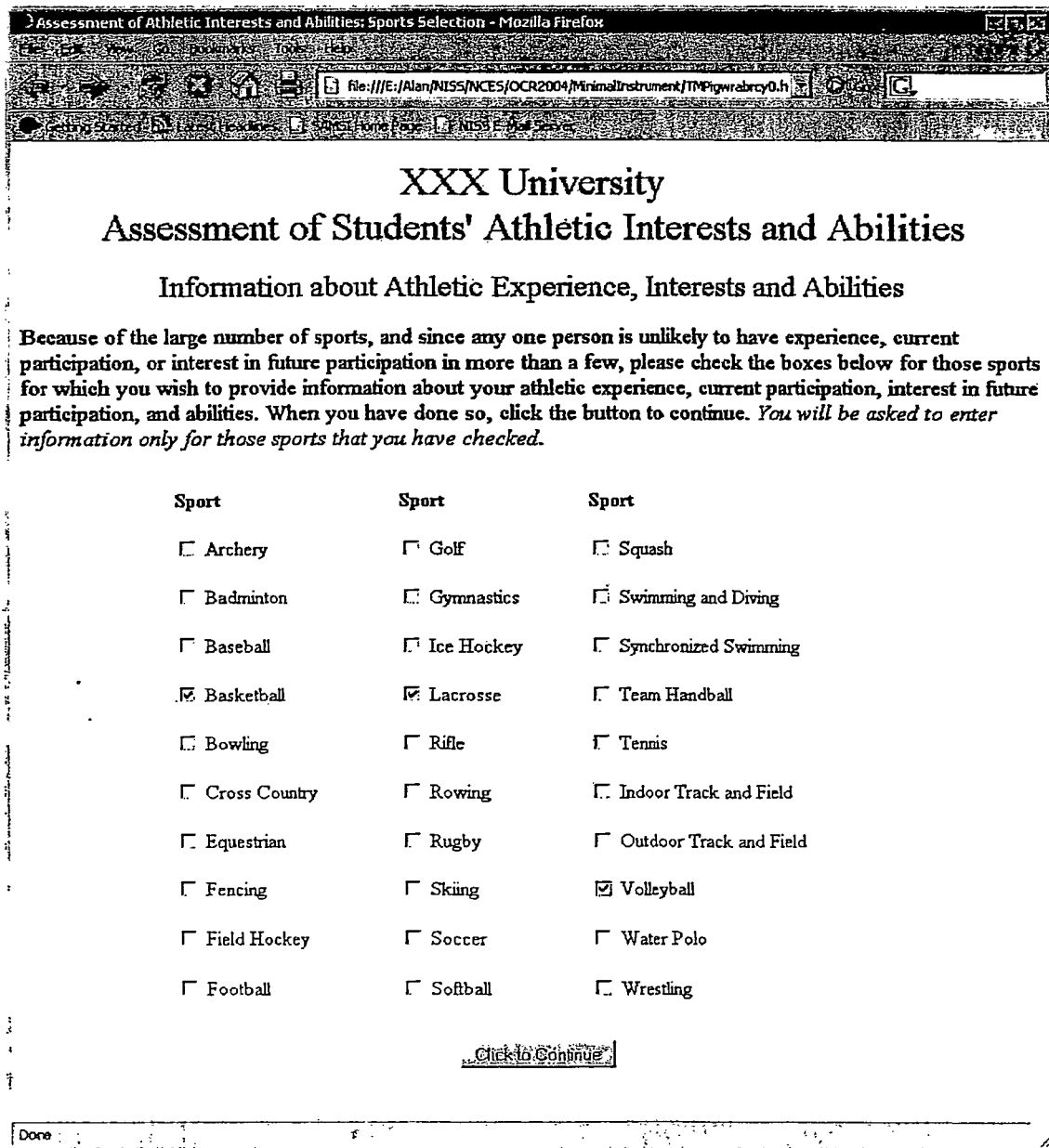
Before you proceed, you should be aware that participation in intercollegiate athletics imposes burdens on student-athletes, but also creates opportunities. For example, intercollegiate athletics usually requires athletes to devote 20 hours of practice each week during the season, as well as individual regimens of training during the off-season. Athletes are required to travel and occasionally miss classes. On the other hand, many intercollegiate athletes receive financial awards that cover all or a portion of school expenses. They are also given access to academic support services, including tutoring, counseling and study tables, that are not available to other students. Of course, how these burdens and opportunities balance against one another is a matter of personal circumstances and judgment.

[Click to Proceed](#)

Done

SOURCE: NISS-produced prototype.

Figure 5.5: Fifth screen of the prototype data collection instrument, which is reached only by respondents who wish to enter information concerning athletic experience, interests and abilities. Here, respondents select the sports for which they wish to provide information. The list consists of 23 sports in which the NCAA conducts championships and seven “emerging sports.” The respondent illustrated here has chosen basketball, lacrosse and volleyball, which appear in screen 6.



SOURCE: NISS-produced prototype.

Figure 5.6: Sixth screen of the prototype data collection instrument, on which respondents enter information concerning experience, current participation, interest in future participation and ability only for those sports selected on screen 5. Continuing the example from screen 5, the respondent—who is female—has indicated high-school varsity experience, current intramural participation, interest in intercollegiate participation and ability for lacrosse.

Assessment of Athletic Interests and Abilities: Sports Detail - Mozilla Firefox

File:///E:/NISS/NICES/OCR2004/Instrument/data-sportsdetail-intrinal.html

XXX University

Assessment of Students' Athletic Interests and Abilities

Information about Athletic Experience, Interests and Abilities

The sports listed below are those you selected on the previous screen.

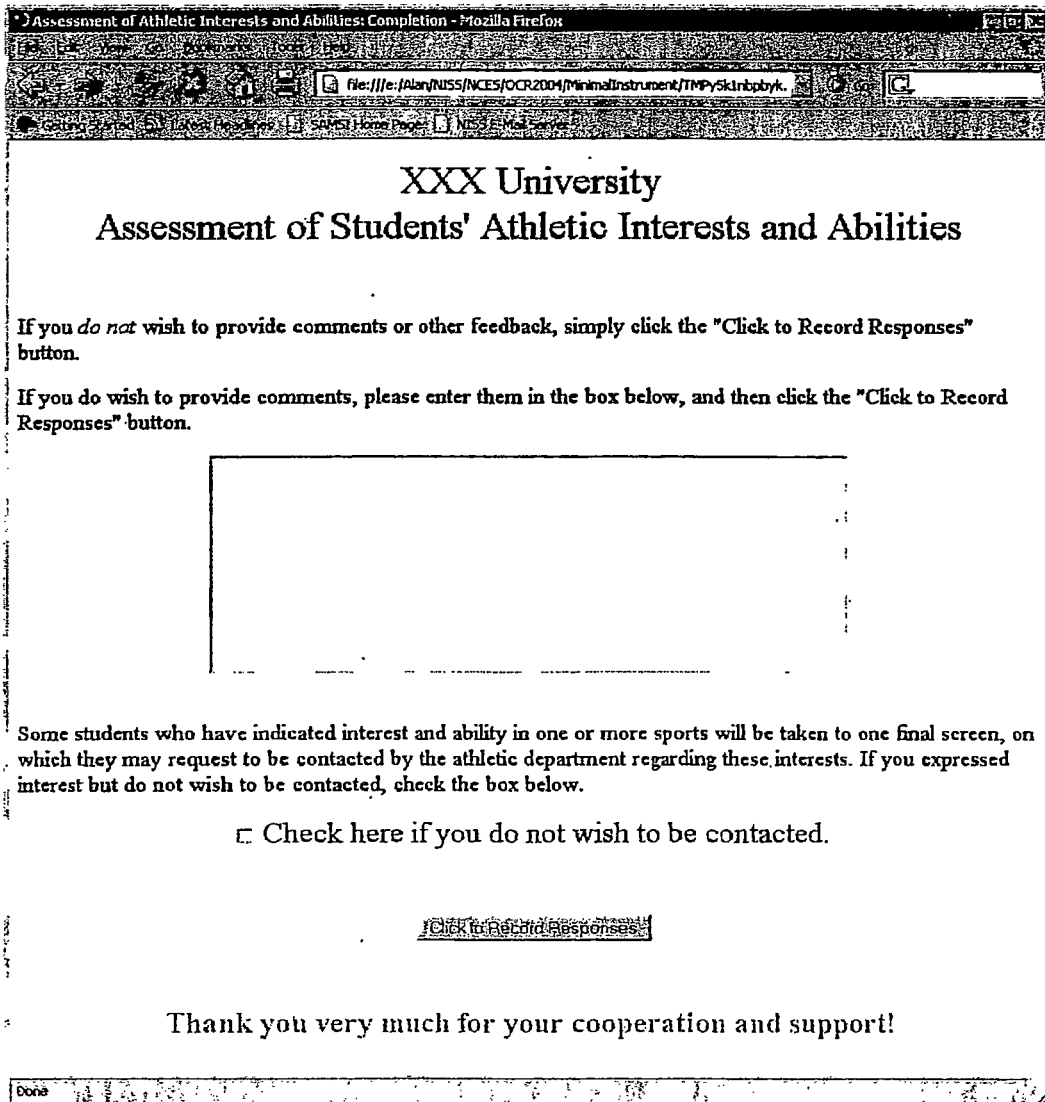
- If the list is not correct, please use your browser's back button to return to the previous screen and modify your choices.
- If the list is correct, please fill in all applicable responses. You do not need to respond to every question, and missing responses will be treated as (depending on category) "No Experience," "No Current Participation," "No Interest in Future Participation" and for Ability, "Not applicable." When you have completed all answers that you wish to complete, click the button to record your responses and proceed to the final part of the survey.

Sport	Experience: At what level did you participate in this sport in high school?	Current Participation: At what level are you participating in this sport at XXX?	Interest in Future Participation: At what level do you wish to participate in this sport at XXX?	Ability: Do you believe that you have the ability to participate at the level at which you indicated interest?
Basketball	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Junior Varsity <input type="radio"/> Varsity	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Yes, I have the ability <input type="radio"/> No, I would need to develop the ability
Lacrosse	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Junior Varsity <input type="radio"/> Varsity	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input checked="" type="radio"/> Yes, I have the ability <input type="radio"/> No, I would need to develop the ability
Volleyball	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Junior Varsity <input type="radio"/> Varsity	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Recreational <input type="radio"/> Intramural <input type="radio"/> Club <input type="radio"/> Intercollegiate	<input type="radio"/> Yes, I have the ability <input type="radio"/> No, I would need to develop the ability

[Click to Proceed](#)

SOURCE: NISS-produced prototype.

Figure 5.7: Seventh, and for most respondents final, screen of the prototype data collection instrument, which offers respondents the opportunity to provide comments or other feedback. Respondents who are members of the data analysis population and have expressed an interest in one or more sports (in our example, full-time female students who are freshmen, sophomores or juniors) are taken automatically to screen 8 unless they check the box "Check here if you do not wish to be contacted."



SOURCE: NISS-produced prototype.

Figure 5.8: Eighth and final screen of the data collection instrument, reached only by respondents who are members of the data analysis population (in our example, full-time female students who are freshmen, sophomores or juniors), on which they are asked whether they wish to be contacted by the athletic department, and if so to provide contact information. The illustrative values here are the same as in figures 5.2-5.7.

Assessment of Athletic Interests and Abilities: Demographic Information - Mozilla Firefox

File:///E:/Alan/NISS/NCES/JOCR2004/MinimalInstrument/TMP7gxdeba17.htm

Getting Started | Full Screen | Refresh | Print | Home Page | NISS E-Mail Server

XXX University

Assessment of Students' Athletic Interests and Abilities

Request to Be Contacted by Athletic Department

You have indicated interest and ability in one or more sports, as summarized below:

Age:	20
Gender:	Female
Year in school:	Junior
Status:	Full-time
Sport(s):	Lacrosse
	Experience = Varsity
	Current Participation = Intramural
	Interest in Further Participation = Interscholastic
	Ability = "Yes, I have the ability"

If you would like to be contacted by the athletic department regarding these interests, please fill in the information below, and then click the "Click to Submit Request" button. This request is optional; your responses have already been recorded. Thank you.

Name:

E-mail address:

Telephone:

Done

SOURCE: NISS-produced prototype.

5.4.2 Software

The screens shown in figures 5.1-5.8 are static HTML prototypes. There are at least two paths to create the software for a full-blown implementation that would generate most of these screens dynamically.

The first of these is commercial tools for web surveys, such as Survey Solutions (Perseus Corporation, 2005). The extent to which commercial tools support functionality such as confidentiality-preserving non-response follow-up is not clear. It is also likely that they involve significant hardware and software overheads that are really not necessary in the setting of this chapter.

The second path is to create CGI, Java, or Visual Basic scripts that

- Allow movement from each screen to the next, including dynamic generation of all screens other than the initial one in figure 5.1;
- Record responses (see additional discussion below).

Implementation of these scripts, together with appropriate security and support, would be a moderate-sized but straightforward programming task.

However, full automation of the process would require one more layer of scripts that would customize such items as

- The institution name;
- Details of wording, with defaults provided that can be edited as necessary;
- The list of sports on screen 5;
- The possibly sport-dependent responses on screen 6.

Storage of responses is straightforward. Other than the free-form text response on screen 7, the instrument described in section 5.4.1 generates only a small number of data items for each respondent:

- Four items of demographic information from screen 2;
- One Yes/No global “no athletic interest, current participation or interest in future participation” from screen 3;
- K Yes/No responses for each sport from screen 5, where K is the number of sports listed there;
- At most $4K$ categorical responses from screen 6, one each for experience, current participation, interest in future participation and ability.

The total number of items is $5K + 5$. To illustrate, for the 30 sports shown in the example in figure 5.5, the survey generates 155 items.

There are, of course, constraints on the item values. First, the instrument itself permits only pre-defined responses to all items (other than on screen 7). This guarantees that responses are interpretable and analyzable. Second, if the value of the global Yes/No

response on screen 3 is "No," then the remaining 5K responses are empty. Similarly if the response on screen 5 for a sport is "No," meaning that it is not listed on screen 6, then its four items associated with screen 6 are empty.

Finally, the software could store the data in a comma-separated-variable (CSV) file, with one (5K + 5) item line for each response. Since no identifying information is stored, confidentiality of responses is guaranteed. The CSV data file can then be read and manipulated by tools ranging from Microsoft Excel to more powerful statistical packages such as SAS, SPSS, STATA and S-Plus.

The encrypted ID provided in the original e-mail would be severed from the response itself, and used in the database file containing respondents' e-mail addresses to mark that a response had been received.

Practice among SURVEY Institutions: No SURVEY institution employed web-based data collection.

Recommendation for Improvement: OCR, NCES or another agency should investigate use of commercial software, and either recommend particular products or support development of custom tools such as those described here.

High-Quality Recommendation: OCR, NCES or another agency should investigate use of commercial software, and either recommend particular products or support development of custom tools such as those described here. In either case, data should be stored in "long form" (allowing empty responses) in CSV files, which maximizes flexibility and portability.

5.5 Data Analysis

Recall that goal analysis of the data generated by the census is to estimate N^+ , the number of students in the data analysis population interested and able to participate at the intercollegiate level in the given sport. If data concerning multiple sports is collected in the same instrument, then each sport requires an analysis of the type described in this section. For technical reasons, it is necessary to calculate the distribution of the estimator \hat{N}^+ .

We assume throughout this section that respondents answer truthfully. While there is good reason to expect untruthful responses in some settings, there seems to be none in this case.

As discussed in section 5.2, the data analysis population consists of the subset of members of the data collection population whose data are relevant to determination of compliance with Title IX. Although the techniques in this section are applicable to any choice of the data analysis population, for concreteness, we take that population to be full-time female students not in their final year of study.

Practice among SURVEY Institutions: There is little evidence in the OCR files that any of the 57 SURVEY institutions or the five “additional survey” institutions in chapter 4 has conducted principled statistical analyses of their data that account for possible non-response bias.

5.5.1 Preprocessing

The “raw data” generated by the data collection instrument in section 5.4.1 consist, in a form different from that in section 5.4.1, of six items for each sport:

- The global Yes/No response from screen 3, in which case the remaining five items are empty;
- The Yes/No selection response for that sport from screen 5; if this response is “No,” then the remaining four items are empty;
- The four categorical responses from screen 6.

Preprocessing of the data reduces these six items to a single Yes/No response, with “Yes” signifying that the respondent is interested in and able to participate in the sport at the intercollegiate level, and “No” signifying all other cases. While there is some flexibility—and obviously changes would be needed if a different instrument were employed—we recommend that “Yes” require all of the following conditions:

- On screen 3, global response = “Yes”;
- On screen 5, selection response for that sport = “Yes”;
- On screen 6, for that sport
 - Experience in high school for = “Club,” “Junior Varsity” or “Varsity”
 - Current participation at any level (i.e., the response is not empty)
 - Interest in future participation = “Intercollegiate”.

This approach provides justification for three of the categories on screen 6.

Another approach, keeping in mind that ability is self-characterized, would also require

- On screen 6, Ability = “Yes, I have the ability”

We do not specifically recommend for or against this stronger criterion.

Effecting this preprocessing, either within a statistical package or with dedicated software, is straightforward. The result, for each sport and respondent, is a single Yes/No item.

Recommendation for Improvement: Data should be pre-processed to produce a single “Yes = Interested and able” or “No = either not interested or not able” response for each respondent and each sport.

High-Quality Recommendation: Data should be pre-processed to produce a single “Yes = Interested and able” or “No = either not interested or not able” response for each respondent and each sport.

5.5.2 Data Analysis in the Absence of Non-Response

In this section and the next, “non-response” means only subject-level non-response—failure of a member of the data collection population to respond at all. The data collection instrument in section 5.4 contains two mechanisms designed to minimize item non-response. The first is screen 3, which permits a global “no experience, participation or interest” response that concludes the data collection. The second is the statement on screen 6 that “... missing responses will be treated as (depending on category) “No Experience,” “No Current Participation,” “No Interest in Future Participation” and for Ability, “Not applicable.””

Here we describe analysis of the data for a single sport when there is not a problem with response rate. According to NCES statistical standards for censuses (U.S. DOE, 2003), this requires a subject-level response rate of at least 85 percent.

In this case, the analysis is straightforward. Recall the notation:

- P = size of target population, all of whom have been requested to provide information;
- N^+ = number of women in the target population who are interested in and able to participate in the sport at the intercollegiate level;
- M = minimum team size.

Also, let

- R = number of respondents;
- N_R^+ = number of “Yes” responses.

Table 5.1 summarizes the definitions and sources of these values.

Table 5.1: Sources of values used to estimate N^+

Value	Definition	Source
P	Target population size	Institution
N^+	Number of “Yes” responses in full target population	To be estimated
M	Minimum team size	Institution
R	Number of responses	Data
N_R^+	Number of “Yes” responses	Data

Source: This document.

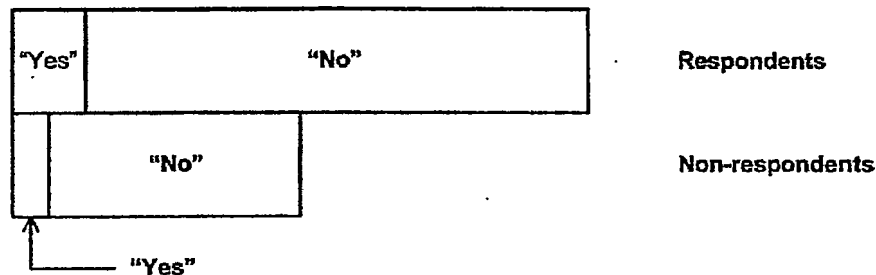
It is important to emphasize that we do not assume that $R = P$, which corresponds to a 100 percent response rate. Were this to happen, then $N^+ = N_R^+$, and the simple decision rule in section 5.1 can be applied by OCR.

Instead, we assume only that $R \geq .85P$. This obviates the need for the more complex analysis described in section 5.5.3, but still requires estimation of the number of "Yes" responses among non-respondents. The estimated value of N^+ is then

$$\hat{N}^+ = N_R^+ + \frac{N_R^+}{R}(P - R)$$

The principal assumption underlying this equation is that the rate of "Yes" responses among the $P - R$ non-respondents has the same value, namely N_R^+ / R , as among respondents. This is shown pictorially in Figure 5.9.

Figure 5.9: Pictorial representation of data analysis in the absence of significant non-response. The proportion of "Yes" responses among non-respondents is assumed to be the same as among respondents.



Source: NISS

The value \hat{N}^+ is not exact. Rather, it is a statistical estimator derived from the census data. As such, it has an associated probability distribution. As noted in section 5.1, we recommend that OCR employ a decision criterion of the form

- If $P\{\hat{N}^+ \geq M\} > \alpha$, where α is a threshold set in advance by agreement between OCR and the institution—in words, if the data indicate that there is sufficiently high probability that \hat{N}^+ exceeds M , then the data collection demonstrates that the interests and abilities of women are *not* accommodated by the present program. What action would be necessary, and under what additional conditions (see section 5.1), must be determined by OCR.
- If $P\{\hat{N}^+ \geq M\} \leq \alpha$ (in words, if the data indicate that there is not sufficiently high probability that \hat{N}^+ exceeds M), then the interests and abilities of women are accommodated by the present program, and no action by the institution is necessary.

Computation of $P\{\hat{N}^+ \geq M\}$ is a technical issue, because in models such as that described in appendix F, this probability depends on the unknown value N^+ . These difficulties can be avoided by treating the data values as known rather than unknown values, a simplification that is acceptable for high response rates but not when, as in section 5.5.2, a non-response bias analysis is conducted. Conditional on the data, the second component of \hat{N}^+ , that is, the estimated number of "Yes" responses among non-respondents, has a binomial distribution with parameters $P - R$ and N_R^+ / R , and tables, approximations or simulation may be used to calculate $P\{\hat{N}^+ \geq M\}$.

There is one case in which this entire analysis is unnecessary. If $N_R^+ \geq M$ then among the census respondents alone there are sufficiently many interested and able students, and it is certain that $N^+ \geq M$.

Practice among SURVEY Institutions: Only one-half of the OCR files containing data collection instruments report response rates or contain enough information to calculate response rates; reported values range from less than 1 percent to approximately 70 percent. There is no description in the files of any principled statistical analyses that were performed on the data. Those files that do contain results have nothing beyond tabulations of responses to items on the data collection instrument. Not one file contains any evidence that results were viewed as uncertain, or that uncertainties were calculated.

Recommendation for Improvement: An institution that does follow up on non-respondents should include in both e-mails and the web-based data collection instrument explicit, difficult-to-ignore statements that non-responses will be recorded as "no interest." In this case, the estimated value of N^+ is

$$\hat{N}^+ = N_R^+$$

In this case, N^+ is certain to exceed \hat{N}^+ , so a decision criterion on the form

- If $\hat{N}^+ < M$, then the institution is in compliance with Title IX
- If $\hat{N}^+ \geq M$, then the institution may not be in compliance with Title IX, depending on additional considerations discussed above and in section 5.7

is lenient in favor of the institution.

As an intermediate step, non-responses should not be treated as "no interest" and N^+ should be estimated as

$$\hat{N}^+ = N_R^+ + \frac{N_R^+}{R}(P - R)$$

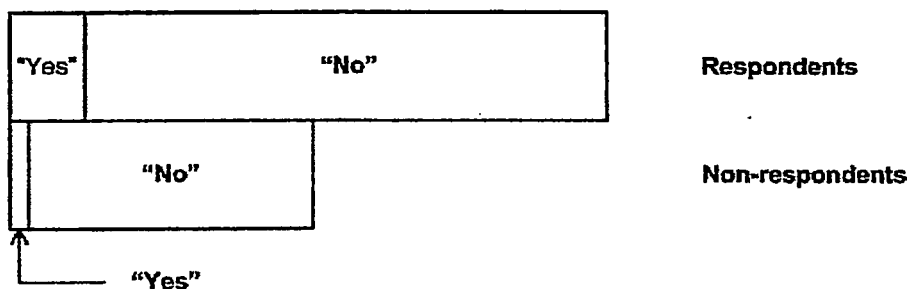
The decision criterion stated above is then unbiased, neither advantaging nor disadvantaging the institution.

High-Quality Recommendation: In the absence of significant non-response (that is, if the response rate exceeds 85 percent), N^+ should be estimated using methods described here, and the compliance decision should be based on $P\{\hat{N}^+ \geq M\}$.

5.5.3 Data Analysis in the Presence of Non-Response

When there is significant non-response, the central assumption in section 5.2.1 and figure 5.9 is called into question: that the probability of a “Yes” response is the same among non-respondents as among respondents. This failure is known as *non-response bias* and is shown pictorially in Figure 5.10, where the relative frequency of “Yes” is higher for respondents than for non-respondents.

Figure 5.10: Pictorial representation of non-response bias. “Yes” responses are relatively more frequent among respondents than among non-respondents.



Source: NISS.

There is, in fact, reason to suspect that the phenomenon in figure 5.8 arises in the setting of this chapter. Students who are interested and consider themselves able to participate in the sport at the intercollegiate level clearly have reason to respond, while those with no athletic interests have much less motivation to respond.

NCES statistical standards (U.S.DOE, 2003) prescribe that when the response rate (R/P in the notation of section 5.2.1) is less than 85 percent a non-response bias analysis be conducted. This process, which can be very resource-intensive, consists of

- Selecting (in most cases) a random sample of non-respondents;
- Contacting them (almost always by phone, to maximize the chances of reaching them);
- Ascertaining their response.

In principle, every selected non-respondent should be contacted, but often of course this is not possible.

Before proceeding, we emphasize that if $N_r^+ \geq M$, then regardless of the response rate, it is certain that $N^+ \geq M$, because among the census respondents alone there are

sufficiently many interested and able students. If this happens, there is no need to collect any additional data, and in particular no need for the non-response bias analysis.

In the most simplistic case, the products of the non-response bias analysis are:

- A sample size S_{NR} ;
- A number N_{NRBS}^+ of positive responses in the non-response bias analysis sample, from students in the non-response bias analysis sample who are interested and able to participate in the sport at the intercollegiate level;
- An estimate \hat{q}_{NR} of the frequency of “Yes” responses among the remaining non-respondents (i.e., those not in the non-response bias analysis sample). Assuming that the non-response bias analysis sample is a simple random sample, then in almost all cases, $\hat{q}_{NR} = N_{NRBS}^+ / S_{NR}$.

Using the same notation as in section 5.2.1, the estimated value of N^+ is then

$$\hat{N}^+ = N_R^+ + N_{NRBS}^+ + \hat{q}_{NR} (P - R - S_{NR})$$

The distribution of \hat{N}^+ , even conditional on the data, is more complex than in section 5.2.2, because \hat{q}_{NR} is based on a sample of non-respondents. An approach that parallels the approach in section 5.5.2 is to condition on all data values. In this case, the first two terms in the expression above are known, and the third term—corresponding to the number of students who neither responded nor are in the non-response bias analysis sample but who are interested and able—has a binomial distribution with parameters $P - R - S_{NR}$ and $\hat{q}_{NR} = N_{NRBS}^+ / S_{NR}$, which allows calculation of $P\{\hat{N}^+ \geq M\}$. Then, the decision criteria described in section 5.5.2 can be applied in the same manner.

The approach in the preceding paragraph overlooks randomness associated with the non-response bias sample. At a deeper level, it is also inconsistent with the underlying purpose of the non-response bias analysis, which is to determine if the *probability* of response depends on whether the response is positive or negative. A Bayesian modeling strategy is outlined in appendix F. In principle, it should be preferred to the approach described in the preceding paragraph, but it may be beyond the capabilities of some institutions, although the services of those who could implement it are readily available.

Recommendation for Improvement: In the presence of significant non-response (that is, if the response rate is less than 85 percent and consequent possible non-response bias, OCR should require, as NCES does, a non-response bias analysis. The decision criterion can be based solely on the estimator $\hat{N}^+ = N_R^+ + N_{NRBS}^+ + \hat{q}_{NR} (P - R - S_{NR})$, without consideration of associated uncertainties.

High-Quality Recommendation: In the presence of significant non-response (that is, if the response rate is less than 85 percent) and consequent possible non-response bias, OCR

should require, as NCES does, a non-response bias analysis. The estimated probability that N^+ exceeds M should be calculated using methods described in appendix F.

5.6 Precautions

The process outlined in sections 5.1-5.6 contains a number of safeguards against what would ordinarily be considered an “unsafe” situation: data collection conducted by an organization with a definable vested interest in the outcome. Specifically, if the institution did not want to offer the sport at the intercollegiate level, then one can assume that the institution would like the data collection to demonstrate N^+ is less than M , so that it will not have to offer the sport.

The census recommendation in section 5.2 avoids a potentially biased sample—a subset of the target population where interest and ability are thought to be low. Interestingly, many of the INSTRUMENT institution surveys summarized in chapter 3 actually focus on sub-populations where interest and ability would be expected to be high, such as students enrolled in physical education courses. This recommendation also avoids excessively small samples meant to produce no interested and able respondents. As discussed in section 5.2, such a strategy is risky, because every positive response carries high weight.

The data collection instrument in section 5.4.1 contains no prejudicial items or wording designed to induce negative responses. Some, but relatively few, of the instruments summarized in chapter 3 exhibit this shortcoming.

The data analysis procedures in section 5.5 specifically do not ever equate failure to respond at all with either lack of interest or ability. The OCR files do not contain information sufficient to determine whether this was done by any of the INSTRUMENT institutions.

5.7 Pre- and Post-Data Collection Procedures

The issues noted here lie outside the data collection process itself, but are important.

When an institution should (or must) conduct data collections such as those described in this chapter is influenced by both external and internal factors. OCR complaints or monitoring activities (see section 2.2.4) are the principal external stimuli. As noted in section 2.3, in the OCR files analyzed by NISS, use of Part 3, and within PART 3 institutions, use of data collections, seem to increase over time. An institution may also, however, wish to conduct periodic assessments on its own, or in response to petitions from students.

An OCR determination of non-compliance requires that the region in which the institution is located offer competitive opportunities in the sport for the under-represented sex. Presumably this can be determined in advance of any data collection. Whether the conference to which the institution belongs offers competitive opportunities is not part of the decision process.

Following completion of the data collection, if the estimated value of N^+ exceeds the minimum team size M , then additional steps take place before OCR would determine that the institution must offer the sport at the intercollegiate level:

1. Especially if the data collection is confidential as in section 5.4, the institution must identify those students who stated themselves to be interested, and ascertain that they remain interested. Holding one or more widely announced meetings appears to be the most common way of doing this. Students who self-identified using the process pictured in figure 5.8 can be contacted directly. If the number of students identified at this stage is less than M , the remaining steps do not occur. There is no logical necessity, however, that this number be less than \hat{N}^+ : the meeting itself may generate additional students—in particular, non-respondents to the data collection—who consider themselves interested and able.
2. If sufficiently many students are identified as interested, the institution (ordinarily, the athletic department) must determine if those students who state they are able to compete at the intercollegiate level are actually able to do so. In most cases, this would be by means of tryouts.
3. Finally, if the number of students who are interested and able, as determined by steps 1 and 2, exceeds M , then OCR would declare the institution not to be in compliance with Title IX.

Considerations of cost (that is, whether the institution would need to build or otherwise access) new facilities are not part of the OCR criteria for determination of Title IX compliance.

Department of Education, Office for Civil Rights: Documents and Related Materials

National Institute of Statistical Sciences *Title IX Data Collection: Technical Manual for Developing the User's Guide*

(Full document available on the US Department of Education Web's site)

Department of Education, Office for Civil Rights: Documents and Related Materials

US Department of Education, Office for Civil Rights' Response to the Senate Committee on Appropriations—Intercollegiate Athletics: Additional Factors Considered by Post-Secondary Institutions, March 17, 2006

Office for Civil Rights
United States Department of Education

Response to the Senate Committee on Appropriations

**Intercollegiate Athletics:
Additional Factors Considered by Post-Secondary Institutions /**

March 17, 2006

Chairman
Committee on Appropriations
United States Senate

Stephanie Monroe
Assistant Secretary
Office for Civil Rights

Introduction

As part of Senate Report No. 109-103, the Senate Committee on Appropriations (Committee) expressed concern about the Department of Education's (Department) March 17, 2005 Additional Clarification of Intercollegiate Athletics Policy (Additional Clarification). Subsequently, the Conference Report on H.R. 3010 (Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations Act for FY2006, P. L. 109-149), which was enacted on December 30, 2005, cross-referenced the Senate Report language. As acknowledged by the Committee, the Additional Clarification was intended to provide recipient institutions with additional guidance concerning compliance with the third part of the Department's three-part test used to assess whether institutions are providing nondiscriminatory opportunities to participate in intercollegiate athletics. The Committee specifically expressed concern that the Additional Clarification may have created confusion about the use of interest surveys to demonstrate compliance with Title IX of the Education Amendments of 1972 (Title IX).

Further, the Committee requested that the Department prepare a report, to be received no later than March 17, 2006, addressing the following questions concerning institutions using student surveys to assess interest in intercollegiate sports:

- What actions, if any, do institutions take to gather and consider sources of information other than student surveys for assessing student interest used in demonstrating compliance with part three of the Title IX test;
- Specifically, what information other than student surveys, if any, do institutions consider when assessing student interest; and
- What decisions were made about athletic opportunities at those institutions?

In order to answer these questions, this report examines the use of surveys and the consideration of additional factors by recipient institutions for the period October 1, 1992 through January 31, 2006. The report presents detailed findings concerning the consideration of additional factors throughout the investigative, resolution, and monitoring stages of the Title IX athletics cases analyzed. With respect to the Committee's request concerning decisions made about athletic opportunities, this report also presents detailed findings of the institutional decisions whether to add additional sports teams, and the acceptance or rejection of such decisions by the Department.

Background

The Department's Office for Civil Rights (OCR) enforces Title IX, 20 U.S.C. § 1681 *et seq.*, an anti-discrimination statute that prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX¹ contains specific provisions governing athletic programs, including a requirement that institutions "provide equal athletic opportunity for members of both sexes."² In determining whether equal opportunities are available, the regulation provides that OCR will consider, among other factors, whether the selection of sports effectively accommodates the interests and abilities of students of both sexes.

To provide further clarification of the Title IX regulatory requirements, the Department published the Intercollegiate Athletics Policy Interpretation (Policy Interpretation) in the *Federal Register* on December 11, 1979.³ The Policy Interpretation provides that, as part of its responsibility to effectively accommodate the interests and abilities of male and female athletes, an institution must provide the opportunity for individuals of each sex to participate in intercollegiate competition. The Policy Interpretation permits three alternate ways of assessing whether institutions are providing nondiscriminatory opportunities to participate in intercollegiate athletics. Specifically, the Policy Interpretation delineates the following "three-part test" for assessing compliance:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as provided 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.

The part three analysis centers on whether there are concrete and viable interests among the underrepresented sex that should be accommodated by the institution's athletic program. An institution will be found in compliance with part three unless there exists a sport(s) for the underrepresented sex for which *all* three of the following conditions are met:

- a) unmet interest sufficient to sustain a varsity team in the sport(s);
- b) sufficient ability to sustain an intercollegiate team in the sport(s); and

¹ 34 C.F.R. Part 106, effective July 21, 1975.

² *Id.* § 106.41(c).

³ 44 Fed. Reg. 71,413 (1979).

- c) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region.

If the school decides to comply with part three of the three-part test, the assessment of each of the above three conditions is an essential prerequisite for determining a school's Title IX obligation to create a new intercollegiate varsity team or elevate an existing club team to varsity status. Under the Policy Interpretation, institutions have discretion and flexibility in choosing the nondiscriminatory methods to determine the athletic interests and abilities of students.⁴ Nondiscriminatory assessment methods may include the administration of student surveys and a consideration of additional factors.

Previous OCR guidance on the three-part test has included a discussion of the consideration of additional factors.⁵ This report, however, focuses on specific factors our analysis indicated may have been considered by either recipients or OCR during the course of an investigation and post-investigation monitoring. The following additional factors were identified in one or more of the OCR case files reviewed for this report:

- Interviews with the recipient's coaches
- Interviews with the recipient's athletes
- Expressed student interest in the addition of new teams
- Expressed student interest in the elevation of existing club teams to varsity status
- Participation on club or intramural teams
- Participation in recipient elective physical education classes
- Sports offered by local community recreation leagues and participation rates in those sports
- Sports offered by local high schools and participation rates in those sports
- Sports offered by other high schools from which the recipient normally draws its student population (i.e., "feeder" schools) and participation rates in those sports
- Interviews with or surveys of local high school coaches and athletic directors

⁴ "Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided: a. The process takes into account the nationally increasing levels of women's interest and abilities; b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex; c. The methods of determining ability take into account team performance records; and, d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an under represented sex." 1979 Policy Interpretation.

⁵ The 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (1996 Clarification) provided "OCR would look for interest through the following factors, among others: requests by students and admitted students that a particular sport be added; requests that an existing club sport be elevated to intercollegiate team status; participation in particular club or intramural sports; interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports; results of questionnaires of students and admitted students regarding interests in particular sports; and participation in particular interscholastic sports by admitted students." Furthermore, the 1996 Clarification indicated that "OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s)." The 1996 Clarification noted, however, that "while these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students."

- Intercollegiate sports sanctioned by the recipient's athletic conference
- Intercollegiate sports sanctioned by other athletic associations
- Intercollegiate sports offered in the recipient's normal competitive region
- Nationally emerging sports, increasing levels of interest in sports in general, and increasing levels of interest and ability in particular sports
- Other factors

Although many of the above factors are suited to evaluating one or more of the part three conditions, i.e., interest, ability, and expectation of competition, we have not attempted to conduct a comprehensive analysis of which particular condition each of the factors was designed to measure in each of the cases. However, our review of the cases did reveal that often these additional factors were not used to determine student interest, but rather to assess the feasibility of creating a team, the ability to sustain a team, and/or the reasonable expectation of competition for a team. The use of these factors by OCR and recipient institutions is detailed in our findings, below.

Scope and Methodology

The Committee requested that the Department conduct random compliance reviews of postsecondary institutions that used interest surveys to determine what additional factors were considered in determining student interest. We met with Committee staff to discuss the difficulties in conducting such an examination in the limited time available, particularly because institutions do not report this type of information to OCR.

In addition, a recipient's choice of how to comply with Title IX is not static, and a school may choose to alter its method of compliance consistent with its own circumstances (such as fluctuations in student enrollment or other circumstances). Unless the institution requests ~~technical~~ technical assistance, the only way OCR would be in a position to determine how a recipient has chosen to achieve Title IX compliance, would be for OCR to conduct an investigation based on a complaint investigation or proactive compliance review.

Instead, we proposed to do an analysis of the issues raised by the Committee based on a review of OCR's case files from October 1, 1992 through January 31, 2006. None of these cases was opened following the issuance of the Additional Clarification. However, we were able to determine the factors used by institutions and OCR in determining student interest in the cases examined.

Consequently, OCR examined all 166 case files, initiated between October 1, 1992 and January 31, 2006, and identified as Title IX athletics cases involving the use of the three part test. An initial review of these cases revealed 27 files remaining active. These open files were excluded to avoid potential interference with ongoing OCR activity.

The remaining case files were then examined to determine whether they met the criteria specified by the Committee. In accordance with the specified criteria, files not involving the use of part three of the Title IX test or the administration of a student interest survey were excluded from

further consideration.⁶ After all exclusions, 54 files remained in the pool for analysis. These files all proceeded beyond the initial evaluation stage, were closed, and involved institutions that chose to use part three of the Title IX test and to utilize a student interest survey. OCR conducted a detailed examination of all 54 files in the pool.

The Committee is cautioned that the findings herein, such as the consideration of a particular additional factor or the number of teams added as the result of assessments, may not provide a complete representation of the cases under consideration. Because of the very few number of cases available for inclusion in our analysis, it must be noted that small changes or missing documentation could have a significant effect on our analysis.⁷ Moreover, because of the nature of OCR investigations and the uniqueness of each institution, even those files containing relatively complete documentation do not routinely address every data collection category. For most of the period under review, OCR procedures did not require full investigations. Rather, at any time before or during an investigation when a recipient agreed to take action that appeared to resolve the complaint allegations, OCR would enter into an agreement with the recipient and the case was closed prior to a finding.

Finally, because no attempt was made to determine if the cases examined represent a valid sample of postsecondary institutions, it is not suitable to generalize the findings presented in this report to all other recipient institutions.

Results

We discovered that as part of its initial investigation, in many cases OCR considered additional factors to assist in its determination of whether potential sufficient unmet interest, ability, and competitive opportunities existed within the institution's current underrepresented student population. In addition, as part of a voluntary compliance or resolution agreement entered into with OCR, many institutions agreed to not only conduct a student survey, but also to consider specific additional factors. We found that approximately half of all institutions' assessments of student interests and abilities and potential competitive opportunities included the consideration of student interest surveys as well as additional factors. Many of those surveys, pre-dating the Additional Clarification, did not meet the design or implementation standards that now are more readily available as a result of the Additional Clarification. Finally, in only a very few instances, we noted that OCR examined additional factors following an institution's assessment, citing the factors as reasons for its rejection of the institution's conclusion not to add additional sports.

At the outset, our review of the files selected for consideration revealed that in many instances OCR initially made a determination that probable sufficient unmet interest, ability, and competitive opportunities existed within the institution's current underrepresented student population to justify the addition of at least one new sports team. OCR considered several additional factors to assist it in reaching this conclusion concerning probable interest, ability, and

⁶ Several files were excluded because the cases were closed early because OCR did not have jurisdiction, as the complainant failed to provide sufficient factual information for OCR to infer a potential violation of Title IX; because the complainant withdrew the complaint, generally as a result of an independent resolution between the complainant and the institution; or because OCR could not contact the complainant for additional information.

⁷ For instance, many case files, principally due to their age, do not contain complete documentation.

competitive opportunities. Most mentioned factors included current student participation in club or intramural sports, cited as tending to indicate current levels of interest and ability; sports offered and participation rates at local and other feeder high schools, generally considered as an indicator of likely interest by potential students needed to sustain any new sports teams added; and intercollegiate sports sanctioned by the recipient's current athletic conference, used as an indicator of potential competitive opportunities. In addition, opinions of the institution's coaches, athletes, and students concerning interest and ability were afforded particular weight by OCR in its determination.

In many cases, OCR accepted commitments from institutions to implement voluntary resolution agreements without OCR issuing findings. Other institutions entered into similar voluntary agreements after findings of noncompliance. All institutions entering into an agreement agreed to conduct a nondiscriminatory assessment of student interest and abilities, most agreeing to administer one or more student interest surveys and to consider specific additional factors. Factors most frequently mentioned included high school participation rates, included in fully half of all agreements; and intercollegiate sports offered in the recipient's normal competitive geographical region, which was mentioned in nearly 40% of all agreements.

Of the agreements examined, 19 agreed to add a total of 28 new sports teams, irrespective of the results of any assessment. As mentioned above, for most of the period under review, OCR procedures focused on the resolution of allegations of discrimination and did not require full investigations prior to implementation of voluntary resolution agreements. In these cases, evidence may have already existed justifying the addition of teams, such as an institution's recent elimination of a team for the underrepresented sex.

Note that because the institutions agreed to add these teams notwithstanding the results of any assessments conducted, during our analysis we maintained separate data for teams added as a result of assessments of interest, ability, and available competition. Those teams that were not added based on assessments (including surveys or additional factors) are not included in the data presented below.

All institutions conducted at least one assessment of student interest, ability and competitive opportunities, with a few conducting multiple assessments over the course of the investigation. We examined 63 assessments that included a student survey, including 34 in which the institution also considered other factors in addition to the survey results. Of these, five are multi-year composites we constructed during our analysis. These constructs were necessary because, although we did find sufficient documentation to describe the assessments as multi-year aggregates, the case files contained limited documentation concerning each individual assessment.

Assessments were designed to measure unmet student interest, sufficient ability to sustain a new team, and/or a reasonable expectation of competition for the team. We found surveys were always designed to measure student interest, and most often also designed to gauge athletic ability. Student interest surveys were never designed to assess competitive opportunities. In contrast, assessments of additional factors were frequently designed to measure competitive

opportunities in addition to student interest. Seldom were additional factors considered in order to assess potential ability.

Additional factors most frequently considered during all assessments included local and other feeder high school participation, intercollegiate sports sanctioned by the recipient's athletic conference, and student participation on the recipient's club and intramural teams. Other factors mentioned earlier were considered to an appreciably lesser degree.

We were able to determine overall response rates for 33 of the assessment surveys. Overall response rates varied from less than 1% to approximately 78%. Fully two-thirds of the surveys had response rates less than 40%, and only two had response rates above 75%. In addition, almost two-thirds of these assessments also included the consideration of additional factors. Ten assessments resulted in new team additions, with a total of 13 new teams added. We noted that most (10) teams were added by assessments considering both surveys and additional factors. Of the three teams added based on surveys alone, only one team was the result of a survey with less than a 65% response rate.

These findings are consistent with findings of the National Center for Education Statistics (NCES) as presented in the User's Guide to Developing Student Interest Surveys Under Title IX, and as presented in the Technical Manual for Developing the User's Guide, developed by the National Institute of Statistical Sciences (NISS), both published as accompaniments to the Department's Additional Clarification. Based on an analysis of the survey instruments used in OCR cases during nearly all of the time period covered by this report, NISS identified numerous deficiencies in both the survey instruments and their implementation during that time period. These deficiencies include limited pools of students to whom the surveys were administered and very low response rates. Consequently, under the Additional Clarification, OCR also considers other factors, in addition to surveys, if the surveys contain the deficiencies identified by NISS and are not administered consistent with the conditions articulated by NCES for effectiveness and reliability.

Although both surveys and additional factors may be used to measure interest and ability, we found almost no actual conflicts between the data from each of these assessment tools. Of the very few interest conflicts discovered, our analysis revealed that any finding of interest, whether through a survey or through the consideration of additional factors, always resulted in an overall assessment finding of interest. Specifically, we did note three cases in which the survey found unmet interest, but the additional factors did not, and a single case in which the survey did not find interest, but the additional factors did indicate interest. Of the three cases in which the survey indicated interest, one resulted in the addition of a new team, while the remaining did not, due to lack of competitive opportunities. In the single instance in which the survey did not indicate sufficient interest, the survey was based on a very low response rate of less than 1%. Nevertheless, because of student interest expressed apart from the survey, that case too resulted in the addition of a new team.

We noted that assessments that employed a student survey in combination with the consideration of additional factors were slightly more likely to find student interest. However, recipients' decisions to add a new sports team differed little between surveys and assessments including the

consideration of additional factors. In either case, approximately 44% of the assessments resulted in the addition of at least one new sports team.

We noted that many teams were added as a result of assessments that included surveys with low response rates. Of the assessments for which we were able to determine the survey response rates, we found that of the 14 teams added, only two were added as the result of an assessment including a survey with a response rate greater than 75%. Fully half (7) of those teams added, were added as the result of assessments including surveys with response rates between 1 -28%, including one assessment based solely on a survey that had a response rate of only 22%.

Further analysis revealed that the decisions to add teams, whether the result of a survey alone or of an assessment including the consideration of additional factors, appear to be attributable to the survey component of the assessment. Of the assessments including the consideration of additional factors and citing a reason for the institution's decision to add a new team, survey results were mentioned as frequently as additional factors as the basis for the decision. In addition, overall, survey results were most frequently mentioned as a determining factor in an institution's decision to add a team, cited in 23 of the 28 assessments. Additional factors were given as bases in ten assessments.

In sum, our analysis revealed that 28 assessments, conducted by 26 of the 54 institutions under consideration, resulted in the addition of 42 new teams. As mentioned previously, this total does not include team additions that were not based on assessments of interest, ability, and available competition. Overall, we found 28 teams added irrespective of the assessment results and 42 added as the result of assessments, resulting in a total of 70 teams added by the 54 institutions under consideration.

We found that the number of assessments resulting in team additions exceeded the number of assessments finding all three of the criteria necessary to raise an obligation to add a new team under part three of the three-part test. Some of this difference was attributable to those teams added after OCR disputed the recipient's determinations regarding unmet interest, ability, or competitive opportunities. Of the 28 assessments that resulted in the addition of new teams, OCR disputed the recipient's findings in five instances, effecting the addition of six new teams. The remaining difference was attributable to those few institutions deciding to add teams based on indeterminate results.

We discovered only six instances in which OCR independently evaluated additional factors subsequent to an institution's assessment. The most frequently cited factor was student participation on club or intramural teams. In all six cases, OCR used this evaluation of additional factors as a basis for its decision to reject the recipient's interpretation of the results as not requiring the addition of a new team.

Most institutions eventually attained compliance through the use of part three of the three-part test. Most of these recipients cited insufficient remaining unmet interest as the primary deciding factor not to add a team although a considerable minority did indicate that lack of competitive opportunities was a factor. A probable contributor to these findings of insufficient interest was the fact that nearly two-thirds of those schools added at least one new sports team, certainly

contributing to a reduction in unmet interest. Significantly, only two of these institutions attained compliance by demonstrating a lack of sufficient athletic ability within their current student population.

A few institutions (4) that utilized assessments with the aim of achieving part three compliance actually achieved compliance under either parts one or two of the three-part test. The institutions accomplishing such compliance did so through the use of assessments and subsequent team additions based on those assessments.

Conclusion

In summary, of the 63 assessments that included a student survey, we found that approximately half (34) of all institutions' assessments of student interests and abilities and potential competitive opportunities included the consideration of additional factors. The additional factors include interviews with the recipient's coaches or athletes; expressed student interest in the addition of a new team or elevation of an existing club team to varsity status; participation on club or intramural teams or elective physical education classes; sports offered by local and feeder high schools and community recreation leagues and participation rates in those sports; interviews with or surveys of local high school coaches and athletic directors; intercollegiate sports sanctioned by the recipient's athletic conference or other athletic associations or offered in the recipient's normal competitive region; and nationally emerging sports. Increasing levels of interest in sports in general, and increasing levels of interest and ability in particular sports.

Overall, we found that 23 teams were added irrespective of the assessment results and 42 were added as the result of assessments, resulting in a total of 70 teams added by the 54 institutions under consideration. However, recipients' decisions to add a new sports team differed little between surveys and assessments including the consideration of additional factors. In addition, the decisions to add teams, whether the result of a survey alone or of an assessment including the consideration of additional factors, appear to be more frequently attributable to the survey component of the assessment.

As demonstrated by the above analysis, utilization of various types of surveys as a method to measure student athletic interests under part three of the three-part test is not new. Based on NISS' analysis of OCR cases, there were a number of deficiencies in the design and implementation of the survey instruments during the period reviewed, including limited or selective distribution of surveys and low response rates. However, it is interesting to note that surveys, including those that were deficient, resulted in the addition of teams to the same extent as assessments that included the consideration of survey results and additional factors.

To address the inadequacies in the surveys, NCEC developed the Model Survey and survey implementation procedures in the Additional Clarification to effectively measure student interest—with a survey—using an unbiased, standardized methodology. This self-assessment tool, which has been offered as a resource to schools, when implemented consistent with the guidance, has the potential to maximize the possibility of obtaining correct information and generating high response rates.

The Discussion:

1. Title IX, Sex Discrimination, and Intercollegiate Athletics: A Legal Overview, Updated April 28, 2005, CRS Report for Congress.
2. The Controversy over US Department of Education, Office for Civil Rights' Additional Clarification of Intercollegiate Athletics Policy, March 17, 2005
3. Advocating for the March 17, 2007 Additional Clarification
4. Opposing the March 17, 2007 Additional Clarification
5. Public Comments of the American Association of University Women

Title IX, Sex Discrimination, and Intercollegiate Athletics: A Legal Overview, Updated
April 28, 2005, CRS Report for Congress.

CRS Report for Congress

Received through the CRS Web

Title IX, Sex Discrimination, and Intercollegiate Athletics: A Legal Overview

Updated April 28, 2005

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Title IX, Sex Discrimination, and Intercollegiate Athletics: A Legal Overview

Summary

Enacted over three decades ago, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in federally funded education programs or activities. Although the Title IX regulations bar recipients of federal financial assistance from discriminating on the basis of sex in a wide range of educational programs or activities, such as student admissions, scholarships, and access to courses, the statute is perhaps best known for prohibiting sex discrimination in intercollegiate athletics.

Indeed, the provisions regarding athletics have proved to be one of the more controversial aspects of Title IX. At the center of the debate is a three-part test that the Department of Education (ED) uses to determine whether institutions are providing nondiscriminatory athletic participation opportunities for both male and female students. Proponents of the existing regulations point to the dramatic increases in the number of female athletes in elementary and secondary school, college, and beyond as the ultimate indicator of the statute's success in breaking down barriers against women in sports. In contrast, opponents contend that the Title IX regulations unfairly impose quotas on collegiate sports and force universities to cut men's teams in order to remain in compliance. Critics further argue that the decline in certain men's sports, such as wrestling, is a direct result of Title IX's emphasis on proportionality in men's and women's college sports

The debate over Title IX has escalated recently, partly in response to ED's decision in 2002 to appoint a commission to study Title IX and to recommend whether or not the athletics provisions should be revised. The Commission on Opportunity in Athletics delivered its final report to the Secretary of Education in 2003. In response, ED issued new guidance in 2003 and 2005 that clarifies Title IX policy and the use of the three-part test.

This CRS report provides an overview of Title IX in general and the intercollegiate athletics regulations in particular, as well as a summary of the Commission's report and ED's response and a discussion of recent legal challenges to the regulations and to the three-part test. For related reports, see CRS Report RS20460, *Title IX and Gender Bias in Sports: Frequently Asked Questions*, and CRS Report RS20710, *Title IX and Sex Discrimination in Education: An Overview*.

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Title IX, Sex Discrimination, and Intercollegiate Athletics: A Legal Overview

I. Introduction

Enacted over three decades ago, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in federally funded education programs or activities.¹ Although the Title IX regulations bar recipients of federal financial assistance from discriminating on the basis of sex in a wide range of educational programs or activities, such as student admissions, scholarships, and access to courses, the statute is perhaps best known for prohibiting sex discrimination in intercollegiate athletics.

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¹ 20 U.S.C. §§ 1681 et seq.

² June Kronholz, *College Coaches Press Bush on Title IX*, *The Wall Street Journal*, Aug. 27, 2002, at A4.

³ Erik Brady, *Major Changes Debated for Title IX*, *USA Today*, Dec. 18, 2002, at A1.

⁴ The Secretary of Education's Commission on Opportunity in Athletics, "*Open to All*": *Title IX at Thirty*, Feb. 28, 2003, [<http://www.ed.gov/pubs/titleixat30/index.html>].

⁵ Department of Education, *Further Clarification of Intercollegiate Athletics Policy* (continued...)

This CRS report provides an overview of Title IX in general and the intercollegiate athletics regulations in particular, as well as a summary of the Commission's report and ED's response and a discussion of recent legal challenges to the regulations and to the three-part test. For related reports, see CRS Report RS20460, *Title IX and Gender Bias in Sports: Frequently Asked Questions*, and CRS Report RS20710, *Title IX and Sex Discrimination in Education: An Overview*.

II. Title IX Background

Enacted in response to a growing concern regarding disparities in the educational experiences of male and female students, Title IX is designed to eliminate sex discrimination in education. Although Title IX prohibits a broad range of discriminatory actions, such as sexual harassment in elementary and secondary schools or discrimination against women in graduate school admissions, Title IX is perhaps best known for its role in barring discrimination against women in college sports. Indeed, when the Department of Health, Education, and Welfare (HEW), which was the predecessor agency of the Department of Education, issued policy guidance regarding Title IX and athletics, the agency specifically noted that participation rates for women in college sports "are far below those of men" and that "on most campuses, the primary problem confronting female athletes is the absence of a fair and adequate level of resources, services, and benefits."⁶

Federal law regarding Title IX intercollegiate athletics consists of three basic components: (1) the Title IX statute, which was enacted in the Education Amendments of 1972 and amended in the Education Amendments of 1974;⁷ (2) the Department of Education regulations, which were originally issued in 1975 by HEW;⁸ and (3) ED's policy guidance regarding Title IX athletics. The athletics policy guidance is primarily comprised of two documents: (1) a 1979 Policy Interpretation that established the controversial three-part test,⁹ and (2) a 1996 Clarification of the three-part test, which reinvigorated enforcement of Title IX in intercollegiate athletics.¹⁰ In addition, ED issued further clarifications in 2003 and 2005.¹¹ Despite the public attention generated by the three-part test, it is important to note that the test

⁵ (...continued)

Guidance Regarding Title IX Compliance (July 11, 2003) (hereinafter 2003 Clarification); Department of Education, Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test — Part Three (March 17, 2005) (hereinafter 2005 Clarification).

⁶ Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,419 (Dec. 11, 1979) (hereinafter 1979 Policy Interpretation).

⁷ P.L. 93-380.

⁸ 34 CFR Part 106.

⁹ 1979 Policy Interpretation, *supra* note 6, at 71,413.

¹⁰ Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) (hereinafter 1996 Clarification).

¹¹ 2003 Clarification, *supra* note 5; 2005 Clarification, *supra* note 5.

itself forms only a small part of the larger body of Title IX law. A general overview of the Title IX statute and regulations is provided below, while the athletics policy guidance and the legal debate surrounding Title IX and the three-part test are described in greater detail in subsequent sections.

In addition to this substantial body of Title IX law and policy, one other federal statute – the Equity in Athletics Disclosure Act¹² – also applies to intercollegiate athletics. Under this statute, colleges and universities are required to report statistical data, broken down by sex, on undergraduate enrollment and athletic participation and expenditures.

The Title IX Statute

Enacted over thirty years ago, the Title IX statute is designed to prevent sex discrimination by barring recipients of federal funds from discriminating in their education programs or activities. Specifically, the statute declares, “No person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,” subject to certain exceptions.¹³

The original Title IX legislation, which set forth the broad prohibition against sex discrimination but provided little detail about specific programs or activities, made no mention of college sports. However, the Education Amendments of 1974 directed HEW to issue Title IX implementing regulations “which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.”¹⁴ This provision was added after Congress eliminated a section that would have made revenue-producing sports exempt from Title IX.¹⁵

It is important to note that, under Title IX, the receipt of any amount of federal financial assistance is sufficient to trigger the broad nondiscrimination obligation embodied in the statute. This nondiscrimination obligation extends institution-wide to *all* education programs or activities operated by the recipient of the federal funds, even if some of the education programs or activities themselves are not funded with federal dollars.¹⁶ For example, virtually all colleges and universities in the United States are recipients of federal financial assistance because they receive some form of federal aid, such as scientific research grants or student tuition financed by federal loans. Once a particular school is deemed a recipient of federal financial assistance,

¹² 20 U.S.C. § 1092(g).

¹³ *Id.* at § 1681(a). Exceptions include admissions to elementary and secondary schools, educational institutions of religious organizations with contrary religious tenets, military training institutions, educational institutions that are traditionally single-sex, fraternities and sororities, certain voluntary youth service organizations such as the Girl or Boy Scouts, father-son or mother-daughter activities at educational institutions, and beauty pageants. *Id.*

¹⁴ P.L. 93-380 § 844.

¹⁵ 1979 Policy Interpretation, *supra* note 6, at 71,413.

¹⁶ Department of Justice, Civil Rights Division, Title IX Legal Manual 51 (Jan. 11, 2001), available at [<http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf>].

all of the education programs and activities that it operates are subject to Title IX. Thus, if a college or university receives federal assistance through its student financial aid program, its nondiscrimination obligation is not restricted solely to its student financial aid program, but rather the obligation extends to all of the education programs or activities conducted by the institution, including athletics and other programs that do not receive federal funds. The provision regarding receipt of federal funds, therefore, is the primary mechanism for compelling institutions to comply with Title IX in their athletic programs.¹⁷

The Title IX Regulations

Because Title IX's prohibition against sex discrimination extends to all education programs or activities operated by recipients of federal funds, the scope of Title IX is quite broad. While the statute lays out only the general prohibition against sex discrimination, the implementing regulations specify the wide range of education programs or activities affected. Indeed, the regulations bar recipients from discriminating on the basis of sex in: student admissions, recruitment, scholarship awards and tuition assistance, housing, access to courses and other academic offerings, counseling, financial assistance, employment assistance to students, health and insurance benefits and services, athletics, and all aspects of education-related employment, including recruitment, hiring, promotion, tenure, demotion, transfer, layoff, termination, compensation, benefits, job assignments and classifications, leave, and training.¹⁸

Despite the wide array of programs and activities subject to Title IX, it is the provisions on athletics that have generated the bulk of public attention and controversy in recent years. Under the Title IX regulations, recipients of federal financial assistance are prohibited from discriminating on the basis of sex in their sports programs. Specifically, the regulations declare, "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient."¹⁹ In addition, recipients are barred from providing athletics separately on the basis of sex, except under certain circumstances, such as when team selection is based on

¹⁷ For a brief period from 1984 to 1988, Title IX enforcement in college athletics was suspended as a result of a Supreme Court ruling that Title IX was "program-specific," meaning that the statute's requirements applied only to education programs that received federal funds and not to an institution's programs as a whole. *Grove City College v. Bell*, 465 U.S. 555, 574 (1984). Because few university athletic programs receive federal dollars, college sports were essentially exempt from Title IX coverage after this decision. In the Civil Rights Restoration Act of 1987 (P.L. 100-259), however, Congress overrode the Supreme Court's interpretation of Title IX by passing legislation to clarify that Title IX's requirements apply institution-wide and are not program-specific, thus reinstating Title IX's coverage of athletics. 20 U.S.C. § 1687.

¹⁸ 34 CFR §§ 106.31-106.56.

¹⁹ *Id.* at § 106.41(a).

competitive skill or the activity is a contact sport.²⁰ Finally, the regulations require institutions that provide athletic scholarships to make such awards available in proportion to the numbers of male and female students participating in intercollegiate athletics.²¹

An important principle embodied in the Title IX regulations on athletics is the principle of equal opportunity. Under the regulations, recipients such as colleges and universities must “provide equal athletic opportunity for members of both sexes.”²² When evaluating whether equal opportunities are available, the Department of Education (ED) examines, among other factors, the provision of equipment and supplies, scheduling of games and practice time, travel and per diem allowance, opportunity to receive coaching and academic tutoring, assignment and compensation of coaches and tutors, provision of locker rooms and practice and competitive facilities, provision of medical training facilities and services, provision of housing and dining facilities and services, and publicity.²³ In addition, ED considers “whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”²⁴ In order to measure compliance with this last factor, ED established the three-part test that has been challenged by opponents of existing Title IX policy.

To clarify how to comply with the intercollegiate athletics requirements contained in the Title IX regulations, ED issued a Policy Interpretation in 1979²⁵ and a subsequent Clarification of this guidance in 1996.²⁶ Combined, these two documents form the substantive basis of the policy guidance on the three-part test, which has generated the bulk of the questions and concerns surrounding Title IX and intercollegiate athletics. ED also issued a further clarification in 2003, but this document made only minor alterations to the 1979 Policy Interpretation and the 1996 Clarification.²⁷ In addition, ED recently yet another clarification that established a new way in which colleges may demonstrate compliance with the interest test prong of the three-part test.²⁸ These guidance documents are discussed in greater detail in the section below.

²⁰ *Id.* at §106.41(b). Under the regulations, contact sports are defined to include boxing, wrestling, rugby, ice hockey, football, and basketball.

²¹ *Id.* at § 106.37(c).

²² *Id.* at § 106.41(c).

²³ *Id.*

²⁴ *Id.*

²⁵ 1979 Policy Interpretation, *supra* note 6.

²⁶ 1996 Clarification, *supra* note 10.

²⁷ 2003 Clarification, *supra* note 5.

²⁸ 2005 Clarification, *supra* note 5.

III. Intercollegiate Athletics and the Policy Guidance

As noted above, ED has set forth its interpretation of the intercollegiate athletics provisions of the Title IX statute and implementing regulations in two documents: the 1979 Policy Interpretation and the subsequent 1996 Clarification. These two documents, which remain in force, were designed to provide guidance to colleges and universities regarding how to achieve Title IX compliance by providing equal opportunity in their intercollegiate athletic programs. To that end, both of the guidance documents discuss the factors that ED considers when enforcing Title IX.²⁹

Under the 1979 Policy Interpretation, HEW established three different standards to ensure equal opportunity in intercollegiate athletics.³⁰ First, with regard to athletic scholarships, the compliance standard is that such aid “should be available on a substantially proportional basis to the number of male and female participants in the institution’s athletic program.”³¹ Second, HEW established a standard that male and female athletes should receive “equivalent treatment, benefits, and opportunities” in the following areas: 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 practice and competitive facilities, medical and training facilities, housing and dining facilities, publicity, recruitment, and support services.³² Finally, in terms of meeting the regulatory requirement to address the interests and abilities of male and female students alike, the compliance standard is that such interests and abilities must be equally effectively accommodated.³³

In order to determine compliance with the latter accommodation standard, ED considers three additional factors: (1) the determination of athletic interests and abilities of students, (2) the selection of sports offered,³⁴ and (3) the levels of

²⁹ 1979 Policy Interpretation, *supra* note 6; 1996 Clarification, *supra* note 10.

³⁰ Although the Policy Interpretation focuses on formal intercollegiate athletic programs, its requirements also apply to club, intramural, and interscholastic athletics. 1979 Policy Interpretation, *supra* note 6.

³¹ *Id.* at 71,414. This requirement, however, does not mean that schools must provide a proportional number of scholarships or that all individual scholarships must be of equal value; the only requirement is that the overall amount spent on scholarship aid must be proportional. *Id.* at 71,415.

³² *Id.* Such benefits, opportunities, and treatment need not be identical, and even a finding of nonequivalence can be justified by a showing of legitimate nondiscriminatory factors. According to the Policy Interpretation, “some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities.” The Policy Interpretation specifically cites football as an example of such a sport. *Id.* at 71,415-16.

³³ *Id.* at 71,414.

³⁴ According to the Policy Interpretation, “the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a

(continued...)

competition available, including the opportunity for team competition.³⁵ It is the criteria used to assess this third and final factor that form the basis of the three-part test. The three-part test, the debate over the test and its proportionality requirement, ED's Title IX review commission, and ED's response to the Commission's report are discussed in detail below.

The Three-Part Test

Under the Policy Interpretation, in accommodating the interests and abilities of athletes of both sexes, institutions must provide the opportunity for male and female athletes to participate in competitive sports. ED measures an institution's compliance with this requirement through one of the following three methods:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion, which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.³⁶

These three methods for determining whether institutions are complying with the Title IX requirement to provide nondiscriminatory participation opportunities for both male and female athletes have come to be referred to as the three-part test. In its 1996 Clarification, which addresses only the three-part test, ED provides additional guidance for institutions seeking to comply with Title IX.

According to the 1996 Clarification, an institution must meet only one part of the three-part test in order to prove its compliance with the nondiscrimination requirement.³⁷ Thus, institutions may prove compliance by meeting: (1) the proportionality test, which measures whether the ratio of male and female athletes is substantially proportional to the ratio of male and female students at the institution, (2) the expansion test, which measures whether an institution has a history and continuing practice of expanding athletic opportunities for the underrepresented sex, or (3) the interests test, which measures whether an institution is accommodating the athletic interests of the underrepresented sex.³⁸

³⁴ (...continued)

separate team for the previously excluded sex." *Id.* at 71,417-18.

³⁵ *Id.* at 71,417.

³⁶ *Id.* at 71,418.

³⁷ 1996 Clarification, *supra* note 10.

³⁸ Dear Colleague Letter from the Department of Education's Office for Civil Rights (continued...)

In addition, the 1996 Clarification reiterates that ED examines many other factors beyond those set forth in the three-part test when it evaluates an institution's Title IX athletics compliance.³⁹ The 1996 Clarification also provides a more detailed examination of the factors that ED considers under each of the three tests, as well as examples illustrating how the various factors affect a finding of compliance or noncompliance.⁴⁰

The 2003 Clarification and the 2005 Clarification, which provide additional guidance regarding the three-part test, are discussed separately below.

The Proportionality Test and the Current Controversy

The first prong of the three-part test – the proportionality test – is the most controversial. Indeed, critics contend that proportionality amounts to an unfair system of quotas. Because women's enrollment in postsecondary schools has increased dramatically in the decades since Title IX was enacted, rising 30 percent from 1981 to 1999,⁴¹ critics argue that proportionality results in reverse discrimination, forcing schools to cut existing men's teams in order to create new slots for women.⁴²

Proponents of proportionality respond that Title IX does not require quotas because schools that cannot demonstrate proportionality can still comply with Title IX if they pass one of the two remaining parts of the three-part test. Supporters also reject the notion that Title IX forces schools to eliminate men's teams, arguing that costly men's sports like football are to blame for cuts in less popular sports for both men and women. In addition, supporters note that instead of cutting men's sports, schools can achieve proportionality by adding women's teams.⁴³

Critics counter that even though the three-part test offers an alternative to the proportionality approach in theory, in reality, maintaining proportionality is the only sure way to avoid a lawsuit. Furthermore, say critics, even though schools can technically comply with the proportionality standard by adding women's teams, budget realities often force institutions to cut men's teams instead. Proponents, however, respond that the vast majority of schools that add women's teams do not eliminate men's teams. Changing the proportionality test, say proponents, would be

³⁸ (...continued)
regarding the Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), *available at* [<http://www.ed.gov/offices/OCR/docs/clarific.html>] (hereinafter Dear Colleague Letter).

³⁹ 1996 Clarification, *supra* note 10.

⁴⁰ *Id.*

⁴¹ General Accounting Office, Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams 8 (March 2001).

⁴² Brady, *supra* note 3.

⁴³ *Id.*

tantamount to repealing a law that is widely credited for dramatically increasing women's interest, participation, and success in sports.⁴⁴

In 2001, the General Accounting Office (GAO) released a study of intercollegiate athletics. The GAO report included the following findings:

- “The number of women participating in intercollegiate athletics at 4-year colleges and universities increased substantially—from 90,000 to 163,000—between school years 1981-82 and 1998-99, while the number of men participating increased more modestly—from 220,000 to 232,000.”⁴⁵
- “Women’s athletic participation grew at more than twice the rate of their growth in undergraduate enrollment, while men’s participation more closely matched their growth in undergraduate enrollment.”⁴⁶
- “The total number of women’s teams increased from 5,595 to 9,479, a gain of 3,784 teams, compared to an increase from 9,113 to 9,149 teams for men, a gain of 36 teams.”⁴⁷
- “Several women’s sports and more than a dozen men’s sports experienced net decreases in the number of teams. For women, the largest net decreases in the number of teams occurred in gymnastics; for men, the largest decreases were in wrestling.”⁴⁸
- In men’s sports, “the greatest increase in numbers of participants occurred in football, with about 7,200 more players. Football also had the greatest number of participants—approximately 60,000, or about twice as many as the next largest sport. Wrestling experienced the largest decrease in participation—a drop of more than 2,600 participants.”⁴⁹
- “In all, 963 schools added teams and 307 discontinued teams since 1992-93. Most were able to add teams—usually women’s teams—without discontinuing any teams.”⁵⁰
- “Among the colleges and universities that added a women’s team, the two factors cited most often as greatly influencing the decision

⁴⁴ *Id.*

⁴⁵ General Accounting Office, *Intercollegiate Athletics: Four-Year Colleges’ Experiences Adding and Discontinuing Teams 4* (March 2001).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 10.

⁵⁰ *Id.* at 5.

were the need to address student interest in particular sports and the need to meet gender equity goals or requirements. Similarly, schools that discontinued a men's team cited a lack of student interest and gender equity concerns as the factors greatly influencing their decision, as well as the need to reallocate the athletic budget to other sports."⁵¹

ED's Interpretation of the Title IX Proportionality Test.

Until recently, when ED appointed a commission to study changes in Title IX athletics policy, the agency had historically favored the proportionality approach. Among the factors that ED considers under the proportionality test are the number of participation opportunities provided to athletes of both sexes. According to ED, "as a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants."⁵² ED next determines whether these participation opportunities are substantially proportionate to the ratio of male and female students enrolled at the institution, but, for reasons of flexibility, ED does not require exact proportionality.⁵³

According to the 1996 Clarification, the proportionality test acts as a safe harbor. In other words, if an institution can demonstrate proportional athletic opportunities for women, then the institution will automatically be found to be in compliance.⁵⁴ If, however, an institution cannot prove proportionality, then the institution can still establish compliance by demonstrating that the imbalance does not reflect discrimination because the institution either (1) has a demonstrated history and continuing practice of expanding women's sports opportunities (prong two) or (2) has fully and effectively accommodated the athletic interests of women (prong three).

In its 2003 Clarification, ED specifically addressed the "safe harbor" language in the 1996 guidance. Noting that the "safe harbor" phrase had led many schools to believe erroneously that achieving compliance with Title IX could be guaranteed by meeting the proportionality test only, ED reiterated that "each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored."⁵⁵

Finally, the 1996 Clarification explicitly declares that "nothing in the three-part test requires an institution to eliminate participation opportunities for men" and challenges the notion that the three-part test requires quotas.⁵⁶ Rather, the 1996 Clarification states that "the three-part test gives institutions flexibility and control

⁵¹ *Id.*

⁵² 1996 Clarification, *supra* note 10.

⁵³ *Id.*

⁵⁴ Dear Colleague Letter, *supra* note 38.

⁵⁵ 2003 Clarification, *supra* note 5.

⁵⁶ 1996 Clarification, *supra* note 10.

over their athletic programs.”⁵⁷ Furthermore, the 1996 Clarification notes that the Policy Interpretation in general and the three-part test in particular have been upheld by every court that has reviewed the guidance documents.⁵⁸

The Title IX Review Commission

Although ED has enforced its Title IX policy, including the three-part test and its proportionality standard, virtually unchanged since shortly after the statute was enacted three decades ago, the agency recently considered whether or not to alter its athletics policy. To that end, ED appointed the Commission on Opportunity in Athletics in June 2002 to review Title IX and to recommend changes if warranted. The commission, which held a series of meetings around the country to discuss problems with and improvements to Title IX, issued its final report containing findings and recommendations in February 2003.⁵⁹

In its report, the Commission noted that it “found strong and broad support for the original intent of Title IX, coupled with a great deal of debate over how the law should be enforced,” but that “more needs to be done to create opportunities for women and girls and retain opportunities for boys and men.”⁶⁰ Ultimately, the final report contained 23 recommendations for strengthening Title IX, including 15 recommendations that were adopted unanimously. When the Commission issued its final report, however, two dissenting members of the panel refused to sign the document and instead issued a minority report in which they withdrew their support for two of the unanimous recommendations and raised concerns about several other unanimous recommendations.⁶¹ The Secretary of Education indicated that he intended to consider changes only with respect to the unanimous recommendations of the Commission.

Among the unanimous recommendations of the Commission are suggestions that ED: (1) reaffirm its commitment to eliminating discrimination; (2) clarify its guidance and promote consistency in enforcement; (3) avoid making changes to Title IX that undermine enforcement; (4) clarify that cutting teams in order to achieve compliance is a disfavored practice; (5) enforce Title IX aggressively by implementing sanctions against violators; (6) promote student interest in athletics at elementary and secondary schools; (7) support amendments to the Equity in Athletics Disclosure Act that would improve athletic reporting requirements; (8) disseminate information on the criteria it uses to help schools determine whether activities that they offer qualify as athletic opportunities; (9) encourage the National Collegiate

⁵⁷ *Id.*

⁵⁸ Dear Colleague Letter, *supra* note 38. For a brief review of significant Title IX court decisions, as well as a discussion of a current legal challenge to Title IX by the National Wrestling Coaches Association, see the “Title IX and the Courts” section below.

⁵⁹ The Secretary of Education’s Commission on Opportunity in Athletics, “*Open to All*”: *Title IX at Thirty*, Feb. 28, 2003, [<http://www.ed.gov/pubs/titleixat30/index.html>].

⁶⁰ *Id.* at 4, 21.

⁶¹ Donna de Varona and Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 2003, [<http://www.nwlc.org/pdf/MinorityReportFeb26.pdf>].

Athletic Association to review its scholarship and other guidelines; (10) advise schools that walk-on opportunities are not limited for schools that comply with the second or third prong of the three-part test; (11) examine the prospect of allowing institutions to demonstrate compliance with the third prong of the three-part test by comparing the ratio of male and female athletic participation with the demonstrated interests and abilities shown by regional, state, or national youth or high school participation rates or by interest levels indicated in student surveys; (12) abandon the "safe harbor" designation for the proportionality test in favor of treating each of the three tests equally; and (13) consider revising the second prong of the three-part test, possibly by designating a point at which a school can no longer establish compliance through this part.⁶²

The Commission originally adopted an additional two recommendations unanimously, but the two dissenting members of the panel withdrew their support for these recommendations upon further opportunity for review of the final report. These contested recommendations suggest that ED: (1) clarify the meaning of "substantial proportionality" to allow for a reasonable variance in the ratio of men's and women's athletic participation; and (2) explore additional ways of demonstrating equity beyond the three-part test.⁶³

Other recommendations that the Commission adopted by a majority, but not unanimous, vote included suggestions that ED: (1) adopt any future changes to Title IX through the normal federal rulemaking process; (2) encourage the reduction of excessive expenditures in intercollegiate athletics, possibly by exploring an antitrust exemption for college sports; (3) inform universities about the current requirements governing private funding of certain sports; (4) reexamine its requirements governing private funding of certain sports to allow such funding of sports that would otherwise be cut; (5) allow schools to comply with the proportionality test by counting the available slots on sports teams rather than actual participants; (6) for purposes of the proportionality test, exclude from the participation count walk-on athletes, who are non-scholarship players that tend to be male; (7) allow schools to conduct interest surveys to demonstrate compliance with the three-part test; and (8) for purposes of the proportionality test, exclude nontraditional students, who tend to be female, from the count of enrolled students. In addition, the Commission was evenly divided on a recommendation that would allow schools to meet the proportionality test if athletic participation rates were 50 percent male and 50 percent female, with a variance of two to three percentage points allowed.⁶⁴

⁶² The Secretary of Education's Commission on Opportunity in Athletics, *"Open to All": Title IX at Thirty*, Feb. 28, 2003, 33-40, [<http://www.ed.gov/pubs/titleixat30/index.html>].

⁶³ Donna de Varona and Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 2003, [<http://www.nwlc.org/pdf/MinorityReportFeb26.pdf>].

⁶⁴ The Secretary of Education's Commission on Opportunity in Athletics, *"Open to All": Title IX at Thirty*, Feb. 28, 2003, 33-40, [<http://www.ed.gov/pubs/titleixat30/index.html>].

ED's Response to the Title IX Commission: The 2003 and 2005 Clarifications

In response to the Commission's report, ED indicated that it would study the recommendations and consider whether or not to revise its Title IX athletics policy.⁶⁵ Several months later, ED issued new guidance that essentially left the existing Title IX policy unchanged. In its 2003 Clarification, which provided further guidance regarding Title IX policy and the three-part test, ED reiterates that all three prongs of the three-part test have been and can be used to demonstrate compliance with Title IX, and the agency encourages schools to use the approach that best suits its needs. In addition, the 2003 Clarification declares that complying with Title IX does not require schools to cut teams and that eliminating teams is a disfavored practice. The 2003 Clarification also notes that ED expects both to provide technical assistance to schools and to aggressively enforce Title IX. Finally, the guidance indicates that ED will continue to allow private sponsorship of athletic teams.⁶⁶

In 2005, ED issued yet another clarification of the three-part test.⁶⁷ In the 2005 Clarification, ED provided additional guidance with respect to part three of the three-part test. Under that test, known as the interests test, an institution may demonstrate compliance with Title IX by establishing that it is accommodating the athletic interests of the underrepresented sex. The new guidance clarifies that one of the ways in which schools may demonstrate compliance with the interests test is by using an online survey to establish that the underrepresented sex has no unmet interests in athletic participation. Such a survey must be administered periodically to all students that are members of the underrepresented sex, and students must be informed that a failure to respond to the survey will be viewed as an indication of a lack of interest. As a result, the survey must be administered in a way designed to generate high response rates.

The 2005 Clarification emphasizes that schools have flexibility to demonstrate compliance under any one part of the three-part test and that schools who choose to demonstrate compliance through the interests test have the option to do so in several ways. Among the factors that ED considers when determining whether the school has accurately measured student interest are: surveys, requests for the addition of a varsity team, participation in club or intramural sports, participation rates in local high schools and athletic organizations, and intercollegiate participation rates in the school's region. Even if a school's population of the underrepresented sex is found to have an unmet interest in sports, the institution will not be found to have violated Title IX unless ED also finds that there is sufficient ability to sustain a team and a

⁶⁵ ED also recently proposed to amend the Title IX regulations in order to encourage single-sex classes and schools. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,276 (March 9, 2004). *See also*, Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102 (May 8, 2002); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31,098 (May 8, 2002).

⁶⁶ 2003 Clarification, *supra* note 5.

⁶⁷ 2005 Clarification, *supra* note 5.

reasonable expectation of intercollegiate competition in the sport within the school's normal competitive region.⁶⁸

IV. Title IX and the Courts

Over the years, the Supreme Court has heard several cases pertaining to Title IX. Until a recent decision in 2005, none of these cases involved college or high school sports, but they did help to shape the legal landscape surrounding Title IX athletics policy. For example, in 1979, the Supreme Court held that Title IX includes a private right of action.⁶⁹ This decision strengthened Title IX enforcement because it means that an individual can sue in court for violations under the statute rather than wait for ED to pursue a complaint administratively. The Court further strengthened Title IX enforcement in 1992, when it ruled that individuals could sue for money damages in a Title IX lawsuit.⁷⁰ Finally, in a decision that was later overturned by Congress, the Court ruled that Title IX did not apply to an entire educational institution but rather applied only to the portion of the institution that received federal funds.⁷¹

In 2005, the Court handed down its decision in *Jackson v. Birmingham Board of Education*.⁷² In this case, which involved a girl's basketball coach who claimed that he was removed from his coaching position in retaliation for his complaints about unequal treatment of the girl's team, the Court held that Title IX not only encompasses retaliation claims, but also is available to individuals who complain about sex discrimination, even if such individuals themselves are not the direct victims of sex discrimination.⁷³ Reasoning that "Title IX's enforcement scheme would unravel" "if retaliation went unpunished,"⁷⁴ the Court concluded that "when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional discrimination on the basis of sex in violation of Title IX."⁷⁵

Although the Supreme Court has decided only one case that directly involves Title IX athletics, the lower federal courts have heard multiple challenges to the statute and regulations. In fact, all of the federal courts of appeals that have considered the athletics Policy Interpretation, the three-part test, and the

⁶⁸ *Id.*

⁶⁹ *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

⁷⁰ *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

⁷¹ *Grove City College v. Bell*, 465 U.S. 555 (1984). *See also supra* notes 16-17 and accompanying text.

⁷² 125 S.Ct. 1497 (2005).

⁷³ *Id.* at 1502.

⁷⁴ *Id.* at 1508.

⁷⁵ *Id.* at 1504 [internal quotations omitted].

proportionality rule have upheld ED's Title IX regulations and policy.⁷⁶ In general, these courts have noted that the regulations and guidance represent a reasonable agency interpretation of Title IX, and they have ruled that the three-part test does not unfairly impose quotas because institutions may select from two other methods besides proportionality in order to comply with Title IX. Indeed, in 1993, the First Circuit reached this conclusion in *Cohen v. Brown University*, a landmark Title IX case that was the first federal appeals court decision regarding Title IX athletics.⁷⁷ This section provides a brief summary of the *Cohen* decision, as well as a description of the National Wrestling Coaches Association lawsuit, which was recently dismissed.

Cohen v. Brown University

In the *Cohen* case, female athletes at Brown University sued under Title IX when the school eliminated two women's sports – gymnastics and volleyball – and two male teams – golf and water polo – in a cost-cutting measure.⁷⁸ Although the cuts made far larger reductions in the women's athletic budget than in the men's, the cuts did not affect the ratio of male to female athletes, which remained roughly 63 percent male to 37 percent female, despite a student body that was approximately 52 percent male and 48 percent female.⁷⁹ In their lawsuit, the members of the women's gymnastics and volleyball teams “charged that Brown's athletic arrangements violated Title IX's ban on gender-based discrimination.”⁸⁰ When the district court ordered the university to reinstate the two women's team pending a full trial on the merits, Brown appealed by challenging the validity of both the Title IX guidance in general and the three-part test in particular. The First Circuit, however, affirmed the district court's decision in favor of the female athletes.⁸¹

In reaching its decision to uphold the validity of the three-part test, the First Circuit emphasized that ED's interpretation of Title IX warranted deference. According to the court, “the degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards

⁷⁶ See, e.g., *Chalenor v. Univ. of North Dakota*, 291 F.3d 1042 (8th Cir. 2002); *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Neal v. Bd. of Trustees*, 198 F.3d 763 (9th Cir. 1999); *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Bd. of Trustees*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128; *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3^d Cir. 1993); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004; *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (hereinafter *Cohen I*). In addition, in a second appeal on a separate issue in the *Cohen* case, the First Circuit strongly reiterated its previous ruling upholding Title IX. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (hereinafter *Cohen II*).

⁷⁷ 991 F.2d 888, 891 (1st Cir. 1993).

⁷⁸ *Id.* at 892.

⁷⁹ *Id.*

⁸⁰ *Id.* at 893.

⁸¹ *Id.* at 891.

for athletic programs under Title IX.”⁸² Thus, the court adopted ED’s three-part test as an acceptable standard by which to measure an institution’s compliance with Title IX, as have all other appeals courts to subsequently consider the issue.⁸³

Next, the court in *Cohen* turned to the question of whether the university had met any one part of the three-part test. Because there was a large disparity between the proportion of women at Brown who were students versus the proportion who were athletes and because the university had not demonstrated a history of expanding women’s sports, the court focused its inquiry on whether or not Brown had met part three of the test by effectively accommodating student interest. The university argued that when measuring interest under this standard, the relative athletic interests of male and female students should be the proper point of comparison rather than the relative enrollment of male and female students.⁸⁴ In effect, Brown argued that its female students were less interested in sports than its male students and that its Title IX compliance should thus be measured by this standard.

Under ED’s construction of the accommodation test, however, institutions must ensure participation opportunities where there is “sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.”⁸⁵ Noting that this standard does not require institutions to provide additional athletic opportunities every time female students express interest, the court upheld the district court’s finding that the existence and success of women’s gymnastics and volleyball at Brown demonstrated that there was sufficient interest in and expectation of competition in those sports to rule in favor of the female athletes with regard to the third prong of the three-part test.⁸⁶ In a subsequent appeal in the *Cohen* case, the court explicitly noted that Brown’s view of the accommodation test, which seems to assume that women are naturally less interested in sports than men, reflects invidious gender stereotypes and could potentially freeze in place any existing disparity in athletic participation.⁸⁷

⁸² *Id.* at 895.

⁸³ See, e.g., *Chalenor v. Univ. of North Dakota*, 291 F.3d 1042 (8th Cir. 2002); *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Neal v. Bd. of Trustees*, 198 F.3d 763 (9th Cir. 1999); *Horner v. Kentucky High Sch. Athletic Ass’n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Bd. of Trustees*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128; *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3^d Cir. 1993); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004; *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (*Cohen I*). In addition, in a second appeal on a separate issue in the *Cohen* case, the First Circuit strongly reiterated its previous ruling upholding Title IX. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (*Cohen II*).

⁸⁴ *Cohen I*, 991 F.2d at 899.

⁸⁵ 1979 Policy Interpretation, *supra* note 6, at 71,418.

⁸⁶ *Cohen I*, 991 F.2d at 904.

⁸⁷ *Cohen II*, 101 F.3d 155, 176.

Finally, the court rejected the university's constitutional challenge, ruling that Title IX does not violate the Equal Protection clause of the Fourteenth Amendment.⁸⁸ In a subsequent appeal in the *Cohen* case, the court emphasized this point:

No aspect of the Title IX regime at issue in this case – inclusive of the statute, the relevant regulation, and the pertinent agency documents – mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.... Race- and gender-conscious remedies are both appropriate and constitutionally permissible under a federal anti-discrimination regime, although such remedial measures are still subject to equal protection review.⁸⁹

The National Wrestling Coaches Association Lawsuit

Meanwhile, disturbed by the decline in the number of men's wrestling teams at colleges and universities across the country, the National Wrestling Coaches Association (NWCA), together with former wrestling teams at several institutions, filed a lawsuit against ED in 2002, arguing that the Title IX regulations were adopted illegally and that Title IX unfairly discriminates against men.⁹⁰ In the lawsuit, the NWCA argued (1) that ED's establishment of the Title IX regulations and policy guidance was procedurally defective, (2) that ED exceeded its authority under the Title IX statute when enacting those regulations and guidance, and (3) that ED's regulations and guidance discriminate against male athletes, thereby violating the Title IX statute and the Equal Protection clause of the Fourteenth Amendment.⁹¹

In response to the lawsuit, ED, backed by the Bush Administration, moved to dismiss the case on the grounds that (1) the plaintiffs lacked standing to bring the case; (2) judicial review was unauthorized under the circumstances of this particular case; and (3) the suit was barred by the statute of limitations.⁹² The National Women's Law Center (NWLC) filed an amicus brief in support of ED, arguing that the suit was improper because there was no guarantee that institutions would reinstate men's sports teams even if the Title IX regulations and policy were changed. The NWLC further observed that arguments similar to those made in the NWCA lawsuit had been rejected by every federal appeals court to consider the issue of Title IX.⁹³ Ultimately, the NWCA lawsuit was dismissed from federal court on the grounds that

⁸⁸ *Cohen I*, 991 F.2d at 900-01.

⁸⁹ *Cohen II*, 101 F.3d at 170, 172.

⁹⁰ Lori Nickel and Nahal Toosi, *Title IX is Taken To Task*, Milwaukee Journal Sentinel, Jan. 17, 2002 at C1.

⁹¹ Complaint for Declaratory and Injunctive Relief, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., Civil Action No. 1:02CV00072-EGS, available at [<http://www.nwcaonline.com>].

⁹² Defendant's Motion to Dismiss, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., Civil Action No. 1:02CV00072-EGS, available at [<http://www.ed.gov/PressReleases/05-2002/wrestling.dismiss.mem.fin.pdf>].

⁹³ Brief of Amici Curiae, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., Civil action No. 1:02CV00072-EGS, available at [<http://www.nwlc.org/pdf/amicusbrief.final.pdf>].

the plaintiffs lacked the proper standing to bring the case,⁹⁴ and the dismissal was recently affirmed by an appeals court.⁹⁵

Given the results in the NWCA case and in other Title IX cases brought before the federal courts of appeals, it seems likely that the courts will continue to defer to ED with regard to Title IX athletics policy in the near future. As noted above, ED has indicated that it intends to continue to use the three-part test to enforce Title IX. Although Congress could, if it disapproves of ED's Title IX athletics policy, respond with legislation to override the current regulations and guidance, it appears that congressional support for Title IX remains high. For example, before ED announced that it was not altering existing Title IX policy, at least four members of the 108th Congress introduced legislation anticipating changes in Title IX.⁹⁶ Given this evidence of congressional support for Title IX and absent action by the courts or ED, it appears likely that the Title IX athletics policy will remain unchanged for the near future.

⁹⁴ Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 263 F. Supp. 2d 82, at 129-30 (D.D.C. June 11, 2003).

⁹⁵ Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 361 U.S. App. D.C. 257 (D.C. Cir. May 14, 2004).

⁹⁶ See H. Res. 137, S. Res. 40, S. Res. 153, and S. 282. Currently, no legislation specifically relating to Title IX has been introduced in the 109th Congress.

The Controversy over the Additional Clarification

"New Policy Clarifies Title IX Rules for Colleges; Women's Group Objects," Welch Suggs, *Chronicle for Higher Education*, April 1, 2005

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From the issue dated April 1, 2005

New Policy Clarifies Title IX Rules for Colleges; Women's Group Objects

By WELCH SUGGS

Washington

Title IX rules just got a little simpler for some college athletics departments, thanks to a policy clarification issued this month by the U.S. Department of Education. Whether the rules mean that colleges will not have to add more women's teams is being hotly debated.

Women's advocates are furious about the new document, a clarification of regulations issued under Title IX of the Education Amendments of 1972, the law banning sex discrimination at institutions receiving federal funds. It places the burden of proof on students and government investigators, rather than on a college, to show that women's athletics interests and abilities are not being accommodated. And it says that all colleges have to do to determine demand is to send out a survey by e-mail.

But the department insisted that the clarification was in line with previous statements of policy, and a Clinton-era department official agreed.

In athletics, colleges comply with Title IX by offering scholarships, program benefits like locker rooms and coaching, and opportunities to participate. Since 1979, the department has used a three-part test to determine whether women have enough opportunities to play sports.

Under that test, colleges may choose any one of these criteria to meet:

- Having the proportion of athletes who are women the same as the proportion of students who are women.
- Having a history and continuing practice of expanding programs for women.
- Being able to demonstrate that the women's sports program fully and effectively accommodates the interests of female students and potential students.

The third part of the test is in some ways the toughest to meet. In a 1993 decision in a case involving Brown University, a three-judge panel of the U.S. Court of Appeals for the First Circuit ruled that complying with the third option did not mean accommodating women's interests and ability to the same degree as men's. Rather, the court said, it meant completely accommodating them.

"If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this part of the test," wrote Judge Bruce M. Selya in the court's opinion, which Brown unsuccessfully appealed to the U.S. Supreme Court.

A 1996 policy clarification by the Education Department underscored the appeals court's ruling, noting

that if a college had women who were interested in a particular sport, talented enough to sustain a team in that sport, and had a reasonable expectation of competition, a college had to start a team if it wanted to comply with the third part of the test. The department said it would assess the interests of not only enrolled students but also of high-school students in the college's recruiting region, members of amateur-athletics associations, and community sports leagues.

Shifting the Burden

The new clarification flipped that measure around. An institution will be found in compliance, it said, unless a women's sport existed "for which all three of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region."

"In this analysis, the burden of proof is on [the department's Office for Civil Rights] or on students to show by a preponderance of the evidence that the institution is not in compliance with part three," according to the clarification.

Further, all a college has to do to judge demand for sports is to send a periodic survey to all its students, or at least to all female undergraduates. The department is offering a model survey on its Web site.

The National Women's Law Center strongly criticized the clarification, saying that it was a substantial rollback of the department's policy.

"The survey is inherently flawed because it presumes a survey alone can accurately measure student interests," the law center said in a written statement last week. "The guidance does not require schools to look at other factors they once had to consider, such as coaches' and administrators' opinions or women's participation in sports in surrounding high schools or recreational leagues."

Weakening Title IX

Neena K. Chaudhry, senior counsel for the law center, noted that the department had considered major revisions in Title IX proposed by the 2003 Secretary's Commission on Opportunity in Athletics. "We certainly see it as a further attempt to weaken Title IX," she said. "There were attempts to do that via the commission, and the administration pulled back because of the public outcry."

Susan M. Aspey, a spokeswoman for the department, said the clarification wasn't a big enough change from previous regulations to warrant sending it out for comment.

"One would be hard pressed to explain how providing additional information to help schools to provide equal opportunity for all is, to use their word, underhanded," she said, referring to the center's statement.

Institutions also can still use either of the other parts of the test, she said, but the department had no plans to issue further clarifications on those.

Arthur L. Coleman, who served as deputy assistant secretary for civil rights in the department under President Clinton and helped write the 1996 clarification, agreed with Ms. Aspey's assessment.

"Broadly speaking, this tracks precisely with what OCR put out in 96 in terms of its clarification," said Mr. Coleman, now a lawyer with the Washington office of Holland & Knight. "The material shift here is

less one about substantive legal standards than issues of evidence, and how OCR will address issues in the middle of an investigation."

While the new policy explicitly shifts the burden of proving discrimination to the civil-rights office or people who complain about it, said Mr. Coleman, that was always the way investigations worked. The new policy streamlines the process for assessing and proving compliance with the law, he said.

The policy points out that even if a survey does not find sufficient interest and ability in a sport to justify adding a team, "direct and persuasive interest" shown in other ways -- such as having a high-quality club team or intramural program in a sport -- could force a college to add a team.

Mr. Coleman also pointed out that the clarification says colleges ought to survey not just women, but also men. If a college could show that a demand existed for a men's sport, and it could prove that women's interests were being fully and effectively accommodated, then it would be free to add the men's sport.

Many colleges have cut back on men's sports to comply with the first part of the three-part test, and advocates of those sports said the policy clarification could stem the bleeding.

"This is a positive step forward," said Eric Pearson, executive director of the College Sports Council, a public-interest group that has sued for changes in the law. "It fills in some gaps in the third test. It was a little mushy before, but this gives more concrete example for universities to follow."

The new policy is on the Education Department's Web site (<http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html>).

<http://chronicle.com>

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Volume 51, Issue 30, Page A47

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The Controversy over the Additional Clarification

"Women's Groups against Title IX Changes," Shannon Blosser, The John W. Pope Center for Higher Education, April 22, 2005

News

Women's groups against Title IX changes

Want Congress to act on clarification

By

April 22, 2005

CHAPEL HILL — A group of female college administrators has begun a grassroots effort to overturn a recent Title IX clarification that makes it easier for college and universities to comply with Title IX regulations regarding athletics.

According to *NCAA News*, the National Association of Collegiate Women's Athletics Administrators has sent an email to its members asking them to contact their congressmen and other political leaders to get the Department of Education's Office of Civil Rights decision overturned. The Women's Sports Foundation is also joining in the effort.

The March 17 clarification, signed by Assistant Secretary for Civil Rights James F. Manning, specifically deals with the "fully and effectively" test, the third of three prongs to determine whether a school is in compliance with the 1972 regulation that bans discrimination on the basis of sex from institutions that receive federal funding. The clarification was published on the Office of Civil Rights' Web site.

By definition, the "fully and effectively" test judges to see whether a school is "accommodating the athletic interests and abilities of its students who are under-represented in its current varsity athletic program offerings," Manning wrote.

Other prongs look to see whether a school has a history and continued practice of providing athletic opportunities for women and a proportionality requirement, which states that the ratio among male and female athletes must be similar to the ratio of male and female students.

A school only has to be in compliance with one of the three tests for the Office of Civil Rights to consider that the institution is providing "nondiscriminatory" athletic opportunities to the undergraduate population.

In a letter on the Women's Sports Foundation's Web site, www.womenssportsfoundation.org, Executive Director Donna Lopiano writes that strengthening Title IX is not a partisan issue, because both Republicans and Democrats want their "daughters and sons treated equally by our educational institutions."

"Why are we asking you to do this?" Lopiano writes. "On March 17, without any notice or public input, the Department of Education (DOE), issues a new guiding principle that would significantly weaken Title IX in the area of athletics and represents a significant policy change at odds with previous DOE policy and all court cases to date."

Lopiano claims that the survey requirement would allow schools to focus differing amounts of attention on male and female athletes, because male athletes are typically recruited to a school.

However, while Lopiano's Women's Sports Foundation and the National Association Collegiate Women's Athletics Administrators are fighting against the clarification, other sports organizations are heralding the

decision.

Eric Pearson, executive director of the College Sports Council, wrote on the organization's Web site, www.collegesportscouncil.org, that the clarification is worthy of praise.

"This clarification now gives schools a viable, common-sense alternative to the gender quota that has wreaked havoc on college athletics," Pearson said. "There is still work to be done toward restoring Title IX to its original intent, fairness for all student athletes. Schools will no longer feel bound to proportionality and forced to eliminate sports opportunities for male athletes now that they can accurately measure and meet interest for male and female student athletes."

Title IX regulations have been used to increase the number of women's sports on college campuses across the country. However, opponents claim the administration of Title IX regulations are to blame for colleges discontinuing several men's programs, including wrestling and track and field.

The fully and effectively test has long been considered the hardest of the three prongs for schools to comply with.

According to Manning's clarification, school administrators would only have to survey its population to determine whether there is interest in the creation of a sport for the underrepresented gender. A school would be considered in compliance with the new guidelines unless there is unmet interest sufficient to sustain a varsity team, a sufficient ability to sustain an intercollegiate team in the sport, and there is a reasonable expectation of intercollegiate competition for a team in the sport within the school's normal competitive region.

The burden of proof to determine whether a school is not in compliance would fall on the Office of Civil Rights through its investigation or on individual students through school-based Title IX complaints.

A presumption of compliance would exist if survey results show an insufficient level of interest to support an additional varsity team for women, according to the letter.

"The presumption of compliance can only be overcome if OCR finds direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team, such as the recent elimination of a viable team for the under-represented sex or a recent, broad-based petition from an existing club team for elevation to varsity status," Manning wrote. "Where the Model Survey shows insufficient interest to field a varsity team, OCR will not exercise its discretion to conduct a compliance review of that institution's implementation of the three-part test."

Manning said schools were already using student surveys to determine if it is meeting the athletic needs of under-represented sexes. When results show that there is insufficient support for the creation of a sport, the school would be considered in compliance.

The survey would be sent to all undergraduate students or to all students of the under-represented sex, Manning said. Along with the clarification, the Office of Civil Rights gave college officials information regarding a survey and how to administer it on campus through a "User Guide and Technical Manual."

"Where the Model Survey shows insufficient interest to field a varsity team, OCR will not exercise its



discretion to conduct a compliance review of that institution's implementation of the three-part test," Manning said.

While the clarification centers on the third prong of the three-part test, Manning writes that schools should not overlook the importance of the other two prongs when attempting to be in compliance of Title IX regulations.

"Despite the focus on part three, OCR strongly reiterates that each part of the three-part test is an equally sufficient and separate method of complying with the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities," Manning wrote. "In essence, each part of the three-part test is a safe harbor."

According to NCAA statistics, in the past 15 years cross-country programs have seen the majority of cuts by schools wanting to be compliant with Title IX regulations. A total of 183 programs have been cut in the time. Indoor track, golf, tennis, rowing, outdoor track, swimming, and wrestling have also seen significant cuts in the number of men's programs due to Title IX regulations.

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The Controversy over the Additional Clarification

"Women's Groups, OCR Spar over Title IX Surveys," Erik Brady, *USA Today*, May 16, 2005

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Women's groups, OCR spar over Title IX surveys

By Erik Brady, USA TODAY

WASHINGTON — The culture wars over Title IX are raging again. The rhetoric is familiar, but the particulars are new and the stakes high.

In mid-March, the Bush administration embraced surveys that can be distributed by e-mail as a way for schools to show their sports programs meet the interest and abilities of their female students. Schools that say they find no interest in adding new sports are presumed to comply with the law.

Women's groups cried foul. They accused the U.S. Department of Education of providing schools a loophole to get around Title IX, which bans sex discrimination at schools receiving federal funds.

Education Department officials say the model survey is not a loophole — and may well result in new women's teams.

The culture wars last raged in 2002 and 2003 when a commission named by the administration debated changes to Title IX policy. But all had been mostly quiet since July 2003, when the administration, in effect, rejected commission recommendations, including some on surveys, and reaffirmed longstanding policies on the law's participation requirements.

Then, two months ago, the Education Department's Office for Civil Rights provided schools with a blueprint on how interest surveys alone can earn a presumption of compliance.

At its core, the chasm between the OCR and its critics is one of philosophy. Women's groups say opportunity leads to interest and surveys freeze discrimination in place. The OCR says there is no fairer way to measure interest than to ask directly. The courts will decide which side is right if a case comes to trial in the years ahead.

Fundamental disagreement

Courts consistently have backed the position of women's groups in Title IX cases. But in those, courts gave deference to OCR rules. Here women's groups would for the first time argue against OCR regulations. How a court might rule is anybody's guess.

In the meantime, it is too early to know if schools will choose to use the model survey in great numbers. The NCAA Executive Council passed a resolution last month urging schools not to use it.

Sheldon Steinbach, general counsel at the American Council on Education, a group representing colleges, says it is wrong to suggest schools are looking for loopholes. "The spirit of Title IX permeates every college in America," he says. "They want to do the right thing."

Neena Chaudhry, senior counsel for the National Women's Law Center, wants to believe that's true. "But our experience is if you give schools an easy way out, they're likely to take it," she says.

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The government and the law center can't even agree on what the OCR's letter is. Chaudhry calls it a fundamental change in Title IX policy. OCR calls it technical assistance to existing policy.

James Manning, who heads the OCR, signed the March 17 clarification letter that began the current controversy. Manning says he loves the law. His daughter walked on the rowing team at Clemson and competed for four years. "She had an opportunity only because of Title IX," he says.

Manning's critics think of surveys as a way to deny interest. He believes surveys often will find it. He says that is because tiny percentages of women or girls who say they have interest in playing a sport can obligate a school to take steps toward adding a team.

For example, he says, a school with several thousand female students might have to look into adding volleyball even if only two dozen or so say on a survey they are interested in playing it.

The raw number needed for sports with smaller rosters, such as golf, would be even less, perhaps only a dozen or so.

"What we're hoping for," Manning says, is "that schools will use (the model survey) as a vehicle to find out whether they're meeting the interest of their students. That's their obligation and I'm quite confident there will be schools that use the survey that will find there is unmet need and they will have to respond."

Manning gives a hypothetical example of a school with 1,000 female students where just 200 respond to an interest survey and just 25 say they want to play volleyball. The school would have an obligation to take further steps, such as organizational meetings and tryouts, which could lead to a new varsity team even if only a dozen or so had the ability to play. Members of a club team might well run an organized campaign to make sure dozens of students express interest. "That's natural," Manning says. "We expect those types of dynamics will be in play."

On the other hand, Manning says, some schools that use the survey "will see that they are providing sufficient opportunities and there is no additional requirement" for them to do more.

Which is just the trouble, according to Jocelyn Samuels, a vice president of the National Women's Law Center. She argues use of interest surveys, absent other criteria, will underestimate women's interest.

"Students who have an interest in playing a certain sport won't go to a school that doesn't have it," Samuels says. "If you do a survey of the students who do come, the common-sense reality is you're not likely to find interest. It is a self-limiting principle."

Interpretations at odds

Title IX became law in 1972. Its underlying policies, including its three-part test of participation requirements that is at issue here, were codified in 1979. Courts have upheld the policies in a series of cases over the years.

The OCR's letter to schools addresses the third part of the test — and, depending on whom you believe, desecrates it or provides guidance on one way to meet it. A school must pass only one part of the three-part test:

•**Prong 1:** A school's male and female athletes are substantially proportionate to enrollment. (That means if a school is 54% female, about the national average, then about 54% of its athletes should be female.)

•**Prong 2:** A school has a history and continuing practice of expanding opportunities for female students. (That means if a school has added teams for women or girls recently and over the years, it is probably in compliance, though only for a time.)

•**Prong 3:** A school can demonstrate that the interests and abilities of the underrepresented sex have been fully and effectively accommodated by the present program. (About two-thirds of 130 schools investigated by the OCR over a decade used this method.)

"The requirement is to fully and effectively meet the interests and abilities of the underrepresented sex. That's Prong 3 in a nutshell," OCR attorney David Black says. "There is no better way of doing that than putting the question directly to every one of your students and giving them the opportunity to express their interest."

Samuels says there is a better way — the way it has been done in the past. She says schools have long been required to look at a range of factors under the third prong, which could include interest surveys, but which also could include what club sports are played by women on a college

campus and what sports are played by girls in high schools from which a college draws.

Black says schools are "only responsible for fully and effectively meeting the interest on campus at the time." Chaudhry says that ignores the reality that varsity athletes are typically recruited, not drawn from the student body.

Schools that choose to use the model survey are required to give it to all female undergraduate students. Eric Pearson, executive director of the College Sports Council, an advocacy group for men's sports, says schools should also be required to survey all male students; the clarification only recommends that. "We're pleased with the clarification" otherwise, he says. "We hope it leads to schools having greater flexibility" to meet the interest of both sexes.

If a survey shows female interest is fully accommodated and male interest is not, schools could add teams for men and still comply under the third prong. "That's a possibility," Manning says. "Yes, indeed."

Court question looms

The OCR's letter tells schools a presumption of compliance can only be overcome by "direct and very persuasive evidence" of unmet interest. Chaudhry says that unfairly shifts the onus from schools to students.

Black says there is no shift — the burden has always been on students or on the OCR. Arthur Coleman, an attorney in Washington who worked for the OCR in the Clinton administration, agrees investigations have long worked that way.

Valerie Bonnette, who once worked at the OCR, runs Good Sports, a consulting firm on Title IX issues. She says she will advise clients not to use the model survey because she does not believe it will hold up if challenged in court.

"The clarification did not go through any level of review outside the agency," she says, "which means it is less persuasive as a legal document."

Black says there was no requirement it be made available for review. He also says he is confident the document "will withstand scrutiny." But he adds, "What a court will or will not do is anyone's best guess."

Gerald Reynolds, former head of the OCR, said at a commission hearing if the OCR instituted "a reasonable survey instrument, then I think a court would bless it."

School choice

Pam Bernard, general counsel of the University of Florida, says her school will continue to employ the broader approach to Prong 3 it uses now.

Manning says he expects many schools to continue with the approach they already feel comfortable using. But, he adds, "We do think this survey is an attractive option for schools to consider."


Jim McCarthy is a policy and public affairs adviser to the College Sports Council, which maintains that Prong 1 is a quota system that hurts male athletes. McCarthy thinks use of the model survey will become widespread among colleges. "We think even if college administrators say they don't want to use it, their legal departments will tell them they should," he says. "It is an additional shield against litigation. We think schools will come to see surveys as the safe side of the street."

Some athletics directors complained at Title IX commission hearings that Prongs 2 and 3 are subjective compared to the by-the-numbers approach of Prong 1. Iowa athletics director Bob Bowsby, who served on the commission, says he assumes the idea of the clarification is to give schools a more objective way to meet Prong 3. "And I'm in favor of that," he says.

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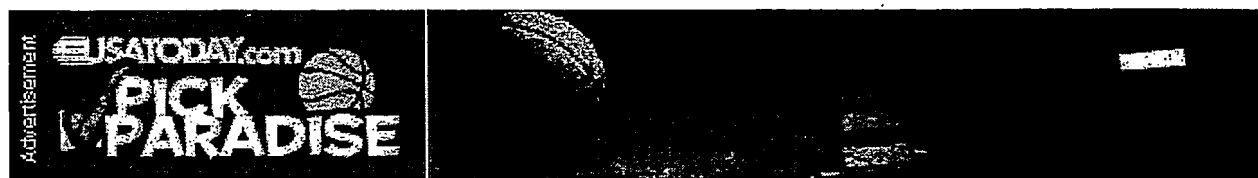
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The Controversy over the Additional Clarification

"Schools Not Using Latest Title IX Tool," Erik Brady, *USA Today*, March 14, 2006



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Schools not using latest Title IX tool

By Erik Brady, USA TODAY

The Department of Education offered e-mail surveys a year ago as a new way for schools to prove compliance with Title IX. So far, no college has publicly embraced the approach. But a law journal article published last week urges schools at least to consider it.

The department's Office of Civil Rights (OCR) issued a clarification letter last March, though what it means is less than clear, as is often the case with Title IX, the law that bans sex discrimination at schools receiving federal funds.

John J. Almond and Daniel J. Cohen, attorneys with the Atlanta firm of Rogers & Hardin, argue in their article in the *Vanderbilt Journal of Entertainment and Technology Law* that OCR offered schools a "new safe harbor" — a by-the-numbers way to prove they have met the athletic interests of their female students.

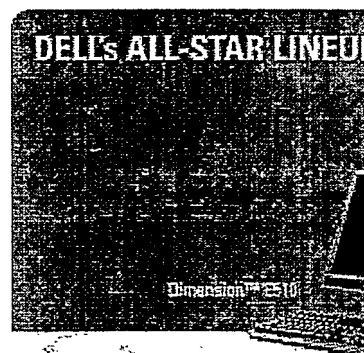
"It is kind of mysterious to us that it's sitting there unused," Almond says.

To meet the participation requirements of Title IX, a school must pass one part of a three-part test:

- Test 1. A school's male and female athletes are proportionate to enrollment.
- Test 2. A school has a history and continuing practice of expanding opportunities for female students.
- Test 3. A school can demonstrate that the interests and abilities of female students are fully and effectively accommodated.

OCR said a year ago that schools could use e-mail

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interest surveys alone as a means of showing compliance under the third test. Critics complained it allowed schools to consider non-response as evidence of non-interest. The NCAA Executive Council quickly passed a resolution urging schools not to use the model survey.

NCAA spokesman Bob Williams said Tuesday that the NCAA sticks by its position.

"The NCAA is a powerful body, and its name does mean something," Cohen says. "The position it took could have had an impact on schools. We suspect it did."

Almond and Cohen say they have no stake in whether the guidance provided by OCR is fair. They say only that OCR makes the rules and schools that use the third test would be foolish not to consider the model survey, which OCR says will receive deference if properly administered.

Women's groups say female athletes interested in playing a particular sport won't go to a school that doesn't have it, so it is unfair to survey absent other criteria.

"That may be a good criticism, but it isn't really relevant to what I'm advising the client," Almond says. "Which is: If that's a bad mechanism, it was put in place by the OCR and you can benefit from it."

Colleges were allowed to use interest surveys before last March but also had to consider other factors. The article advises schools that criticism of the model survey "can be deflected" by considering those other factors, such as monitoring participation in club and intramural sports and tracking athletic trends in high schools a college draws from.

Monmouth athletics director Marilyn McNeil, who has used surveys in the past, says she has not decided if Monmouth will use the model survey. "If we did, we would only use it in combination with other factors," she says. "An e-mail survey by itself would be terribly unfair."

Eric Pearson, executive director of the College Sports Council, an advocacy group for men's sports, says he thinks the NCAA's advice "not to use the survey will be overridden by general counsels who want to reduce the liability at their schools."

Jocelyn Samuels, a vice president of the National Women's Law Center, says schools are wise to stay away from the model survey because she believes it ultimately will be struck down in the courts: "One can hope schools are recognizing it is in their legal interest and their female students' interest" not to use the year-old clarification.

Department of Education spokesperson Susan Aspey declined comment on the article: "The model survey is simply another option for schools to use — if they choose."

The department is expected to give Congress a report on its year-old advice on surveys by Friday, as requested by the Senate Appropriations Committee.

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The Controversy over the Additional Clarification

"No Retreat on Title IX," *Inside Higher Ed*, March 20, 2006

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March 20, 2006

No Retreat on Title IX

Pressure from the U.S. Senate notwithstanding, the U.S. Education Department appears to be sticking by guidance it issued a year ago that gave colleges more latitude to use e-mail surveys of students to prove that they are not discriminating against female athletes.

On Friday, the department's Office for Civil Rights responded to a 2005 directive from the Senate Appropriations Committee to produce a report showing whether institutions that use surveys of student opinion to prove that they are complying with under Title IX of the Education Amendments of 1972 also "gather and consider other sources of information for assessing student interest." The request was included in a 2005 Senate spending bill that included language challenging the wisdom of the department's approach.

The report, which the department faxed to the committee at 8:30 p.m. Friday — just barely meeting the March 17 deadline — asserts that institutions that were allowed to use student surveys alone to show their compliance with Title IX were as likely to add teams as were colleges that used "additional factors" to show they were meeting the interests and abilities of their students.

"Decisions to add a new sports team differed little between surveys and assessments including the consideration of additional factors," the report says. "In addition, the decisions to add teams, whether the result of a survey alone or of an assessment including the consideration of additional factors, appear to be more frequently attributable to the survey component of the assessment."

The report, which was prepared by Stephanie Monroe, assistant secretary of education for civil rights, concludes that the survey tool "has the potential to maximize the possibility of obtaining correct information and generating high response rates."

The department's report was immediately criticized as flawed by supporters of women's sports who have urged the Bush administration to abandon its year-old guidance on Title IX, which forbids sex discrimination at educational institutions that receive federal funds.

Donna A. Lopiano, chief executive officer of the Women's Sports Foundation, said Sunday that the OCR report does "nothing to modify or clarify" the 2005 guidance about the e-mail surveys, which Lopiano called a "legal and research instrument embarrassment." She added: "We should expect more from the United States Department of Education."

The department has taken its lumps since March 17, 2005, when, in a letter posted on its Web site, the Office for Civil Rights informed institutions, among other things, that they can gauge student interest in

athletic participation using e-mail surveys, where non-responses count as an answer of “no interest.”

If an institution can demonstrate that it is accommodating the “interests and abilities” of students and potential students for women’s sports — known as “prong three” of the three-part test for gauging compliance with Title IX’s participation requirement — it can comply with the law without having a ratio of male to female athletes similar to that of its student body, which is the more common way for colleges to demonstrate compliance.

Department officials and supporters of the guidance — including advocates for men’s teams who believe colleges have used Title IX to justify cutbacks in sports like wrestling and track — asserted that the guidance did not make new policy, but rather clarified existing opportunities for colleges to use surveys of students to prove that they are meeting the needs of female students.

But critics, including the National Collegiate Athletic Association, complained that the guidance was inconsistent with longstanding federal law and regulations, by giving colleges a “model survey” they could use to make that case, and by allowing them to survey students via e-mail, which they view as unreliable.

A vocal minority of Congressional lawmakers has made that case, too. Senators have condemned the department with critical comments at hearings, for instance, and last summer, the Senate Appropriations Committee included language in a spending bill for education and health programs that expressed “concerned that confusion has been created” by the guidance. (The language had been softened from more-critical language that urged the department to withdraw the guidance.)

The committee believed, it said, that “survey results are not sufficient to demonstrate compliance if other evidence exists, such as requests for athletic teams, that contradicts the conclusions drawn from the survey.” It urged the department to make clear that colleges must make “good faith efforts to explore” such alternative evidence, and asked the department to prepare a report that examines whether institutions that seek to comply with Title IX by using such surveys also “gather and consider other sources of information for assessing student interest.”

In the report Friday, the Office for Civil Rights noted that it had been unable to honor the committee’s request that it conduct random reviews of colleges that had used interest surveys to prove their compliance with Title IX, which it described as impractical “in the limited time available.” Instead, the office said it had reviewed its files from October 1992 to January 2006 and identified 54 cases (excluding those that were still active) in which institutions had sought to comply with the third prong of Title IX’s participation requirement by surveying their students.

Of the 63 “assessments” by the colleges in those cases that included a student survey, 34 considered other factors as well as the surveys, including such things as interviews with the colleges’ current coaches or athletes, expressions of interest by club teams in upgrading to varsity status, and interviews with athletes or athletics officials in local high schools.

Twenty-eight of the 63 assessments resulted in the addition of new teams — 42 teams in all. The department said its review had found that institutions that used other factors in addition to student surveys were “slightly more likely” to find sufficient student interest in adding teams than were those colleges that used surveys alone. But there was little difference between the two approaches in how often they resulted in the actual addition of teams, the department said.

The department’s report also said that it had found “almost no actual conflicts” between the findings of

the two approaches — in other words, in most cases, the surveys and the other methods of gauging students' interest almost always reached the same conclusion about whether there was sufficient interest among students in adding teams.

While the department's report provides evidence about how surveys have been used in the past, and suggests that their use may not have diminished the likelihood of adding women's teams, it says nothing about one key objection raised by critics: that allowing such surveys to be delivered via e-mail will make them unreliable.

"The report did not change the 2005 clarification instructions that e-mail survey non-responses would be interpreted as lack of interest, a patently absurd contention that would be refuted by any researcher," said Lopiano. "A non-response is simply that, and no meaning can be conferred to anyone's failure to respond to a survey."

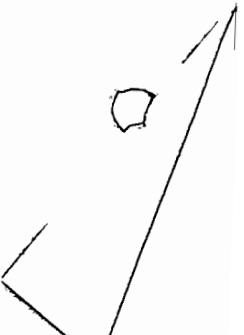
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"Education Dept. Affirms Use of E-Mail Surveys in Title IX Compliance," Brad Wolverson, *Chronicle for Higher Education*, March 31, 2006

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From the issue dated March 31, 2006

Education Dept. Affirms Use of E-Mail Surveys in Title IX Compliance

By BRAD WOLVERTON

The U.S. Department of Education said this month that colleges could continue to rely on e-mail surveys of their students to prove that female athletes have enough opportunities to take part in sports — and that the institutions are thereby complying with a key federal gender-equity law.

But critics, including women's groups, said that such surveys were inadequate and that the department's position was disappointing.

In a report delivered to Congress, department officials affirmed a change the department made last year allowing a college or university to use results from a single e-mail survey to measure demand for women's sports. Previously the department required colleges to meet stricter guidelines to prove they were complying with the law, Title IX of the Education Amendments of 1972.

Title IX bars sex discrimination at institutions that receive federal funds and requires, among other things, that men and women have equal opportunities to play college sports.

Last year the U.S. Senate Committee on Appropriations asked the department to rescind the guideline allowing colleges to rely solely on electronic surveys to determine interest in women's athletics. The committee said that colleges should seek additional evidence when determining whether they needed to add more women's sports.

The committee also asked the Education Department to prepare a report outlining how colleges typically gauge female students' athletic interests.

It said colleges and universities considered many factors when assessing whether they were providing enough opportunities for women, including levels of participation on intramural teams. It also said that colleges that relied on student surveys to prove they were in compliance with federal law were just as likely to add teams as colleges that used other means to show they were providing enough opportunities for female athletes.

A 'Dangerous Change'

Women's-rights advocates criticized the report's findings. A college, they said, could misinterpret a low response to an e-mail survey, which critics say is common, as meaning that students did not seek additional women's sports. That could lead colleges to add fewer such sports than they would have otherwise, the critics said.

Judith M. Sweet, the National Collegiate Athletic Association's senior vice president for championships

and education services, said in an e-mail message on Monday that she found the department's response to the Senate committee request, as well as the department's suggested methodology for measuring interest in women's sports, to be "both disappointing and unsatisfactory."

The NCAA has asked colleges not to rely exclusively on electronic surveys when measuring interest in women's sports.

In a statement, the National Women's Law Center said the Education Department's report suggested a "dangerous change in policy that allows schools to skirt their responsibility to provide equal athletic opportunities for young women."

In an interview, Neena Chaudhry, a lawyer for the center, said an e-mail survey was a "fine tool" for colleges to use in combination with other ways of assessing demand for women's sports. "But alone it's not reliable enough," she said.

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Volume 52, Issue 30, Page A42

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Advocating for the Additional Clarification

"Navigating into the New 'Safe Harbor'—Model Surveys as a New Tool for Title IX Compliance Programs," John J. Almond and Daniel A. Cohen, *Vanderbilt Journal of Entertainment and Technology Law*, Volume 8, Number 1, Winter 2005

VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW

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NUMBER 1

Navigating into the New “Safe Harbor” – Model Interest Surveys as a New Tool for Title IX Compliance Programs

*By John J. Almond and Daniel A. Cohen**

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Whether a college's administrators agree or disagree with the policies behind the "Additional Clarification"¹ published by the Office for Civil Rights (OCR) of the U.S. Department of Education (DOE) last spring, it would be a serious mistake for them to overlook its potential utility as a component of the school's Title IX² compliance efforts.

1. OFFICE FOR CIVIL RIGHTS, U.S. DEPT OF EDUC., ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST – PART THREE (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter ADDITIONAL CLARIFICATION].

2. Title IX of the Education Amendments of 1972 (Title IX) is an antidiscrimination statute which prohibits discrimination on the basis of sex in education programs or

In the Additional Clarification, the OCR provides colleges and universities an objective path to proving compliance with Title IX under Prong Three of the so-called "Three-Prong Test."³ Prong Three provides that a college or university⁴ will be deemed in compliance with the gender equity participation requirements of Title IX as it relates to intercollegiate athletics if the institution can demonstrate "that the [athletic] interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program [of intercollegiate athletics offered at the school]."⁵ To assist schools in gauging students' interests in participating in intercollegiate athletics, the Additional Clarification provides schools a model survey to use in connection with their Prong Three compliance efforts.

The Additional Clarification brings a measure of objectivity to the otherwise subjective process of determining Title IX compliance under Prong Three. The OCR has declared that compliance with any part of the Three-Prong Test provides a school a "safe harbor" from OCR sanctions,⁶ but, before the publication of the Additional

activities by recipients of federal financial assistance. See 20 U.S.C. § 1681 (2000). Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." *Id.* § 1681(a). The Department of Education's regulation implementing Title IX's provisions regarding equality in athletic programs, 34 C.F.R. § 106.41 (2004), requires schools to "provide equal athletic opportunity for members of both sexes." *Id.* § 106.41(c). The OCR enforces Title IX in connection with the federal funding programs implemented by the Department of Education. 20 U.S.C. §§ 1682, 3413(a), 3441(a)(3). Since 1979, the OCR and its parent agencies have periodically published administrative regulations, "interpretations," and "clarifications" to explain Title IX and provide guidance to schools regarding what they would deem to comply with Title IX.

3. See Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71,413-23 (December 11, 1979) [hereinafter 1979 Policy Interpretation] (published by the U.S. Department of Health, Education, and Welfare, precursor to the DOE). The 1979 Policy Interpretation is credited with creating the "Three-Prong Test" (also known as the "Three-Part Test") for determining Title IX compliance, as discussed further herein.

4. The Additional Clarification "is designed specifically for intercollegiate athletics. However, [its] general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by the Title IX implementing regulation." ADDITIONAL CLARIFICATION, *supra* note 1, at 3.

5. *Id.*

6. See, e.g., OFFICE FOR CIVIL RIGHTS, U.S. DEPT OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST 1 (1996), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html#two> [hereinafter 1996 CLARIFICATION] ("[i]f an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement" and, thus, is in compliance with Title IX); OFFICE FOR CIVIL RIGHTS, U.S. DEPT OF EDUC., FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE REGARDING TITLE IX COMPLIANCE 1 (2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>

Clarification, Prong One of the Three-Prong Test (the provision of athletic opportunities “substantially proportional” to the composition of the student body) had been the only objectively measurable – and therefore the only true – “safe harbor.” Through the Additional Clarification, however, the OCR has established a second measurable “safe harbor” under the Three-Prong Test.

For those schools not currently satisfying Prong One, which therefore need to protect themselves legally by demonstrating compliance with Title IX by some other means, the Additional Clarification provides guidance for determining whether they have effectively accommodated the athletic interests and abilities of their students under Prong Three. The OCR’s so-called “Model Survey” is the *only* interest measurement tool that the OCR will presume to provide an accurate measurement of Prong Three “interest” – or lack of “interest.” If the results of the Model Survey show insufficient “unmet interest” among students of the underrepresented gender, the school will have attained a “safe harbor.” If the Survey, to the contrary, shows the existence of sufficient interest, several additional criteria relating to athletic ability levels and sustainability of interest would remain to be proven before the school would find itself in the position of having to start a new varsity sport.

Even those schools currently in compliance with Prong One of Title IX are at risk that, with each new school year, the ever-changing demographics of undergraduate populations could throw their varsity athletic programs out of gender proportionality. Thus, even schools now within the “safe harbor” of Prong One should consider the potential benefits and minimal risks that implementing the Survey presents for those in a position of current compliance.

The principal publicity regarding the issuance of the Additional Clarification has not addressed its potential importance to colleges’ Title IX compliance efforts, but has consisted, rather, of criticism or praise from parties involved in the public policy debate surrounding Title IX enforcement.⁷ That policy debate has little relevance to the

[hereinafter 2003 FURTHER CLARIFICATION] (“each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored”).

7. Certain groups have criticized the Additional Clarification, contending, among other things, that it improperly institutionalizes the past discrimination reflected in women’s current athletic interests. See, e.g., Alison Sawyer, *The Women’s Sports Foundation Calls for Withdrawal of New Title IX Policy*, Women’s Sports Foundation (2005), <http://womenssportsfoundation.org/cgi-bin/iowa/about/media/press.html?record=123>; Jamie Schuman, *House Democrats Urge the Bush Administration to Rescind New Guideline on Title IX Compliance*, CHRON. HIGHER EDUC., June 23, 2005, <http://chronicle.com/daily/2005/06/2005062303n.htm>; Marek Fuchs, *For Women’s Athletics, A Tempest Over a Survey*, N.Y. TIMES, July 31, 2005, at 14WC; Erik Brady, *Women’s*

practical concern of achieving provable Title IX compliance. The Additional Clarification – whether it is regarded as wise or unwise in policy – can help schools achieve compliance and thereby avoid OCR investigations or private legal challenges. The policy debate and the divergent views expressed in the mainstream media have provided little practical advice regarding the Additional Clarification or the Model Survey to the well-intentioned academic institution seeking to comply with Title IX in a cost-effective manner.

This Article is intended to be a source of such practical advice. This Article discusses the Additional Clarification from the perspective of the academic institution and seeks to help it evaluate whether to implement the OCR's recommendations, including the Model Survey, as part of its Title IX compliance program. The Article does not engage in the policy debate regarding the Additional Clarification or Title IX enforcement policy generally.

Section I of this Article discusses Prong Three from a historical perspective, to place the Additional Clarification in context. Section II summarizes the contributions of the Additional Clarification to the Title IX compliance landscape and explains the OCR's recommendations for using the Model Survey. Section III discusses possible advantages and disadvantages of using the Model Survey. Section IV suggests an approach to using the Model Survey as an ongoing component of a Title IX compliance monitoring program.

I. HISTORY OF THE INTERPRETATION AND APPLICATION OF PRONG THREE

A. *The Three Prongs*

The 1979 "Policy Interpretation" published by the Department of Health, Education, and Welfare (HEW)⁸ provides colleges and

Groups, OCR Spar Over Title IX Surveys, USA TODAY, May 16, 2005, at http://www.usatoday.com/sports/2005-05-16-title-ix_x.htm.

Other groups have praised the Additional Clarification for, among other things, breathing life into an alternative for Title IX compliance to Prong One, which they contend had led to the widespread elimination of men's teams. See, e.g., Jen Brown, *New Title IX Debate: Will Women's Sports Suffer or Men's Sports Be Saved?*, ABC NEWS, June 22, 2005, <http://abcnews.go.com/Sports/story?id=868060&page=1>; Carrie Lukas, *Happy Birthday, Title IX: the Bush Administration has Provided a Real Reason to Celebrate*, NAT'L R. ONLINE, June 24, 2005, <http://www.nationalreview.com/script/printpage.p?ref=/comment/lukas200506240757.asp>; Kathryn Jean Lopez, *Interest Surveys Will Let Secret Out on Title IX Women's Sports*, PASADENA STAR-NEWS, Mar. 28, 2005.

8. In 1980, Congress subdivided HEW into the current Department of Health and Human Services and the Department of Education. Department of Education Organization

universities three alternate ways of demonstrating compliance with Title IX in the context of intercollegiate athletic participation.⁹ The three alternative tests have commonly been referred to as the “Three Prongs” of Title IX and should be familiar to most athletic administrators:

1. *Proportionality*: A school complies with Title IX if it provides athletic participation opportunities for male and female students in numbers substantially proportionate to their respective enrollments. For example, if a school has fifty-one percent women in its student body, approximately fifty-one percent of its varsity athletes must be women.¹⁰

2. *Program Expansion*: A school at which members of one gender have been and are underrepresented among intercollegiate athletes complies with Title IX if it demonstrates a history and continuing practice of program expansion demonstrably responsive to the developing athletic interests and abilities of its underrepresented students.¹¹

3. *Interest*: A school complies with Title IX if it demonstrates that the interests and abilities of the members of the underrepresented gender are fully and effectively accommodated by the present athletic program.¹²

The OCR has often implied that each part of the Three-Prong Test is a “safe harbor,”¹³ meaning that the school is insulated from liability if it can demonstrate its compliance with any one of the test’s three parts. Prongs Two and Three, however, have not afforded true safe harbors, as they have not incorporated objective criteria. The Second Prong is inherently vague. Moreover, its usefulness has diminished due to the substantial progress made over the last thirty

Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified in scattered sections of 20 U.S.C.). The Department of Education inherited most of the programs under which HEW provided educational funding. See 20 U.S.C. §§ 3441(a)(2), 3508(b) (2000).

9. See 1979 Policy Interpretation, *supra* note 3.

10. *Id.*

11. *Id.*

12. *Id.*

13. Compare ADDITIONAL CLARIFICATION, *supra* note 1, at 1 (expressly declaring that each Prong “is a safe harbor”) with Letter from Norma V. Cantú, Assistant Secretary for Civil Rights, Office for Civil Rights, accompanying 1996 CLARIFICATION, *supra* note 6, available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter 1996 Cantú Letter] (expressly referring only to Prong One as a “safe harbor” but implying such security also exists under Prongs Two and Three by stating: “If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this [Title IX’s] requirement”). The 2003 Further Clarification put an end to speculation that the 1996 Cantú Letter implicitly eliminated safe harbor protection under Prongs Two and Three, definitively declaring that “[e]ach of the three prongs is thus a valid, alternative way for schools to comply with Title IX.” 2003 FURTHER CLARIFICATION, *supra* note 6.

years of Title IX enforcement. Depending on the demographics of its student populations, a school may find it difficult to persuade an investigator that it is sufficient at this late date merely to show that it is "making progress" towards expanding athletic programs for the underrepresented gender. Nor could a school feel secure in relying upon the Third Prong because of the difficulty of determining whether it had "fully and effectively accommodated"¹⁴ the athletic interests of its female students (usually, the underrepresented gender). Thus, for some years now, proportionality has been the only objective safe harbor that institutions have been able to rely on.¹⁵

For budgetary and other reasons, schools have often struggled, however, to meet proportionality goals under Prong One. Without the legal protection of the measurable Prong One safe harbor, such schools were exposed to the possibility of costly OCR investigations and litigation as to their compliance with the subjective Prongs Two or Three – with little assurance that even their good faith attempts at compliance thereunder would be considered sufficient by OCR investigators or courts. According to the data supplied by the OCR to the National Center for Education Statistics in connection with the development of the Additional Clarification, between 1992 and 2002, the OCR investigated 130 schools for Title IX compliance, of which only thirty-six schools were able to demonstrate compliance with Prong One and a mere eight with Prong Two.¹⁶ Thus, approximately two-thirds of the schools investigated (86 out of 130) sought to demonstrate their compliance with Title IX under Prong Three, many by means of student interest surveys.¹⁷

Until the Additional Clarification, clear official guidance was lacking on how a school could validly measure the athletic interests and abilities of its underrepresented athletes and achieve the

14. ADDITIONAL CLARIFICATION, *supra* note 1, at 3.

15. SEC'Y OF EDUC.'S COMMISSION ON OPPORTUNITY IN ATHLETICS, U.S. DEPT OF EDUC., OPEN TO ALL: TITLE IX AT THIRTY 23-24 (2005) [hereinafter 2003 COMMISSION REPORT]; see also *Hearing before the Sec'y of Educ.'s Comm'n on Opportunity in Athletics* 78 (Oct. 22, 2002) (Statement of Rick Taylor, Athletic Director, Northwestern Univ.) [hereinafter Rick Taylor Statement] ("[I]n 1997, we were faced with an OCR complaint regarding water polo. In dealing with OCR we found out a great deal about the application of Title IX. Proportionality is the only safe harbor. Continuing expansion and meeting interests have no end point except to move you closer to prong one, proportionality, and in this context, proportionality is a quota. When is program expansion enough? When proportionality has been met.").

16. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT OF EDUC., USER'S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX 3 (2005), available at <http://165.224.221/98/pubs2005/2055173.pdf> [hereinafter USER'S GUIDE].

17. *Id.*

theoretical safe harbor under Prong Three.¹⁸ Indeed, any definitive guidelines originally would have been seen as contrary to the OCR's stated goal of preserving institutions' "discretion and flexibility in choosing the nondiscriminatory methods to determine the athletic interests and abilities of the underrepresented sex."¹⁹ To this end, the 1979 Policy Interpretation²⁰ offered as guidance only a description of factors it would consider:

Institutions may determine the athletic interests and abilities of students [under Prong Three] by nondiscriminatory methods of their choosing provided:

- a. The processes take into account the nationally increasing levels of women's interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and
- d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.²¹

Although these factors and others listed in the 1979 Policy Interpretation provided schools some guidance, they still left unclear what actions by a school would be deemed sufficient to assure compliance. This left schools vulnerable to the possibility of varying interpretations of the Prong Three requirements any time the OCR or private litigants questioned their compliance efforts.

B. Judicial Interpretation of Prong Three

This uncertainty was heightened by court cases that held schools liable notwithstanding their attempts at compliance under Prongs Two and Three.²² The most significant of these cases was

18. 2003 COMMISSION REPORT, *supra* note 15, at 26.

19. ADDITIONAL CLARIFICATION, *supra* note 1, at 5.

20. The original 1979 Policy Interpretation, which established the Three-Prong Test, was itself drafted in large part in response to college administrators' complaints that the law was ambiguous and that they needed guidance on how to comply with the statute. *See* 1979 Policy Interpretation, *supra* note 3, at 71,414.

21. 1979 Policy Interpretation, *supra* note 3, at Pt. VII.C.

22. In 1979, the U.S. Supreme Court ruled that an individual has the right under Title IX to sue a school directly if he or she is affected by a violation of Title IX. *See generally* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (allowing a woman to bring suit under Title IX after she was denied admission to two medical schools at two private universities). The Court further expanded the reach of Title IX enforcement in 1992, when it held that a party could collect monetary damages for proving that an institution violated Title IX if this violation affected him or her. *See* Franklin v. Gwinnett County Pub. Sch.,

Cohen v. Brown University.²³ In that case, female athletes challenged a Brown University decision to eliminate its funding of two women's teams, volleyball and gymnastics, due to financial pressures (two men's teams, water polo and golf, were contemporaneously eliminated).²⁴ Brown University argued that, although it had not provided proportional opportunities for its male and female athletes, it had complied under the Third Prong of Title IX.²⁵ Brown University argued that, based on the student interest surveys it had conducted, women did not express the same interests in athletics as men for purposes of its Prong Three analysis.²⁶ Brown University submitted the following evidence in support of its compliance:

- i) [A]dmissions data showing greater athletic interest among male applicants than female applicants; ii) college board data showing greater athletic interest and prior participation rates by prospective male applicants than female applicants; iii) data from the Cooperative Institutional Research Program at UCLA indicating greater athletic interest among men than women; iv) an independent telephone survey of 500 randomly selected Brown undergraduates that revealed that Brown offers women participation opportunities in excess of their representation in the pool of interested, qualified students; v) intramural and club participation rates that demonstrate higher participation rates among men than women; vi) walk-on and try-out numbers that reflect a greater interest among men than women; vi) [sic] high school participation rates that show a much lower rate of participation among females than among males; (viii) the NCAA Gender Equity Committee data showing that women across the country participate in athletics at a lower rate than men.²⁷

The First Circuit Court of Appeals held that Brown University failed to comply with Prong Three by failing to fully and effectively accommodate the interests and abilities of women at the university because the sustained existence of the women's gymnastics and volleyball teams before their elimination showed that Brown University women *had* the interest and ability to sustain them.²⁸ The majority opinion rejected Brown University's contention that Title IX (and hence Prong Three) requires a school to equally accommodate the relative interests of male and female students and held as irrelevant

503 U.S. 60, 77 (1992) (finding sexual harassment and discrimination by a male coach-teacher). Prevailing Title IX plaintiffs also qualify for attorneys fees under 42 U.S.C. § 1988(b), which often dwarf damages awards. See, e.g., *Mercer v. Duke Univ.*, 401 F.3d 199, 211 (4th Cir. 2005) (approving an attorney fee award of \$350,000 in addition to nominal compensatory damages of \$1).

23. 991 F.2d 888 (1st Cir. 1993), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

24. *Id.* at 892.

25. *Id.* at 899.

26. See *Cohen*, 101 F.3d at 198 n.30 (Torruella, C.J., dissenting).

27. *Id.*

28. *Cohen*, 991 F.2d at 904.

evidence showing that men had greater interest in college athletics than did women. The Court instead focused entirely on the interests of female students at Brown University.²⁹

In its Prong Three analysis, the court reiterated and deferred to the formulation of the Prong Three test articulated in the 1979 Policy Interpretation:

[T]he mere fact that there are some female students interested in a sport does not ipso facto require the school to provide a varsity team in order to comply with the third benchmark. Rather, the institution 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 reasonable expectation of intercollegiate competition for that team"³⁰

In recent years, the federal appellate courts that have examined Prong Three or the Three-Prong Test generally have continued to apply and follow the above-quoted formulation, citing the principle that courts should defer to reasonable regulations of an administrative agency.³¹ Indeed, the standard set forth in 1979 continues to play a major role today in the Additional Clarification.³²

C. The 1996 Clarification

The OCR published a "Clarification"³³ of the Three-Prong Test in 1996 in response to numerous requests from schools seeking further explanation of what the OCR would deem to constitute compliance with its requirements. "[T]he objective of the [1996] Clarification is to respond to requests for specific guidance about the existing standards

29. *Cohen*, 101 F.3d at 198 (Torruella, C.J., dissenting).

30. *Cohen*, 991 F.2d at 898 (quoting 1979 Policy Interpretation, *supra* note 3, at 71,418).

31. See 2003 COMMISSION REPORT, *supra* note 15, at 16 (citing *Chalenor v. Univ. of N. Dakota*, 291 F.3d 1042, 1046-47 (8th Cir. 2002); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *Neal v. Bd. Of Trs. of the California State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999); *Cohen*, 101 F.3d at 173; *Horner v. Kentucky High Sch. Athletic Assoc.*, 43 F.3d 265, 275 (6th Cir. 1994); *Kelley v. Bd. Of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3rd Cir. 1993)).

32. As discussed further below, these same factors cited by the court from the 1979 Policy Interpretation mirror the factors outlined by the OCR in the 2005 Additional Clarification: "(a) unmet interest sufficient to sustain a varsity team in the sport(s); (b) sufficient ability to sustain an intercollegiate team in the sport(s); and (c) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region." ADDITIONAL CLARIFICATION, *supra* note 1, at 4.

33. See generally, 1996 CLARIFICATION, *supra* note 6.

that have guided the enforcement of Title IX in the area of intercollegiate athletics."³⁴

With respect to Prong Three, the 1996 Clarification emphasized three factors originally listed in the 1979 Policy Interpretation that the OCR would consider while assessing a school's compliance:

In making this determination [of compliance with Prong Three], OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.³⁵

Yet, the OCR also emphasized its traditional policy of permitting schools the discretion and flexibility "to which they are entitled when deciding how best to comply with the law."³⁶ Recognizing that the 1996 Clarification, with its lack of definitive guidance, still left schools somewhat unclear about what efforts would be sufficient to comply under Prong Three, the OCR also offered to provide more guidance in the future:

[S]everal parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability We recognize . . . that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.³⁷

D. The Paige Commission and the 2003 Further Clarification

On the thirtieth anniversary of Title IX's enactment, the DOE renewed public interest in the law by studying its significance and ways to improve enforcement.³⁸ In June 2002, the U.S. Secretary of Education, Rod Paige, established the Secretary of Education's Commission on Opportunity in Athletics (the Commission), the first federal advisory panel created to study Title IX and to determine the effects of Title IX in the context of intercollegiate athletics over the last thirty years.³⁹ The findings and recommendations from the Commission were published in February 2003. The recommendations "not only speak to compliance, they also speak to the need for greater

34. See 1996 Cantú Letter, *supra* note 13.

35. 1996 CLARIFICATION, *supra* note 6, at Pt. Three.

36. 1996 Cantú Letter, *supra* note 13.

37. *Id.*

38. See 2003 COMMISSION REPORT, *supra* note 15, at 46-47.

39. *Id.* at 2.

clarity and education from the Office for Civil Rights to the nation's sports administrators, educators, coaches, athletes, and parents . . ."⁴⁰

The Commission observed that many college administrators felt that the OCR still failed to provide them with clear guidance on compliance and policy interpretations.⁴¹ The Commission addressed the need for the OCR to educate colleges regarding the OCR's expectations so they could better plan athletic programs that would effectively meet the needs and interests of their students while complying with Title IX.⁴² The Commission Report included the recommendation that:

The Office for Civil Rights should allow institutions to conduct continuous interest surveys on a regular basis as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports. The Office should specify the criteria necessary for conducting such a survey in a way that is clear and understandable.⁴³

The Commission also recommended that: "The Office for Civil Rights should study the possibility of allowing institutions to demonstrate that they are in compliance with the third part of the three-part test . . . by the interest levels indicated in surveys of prospective or enrolled students at that institution."⁴⁴

The Commission had heard numerous complaints from college administrators about the Three-Prong Test. Many administrators told the Commission that because the guidance concerning Prongs Two and Three was so ambiguous, the proportionality prong was the only meaningful test.⁴⁵ Indeed, witnesses testified to the Commission that

40. *Id.* at 1.

41. *Id.* at 3.

42. *Id.*

43. *Id.* at 38 (emphasis omitted) (Recommendation 18). Recommendation 18 was not adopted unanimously by the Commission. *Id.* at 59. It was adopted by an 8-5 vote (the closest vote of all the Commission's recommendations). *Id.*

Those Commissioners opposed to this recommendation believe that allowing interest surveys may prevent future progress in providing opportunities for women because offering opportunities regardless of interest may encourage participation even where none currently exists. They felt that any use of interest surveys should be limited to demonstrating compliance with the third part of the three-part test. They also faulted the recommendation for not taking into consideration the effect of historical patterns of discrimination on women's interest in athletics.

Id. at 38. Consistent with their dissenting votes, some of the Commissioners have stated their opposition to use of the Model Survey. See Erik Brady, *Ex-members of Title IX Panel Urge Against Use of Surveys*, USA TODAY, Oct. 17, 2005, available at http://www.usatoday.com/sports/college/other/2005-10-17-title-ix_x.htm.

44. 2003 COMMISSION REPORT, *supra* note 15, at 39 (Recommendation 19). Recommendation 19 was adopted unanimously by the Commission. *Id.* at 59.

45. *Id.* at 23.

attorneys and consultants had told them that "the only safe way to demonstrate compliance with Title IX's participation requirement is to show that they meet the proportionality requirement [in Prong One] of the three-part test."⁴⁶ The Commission concluded that:

There should be an additional effort to designate [Prongs] two and three as safe harbors along with [Prong] one. For attorneys and consultants, the easily quantifiable nature of the proportionality test, requiring as it does simple data and a clear mathematical formula, may make it more likely to be favored as a means of establishing compliance.⁴⁷

In the 2003 "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance," issued by the OCR in July 2003 following its review of the Commission Report,⁴⁸ the OCR foreshadowed the issuance of the Additional Clarification, noting:

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.⁴⁹

II. THE 2005 ADDITIONAL CLARIFICATION

On March 17, 2005, the OCR sought to clarify the matter of compliance with Prong Three by publishing an "Additional Clarification."⁵⁰ Most notably, this publication describes a model interest survey, which the OCR refers to as the "Model Survey," that can be administered to an undergraduate student population in order to determine the existence or non-existence of students' "unmet interest" in participating in intercollegiate athletics, one component of the Prong Three determination under Title IX. Further, the Additional Clarification states that the "OCR will presume that [the data collected from] the Model Survey is an accurate measure of student interest, absent other direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team,"⁵¹ if it is administered in accordance with the OCR's recommendations. The

46. *Id.*

47. *Id.* at 24.

48. See 2003 FURTHER CLARIFICATION, *supra* note 6.

49. *Id.*

50. The Additional Clarification was published along with a "User's Guide" that further explains the Model Survey and a "Technical Manual" that provides the statistical analysis that is the basis for the Model Survey and the User's Guide. See ADDITIONAL CLARIFICATION, *supra* note 1, at 3.

51. *Id.* at 6.

Additional Clarification also provides that, if the Model Survey is properly administered, a student's failure to respond to it can be considered evidence that he or she actually lacks "interest" as contemplated by Prong Three. Thus, if Model Survey results demonstrate a lack of student interest in additional athletic offerings – including through nonresponses to the Survey – the school will be considered by the OCR to be within a demonstrable Prong Three "safe harbor."⁵²

The Model Survey and the OCR's deference to its results appear to be the most important developments offered by the OCR in the Additional Clarification. With the Model Survey as its centerpiece, however, the Additional Clarification also reorganizes and focuses the OCR's pre-existing and vague Prong Three guidance to create a concise and practical roadmap to compliance with each element of Prong Three that schools can follow with confidence.⁵³

The Additional Clarification is intended to address, in part, the long-standing concerns that institutions have voiced to the Commission and others⁵⁴ about the lack of guidance as to how to comply with Prong Three.⁵⁵ To this end, the OCR restates in the Additional Clarification that:

[A]n institution will be found in compliance with [Prong Three] unless there exists a sport(s) for the underrepresented sex for which *all* three of the following conditions are met:

- a. Unmet interest sufficient to sustain a varsity team in the sport(s);
- b. Sufficient ability to sustain an intercollegiate team in the sport(s); and
- c. Reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region.

....

... When one or more of these conditions is absent, a school is in compliance with [Prong] three. It follows that schools are not required to accommodate the interests and abilities of all their students of the underrepresented sex or to fulfill

52. *Id.* at 7.

53. *Id.* at 3.

54. *Id.* at 2; 2003 COMMISSION REPORT, *supra* note 15, at 38-39.

55. According to the Additional Clarification, "[b]ased on the OCR's experience investigating the three-part test and the fact that the OCR has not investigated the vast majority of recipient institutions, OCR believes that institutions may be uncertain [prior to the Additional Clarification] about the factors OCR considers" under the Third Prong. ADDITIONAL CLARIFICATION, *supra* note 1, at 2.

every request for additions of new varsity teams or elevations of particular club sports to varsity status[, unless all three conditions are present for a given sport].⁵⁶

A. Exploring Prong Three's Test

To measure compliance with this test (and as explained in greater detail throughout the sub-parts to this Section II.A.), the OCR will first look to see whether there is demonstrable interest among students of the underrepresented gender capable of competing at the intercollegiate level in a sport that the school does not presently offer. The burden of proof is on the OCR to demonstrate this unmet interest.⁵⁷ This is where the Model Survey can be dispositive – if the Model Survey responses demonstrate insufficient unmet interest, the OCR will not conduct a compliance review of the school.

If unmet interest is demonstrated in a given sport, however, the school must then take steps to determine whether the interested students actually have the ability to compete at the collegiate level and whether such interest and ability is sustainable over time, presumably over a number of years. This second-step analysis is subjective, but it is a necessary step in determining whether a school is Prong Three compliant once unmet interest is demonstrated.

If this second-step analysis suggests sufficient interest and ability among student-athletes of the underrepresented gender to sustain a team, the OCR will look at competitive opportunities in the school's geographic region to see whether implementation of a new team is practical.

The importance of this three-step procedure is that, if the OCR's relatively clear guidance is followed – specifically, use of the Model Survey to determine interest and use of the Additional Clarification's guidance to evaluate the two additional Prong Three elements in good faith – a school can largely monitor its own compliance efforts with assurance that the OCR will defer to the school's decisions, absent direct and very persuasive evidence contrary to the school's determinations.

56. ADDITIONAL CLARIFICATION, *supra* note 1, at 4. Note that this test is not new; these same factors appeared in the 1979 Policy Interpretation, *supra* note 3, the 1996 CLARIFICATION, *supra* note 6, and were cited by the 1993 *Cohen* court in its Prong Three analysis, see *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

57. ADDITIONAL CLARIFICATION, *supra* note 1, at 4. The burden of proof has always been on the government since the 1979 Policy Interpretation. "The Department would [have] the burden of demonstrating that the institution was actually engaged in unlawful discrimination." 1979 Policy Interpretation, *supra* note 3, at 71,414.

1. Step One: Unmet Interest Sufficient to Sustain a Varsity Team in a Sport

The Model Survey was designed specifically to measure whether sufficient unmet interest exists among the underrepresented gender to sustain a varsity team.⁵⁸

Student interest surveys have always been part of the Title IX compliance landscape. Nearly two-thirds of the schools investigated by the OCR between 1992 and 2002 (86 out of 130) sought to demonstrate their compliance with Title IX under Prong Three.⁵⁹ Of these, approximately three-fourths of the institutions (67 out of 86) did so by means of a student interest survey.⁶⁰ These surveys varied widely in substance and technique, but they were often helpful and sometimes persuasive in demonstrating a school's compliance with Title IX.⁶¹

The OCR charged the National Center for Education Statistics (NCES)⁶² and the National Institute of Statistical Sciences (NISS)⁶³ with conducting a historical analysis of the use of surveys in its case files and designing a streamlined, model survey based on the best practices and collective learning of the various schools over the last decade of Title IX enforcement.⁶⁴ NCES and NISS then drafted the User's Guide and Technical Manual, respectively, to "discuss the effective and problematic elements of [the] survey instruments" used

58. ADDITIONAL CLARIFICATION, *supra* note 1, at 5.

59. USER'S GUIDE, *supra* note 16, at 3.

60. *Id.*

61. The contents of these various survey instruments are discussed and analyzed at length in the so-called "Technical Manual" published by individuals working for the National Institute of Statistical Sciences. See ALAN F. KARR & ASHISH P. SANIL, TITLE IX DATA COLLECTION: TECHNICAL MANUAL FOR DEVELOPING THE USER'S GUIDE (Nat'l Inst. of Statistical Sciences, 2005) [hereinafter TECHNICAL MANUAL].

62. The User's Guide describes the NCES as:

[T]he primary federal entity for collecting, analyzing, and reporting data related to education in the United States and other nations. It fulfills a congressional mandate to collect, collate, analyze, and report full and complete statistics on the condition of education in the United States; conduct and publish reports and specialized analyses of the meaning and significance of such statistics; assist state and local education agencies in improving their statistical systems; and review and report on education activities in foreign countries.

USER'S GUIDE, *supra* note 16, at ii.

63. "NISS was established in 1991 by the national statistics societies and the Research Triangle universities and organizations, with the mission to identify, catalyze and foster high-impact, cross-disciplinary research involving the statistical sciences." NISS Home Page, <http://www.niss.org> (last updated Nov. 22, 2005).

64. USER'S GUIDE, *supra* note 16, at 2.

by the schools.⁶⁵ According to the OCR, as published in the Additional Clarification:

NCES's expert statisticians carefully designed the web-based Model Survey, after extensive analysis of the 57 survey instruments, to effectively measure student interest in a simple, straightforward manner. The Model Survey is an unbiased, standardized methodology that maximizes the possibilities of obtaining correct information and facilitating responses. It effectively captures information on interest, experience, and self-assessment of ability across multiple sports, while not unnecessarily complicating responses with superfluous or confusing questions.⁶⁶

a. How the Model Survey Works

The OCR's representation that the Model Survey measures student interest in a "simple, straightforward manner" seems to be accurate. The computer-based Model Survey consists of only eight screens, and not all respondents need to proceed through all eight screens. As described by the NCES:

Screen 1 introduces the survey and informs respondents of the purposes of the census, provides an explicit confidentiality statement, and provides an explanation of the structure of the instrument.

Screen 2 requests four items of demographic information—age, year in school, gender, and whether the student is full-time. The dropdown boxes and radio buttons constrain responses to those allowed by the institution conducting the census.

Screen 3 explains the next set of questions—on athletic experience, participation, and ability. It allows respondents with no interest in future participation in athletics to so indicate and complete the instrument without having to view any of the other screens.

Screen 4 of the proposed instrument is reached only by respondents who wish to enter information concerning athletic experience, interests, and abilities. It lists the responses that will be allowed when the information is requested (on screen 6), and contains a neutral statement of the burdens and benefits associated with participation in intercollegiate athletics

Screen 5 allows respondents who wish to enter information concerning athletic experience, interests, and abilities to *select the sports for which they wish to provide information*. The purpose of this is to reduce the size and complexity of screen 6, on which the information is actually entered. Only those sports selected on screen 5 are listed on screen 6

65. ADDITIONAL CLARIFICATION, *supra* note 1, at 3.

66. *Id.* at 5. As stated above, sixty-seven institutions demonstrated their compliance under Prong Three by means of a student interest survey between 1992 and 2002. "Detailed data were available on three-fourths of these [student interest] surveys (52 of the 67)." USER'S GUIDE, *supra* note 16, at 6. The OCR-commissioned analysts reviewed the fifty-two survey instruments used in OCR cases plus five additional survey instruments used by other institutions for a total of fifty-seven survey instruments. See ADDITIONAL CLARIFICATION, *supra* note 1, at 3; USER'S GUIDE, *supra* note 16, at 8.

Screen 6 is where actual information regarding experience, current participation, interest in future participation, and self-assessed ability is entered The allowable responses, which are constrained by radio buttons that also prevent multiple responses, are as follows:

For experience at the high school level, "Recreational," "Intramural," "Club," "Junior Varsity" and "Varsity."

For current participation, "Recreational," "Intramural," "Club" and "Varsity."

For interest in future participation at the institution: "Recreational," "Intramural," "Club" and "Varsity."

For ability: "Yes, I have the ability" and "No, I would need to develop the ability."

The reason for inclusion of four separate categories is that a determination of interest and ability is related to the pattern of response across these categories. For example, to determine the number of students of the underrepresented sex with interest and ability in a varsity sport, the students to be counted could be those who express an interest in future participation at the varsity level, indicate that they have the ability to do so, and have current or high school experience beyond the recreational level

Screen 7 offers respondents the opportunity for comments or other feedback, asks them to click a button to record their responses, and thanks them for participating.

Screen 8 is a pop-up screen that appears only for full-time students of the underrepresented sex who have expressed an interest and ability to participate at a higher level. It lists the sport(s) in which the student has indicated an ability and interest in future participation, and asks the student to provide contact information if the student wishes to be contacted by the athletics department or some other organization in the university with respect to her interests. The student can exit this screen without providing the requested information by indicating that she does not wish to be contacted.⁶⁷

b. Administering the Model Survey to Ensure the OCR's Deference

The OCR offers institutions using the Model Survey significant procedural advantages if – but only if – they administer the Model Survey consistently with the OCR's recommendations.

The burden of proof is on OCR (in the case of an OCR investigation or compliance review), or on students (in the case of a complaint filed with the school under its Title IX grievance procedures), to show by a preponderance of the evidence that the institution is not in compliance with [Prong] three.⁶⁸

67. USER'S GUIDE, *supra* note 16, at 13-14; *see also id.* at 15-22. Respondents selecting the "no interest" option on Screen 3 are deemed to have no interest in participating in college athletics for purposes of Prong Three analysis. ADDITIONAL CLARIFICATION, *supra* note 1, at 5.

68. ADDITIONAL CLARIFICATION, *supra* note 1, at 4; *see also supra* note 57.

If the Additional Clarification is diligently followed, the OCR "will presume that Model Survey results indicating lack of interest sufficient to sustain a varsity team are evidence of such actual lack of interest, and an institution will therefore be determined to be in compliance with" Prong Three, so long as the Model Survey is properly administered.⁶⁹ Further,

[S]chools may assume that nonresponse to the census indicates an actual lack of interest if all students have been given an easy opportunity to respond to the census, the purpose of the census has been made clear, and students have been informed that the school will take nonresponse as an indication of lack of interest.⁷⁰

The presumption that responses from a properly-administered Model Survey accurately measure student interest – or lack of interest – can only be overcome "if OCR finds direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team, such as . . . a recent, broad-based petition from an existing club team for elevation to varsity status."⁷¹ "Where the Model Survey shows insufficient interest to field a varsity team, OCR will not conduct a compliance review" of that institution's Title IX compliance efforts,⁷² although OCR is required to investigate any complaint of discrimination brought to its attention.⁷³

Proper administration, according to the OCR, includes: (i) administering the Model Survey "periodically to permit schools to identify developing interests;" (ii) "ideally" providing it to "all full-time undergraduates;" (iii) administering it "in a manner that is designed to generate high response rates;" and (iv) "include in the census at least the full list of sports recommended in the Model Survey."⁷⁴

i. "Periodically" Administering the Model Survey

The Additional Clarification does not specify how often the Model Survey should be administered, other than to suggest that it

69. ADDITIONAL CLARIFICATION, *supra* note 1, at 7.

70. *Id.* at 6 (emphasis added); see also *id.* at 7; USER'S GUIDE, *supra* note 16, at 12.

71. ADDITIONAL CLARIFICATION, *supra* note 1, at 7. As discussed below in Section III.B.2, the creation of such a petition is always a viable option for a group seeking to compel a school to start a new sports team. Since these petitions may be created with or without the impetus of a survey, they should not be seen as a deterrent to administering the Model Survey.

72. *Id.* at 7-8.

73. *Id.* at 8 n.14; see also 1979 Policy Interpretation, *supra* note 3 (citing 45 C.F.R. § 80.7(b) (2004)).

74. ADDITIONAL CLARIFICATION, *supra* note 1, at 6-7; see also USER'S GUIDE, *supra* note 16, at 12.

occur "periodically."⁷⁵ As no definition of "periodically" is provided, it is likely that administration biannually is sufficient.⁷⁶ Indeed, the User's Guide suggests that less frequent surveying may be appropriate for certain schools:

A survey of the entire undergraduate student body that generates high response rates and demonstrates that the interests of the underrepresented sex are fully accommodated might serve for several years if the demographics of the undergraduate population at the institution are stable and if there are no complaints from the underrepresented sex with regard to a lack of athletic opportunities.⁷⁷

ii. Administering the Model Survey to all Undergraduates

The OCR recommends administering the Model Survey as "a census whereby the Model Survey is provided to all full-time undergraduates,"⁷⁸ rather than to a sample of students. As discussed further below, the OCR determines the existence of sufficient Prong Three interest based on the absolute number of Model Survey responses indicating athletic interest, rather than on the relationship that the number of such responses bears to the number of students surveyed. The ability to accurately extrapolate sample survey data to determine the number of interested students with precision would be compromised by "issues associated with sample surveys: selection of the sampling mechanism, selection of the sample size, and calculation of sampling error."⁷⁹

Although the OCR does not permit a school flexibility to survey only a sample of students, if the school wishes to have the benefit of OCR deference to the school's Model Survey results,⁸⁰ the Additional Clarification does give schools the option of only surveying all students of the underrepresented gender.⁸¹ Such an approach, however, would seem more difficult to administer, as the school would need to segregate its list of enrolled students based on gender to restrict access to the survey to a subset of the undergraduate student body. Further, such an approach might project an indifference to the

75. ADDITIONAL CLARIFICATION, *supra* note 1, at 6.

76. *Id.* By its use of the word "periodically" rather than "annually", the OCR likely intended to convey that annual administration of the Model Survey is not required. A school may elect, however, to survey its students annually in order to have more timely information on developing student interest.

77. USER'S GUIDE, *supra* note 16, at 11.

78. ADDITIONAL CLARIFICATION, *supra* note 1, at 6.

79. USER'S GUIDE, *supra* note 16, at 10.

80. ADDITIONAL CLARIFICATION, *supra* note 1, at 7.

81. *Id.* at 6.

interests of the overrepresented gender⁸² and would forego the opportunity to collect potentially useful data that could help an athletic department track students' athletic interests and, thereby, allocate its resources more efficiently.

The OCR does not approve colleges administering the Model Survey to high school students as a way of determining interest. Such an application would inherently involve sampling, because the relevant high school student population served by a given institution is almost impossible to determine.⁸³ It should be noted, however, that "[w]hen determining whether an institution is fully and effectively accommodating the interests and abilities of its students of the underrepresented sex, OCR considers the interests and abilities of currently enrolled students, *as well as students who have been admitted.*"⁸⁴ The OCR also does not require the surveying of part-time students.⁸⁵

iii. Administering the Model Survey in a Manner Designed to Generate High Response Rates

The OCR requires that the Model Survey be administered "in a manner that is designed to generate high response rates."⁸⁶ The OCR will assume that nonresponses to the Model Survey are indicative of lack of interest only "if all students have been given an easy opportunity to respond to the census, the purpose of the census has been made clear, and students have been informed that the school will take nonresponse as an indication of lack of interest."⁸⁷

The Additional Clarification provides two examples of Model Survey distribution methods that are designed to generate high response rates. First, the OCR suggests that the Model Survey may be administered "as part of the registration process whereby students

82. See, e.g., USER'S GUIDE, *supra* note 16, at 10-11.

83. *Id.* at 10.

84. ADDITIONAL CLARIFICATION, *supra* note 1, at 3 n.6 (emphasis added).

85. *Id.* at 6 n.11. Theoretically, only those students eligible to compete at the intercollegiate level, as determined by the governing athletic association, would need to be surveyed, as ineligible students would lack the ability to compete. Isolating ineligible students out of the survey population, however, may be difficult administratively, especially if such an exercise delves into analyses of students' academic standing. See TECHNICAL MANUAL, *supra* note 61, at 49.

86. ADDITIONAL CLARIFICATION, *supra* note 1, at 7; see also USER'S GUIDE, *supra* note 16, at 12.

87. ADDITIONAL CLARIFICATION, *supra* note 1, at 6. Presumably, the OCR's description of the Model Survey, provided in the User's Guide in connection with Screen 1 of the Model Survey, is sufficient. USER'S GUIDE, *supra* note 16, at 15.

must complete or actively bypass the Model Survey to register for courses.”⁸⁸

The Additional Clarification also acknowledges that a school may administer the Model Survey to its students by “send[ing] an email to the entire target population that includes a link to the Model Survey.”⁸⁹ If this method is used, however, the OCR requires that “the school [have] accurate email addresses, [that] students have access to email, and [that] the school [take] reasonable steps to follow-up with students who do not respond.”⁹⁰ The Additional Clarification does not give further guidance about what follow-up efforts would satisfy the OCR’s requirement that the Model Survey be administered in a manner to generate high response rates.⁹¹ The OCR does not require that a properly-administered Model Survey actually generate any minimum response rate: “[a]lthough rates of nonresponse may be high with the email procedure, under these conditions [of proper Survey administration, including some level of follow-up], OCR will interpret such nonresponse as a lack of interest.”⁹²

88. *Id.* at 7.

89. *Id.*

90. *Id.*

91. *Id.*; see also USER’S GUIDE, *supra* note 16, at 12. The reasonable follow-up requirement is imprecise. A school that wishes to avoid any questions about the adequacy of its follow-up efforts might affirmatively contact (beyond the initial email) any students it might expect to be interested in competing intercollegiately in a sport not presently offered at the varsity level, such as those presently participating on the school’s preexisting club or intramural teams. A school can easily publicize the existence of the Model Survey among such already cohesive units by sending follow-up email(s) to the students on such teams or by contacting their teams’ coaches or administrators. Schools should strive, though, to be even-handed in their follow-up efforts. Disparate treatment may lay the case for a statutory Title IX violation or a constitutional violation for public schools subject to the Fourteenth Amendment’s equal protection clause. The Additional Clarification does not purport to provide safe harbor status to constitutional or state-law violations. ADDITIONAL CLARIFICATION, *supra* note 1, at 1 n.1. Thus, a school may instead opt to send follow-up email(s) to all students.

92. ADDITIONAL CLARIFICATION, *supra* note 1, at 7. A low response rate does not, *per se*, raise Title IX concerns. A small gross number of positive Model Survey responses – perhaps ten to fifteen students for a sport with a limited roster like basketball among thousands of students within the Survey population – will obligate a school to take steps to further explore whether it needs to add the desired sport. See discussion *infra* Section II.A.1.c. The responses (or nonresponses) of the overwhelming majority of Survey-takers who lack the ability or the interest to compete at the intercollegiate level are not relevant under a strict Title IX analysis, as a school could not be required to establish an intercollegiate team for their benefit. See, e.g., ADDITIONAL CLARIFICATION, *supra* note 1, at 4, 10-11. Indeed, this has been the case since the original 1979 Policy Interpretation: “As explained in the Policy Interpretation, OCR requires that the assessment of students’ interests and abilities use ‘methods [which] are responsive to the expressed interests of students capable of intercollegiate competitions who are members of an underrepresented sex.’ ” *Id.* at 4-5 (emphasis added) (citing 1979 Policy Interpretation, *supra* note 3, at 71,417). Further, the “survey nonresponse bias” suggests that those most likely to benefit

Critics of the Additional Clarification – including the NCAA – have expressed skepticism about the reliability of the Model Survey to determine athletic interest if it is distributed via email, contending that participation in email surveys is inevitably spotty, leading to unreliable results.⁹³ Such critics fear that low response rates, when accepted as an indication of lack of interest, will be construed as an apparent – and misleading – lack of interest in sports by women, which the OCR will nevertheless accept as conclusive evidence that a school does not need to further accommodate their athletic interests.⁹⁴

OCR's premise, however, appears to be that if students have access to and are properly informed about the Model Survey – including the purpose of the Survey and the fact that the school will interpret a nonresponse as an indication of lack of interest⁹⁵ – then it is appropriate to conclude that a potential student-athlete not interested enough to respond to a survey would not be interested in making the significant commitment needed to compete in an intercollegiate varsity sport.⁹⁶ If a school employing the email method fails to properly publicize the Model Survey, fails to make it readily available, or fails to take "reasonable steps to follow-up" with those

from a survey are the ones most likely to respond to it. See, e.g., TECHNICAL MANUAL, *supra* note 61, at Ch. 5. The Model Survey serves as a direct conduit for varsity-caliber athletes to be heard about their athletic interests, giving them the self-interest to want to respond.

93. See, e.g., Press Release, NCAA, Statement from NCAA President Myles Brand Regarding Department of Education Title IX Clarification Mar. 22, 2005, available at http://www2.ncaa.org/media_and_events/press_room/2005/march/20050322_brand_stmt_titleix_survey.html.

94. See, e.g., National Women's Law Center, Bush Administration Covertly Attacks Title IX by Weakening Athletics Policies, Apr. 5, 2005, <http://www.nwlc.org/details.cfm?id=2211§ion=infocenter>; Womenssportsfoundation.org, *Department of Education Creates Huge Title IX Compliance Loophole: The Foundation Position*, June 16, 2005, <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=1009>; Save Title IX, Questions and Answers on the Department of Education's "Clarification" of Title IX Policy, <http://www.savetitleix.com/questions.html> (last visited Dec. 29, 2005).

95. ADDITIONAL CLARIFICATION, *supra* note 1, at 6.

96. See, e.g., USER'S GUIDE, *supra* note 16, at 18 ("[I]ntercollegiate athletics usually requires [sic.] athletes to devote 20 hours of practice each week during the season, as well as individual regimens of training during the off-season. Athletes are required to travel and occasionally miss classes."). Critics contend, however, that email survey response rates are consistently low, thus ensuring that even interest among female athletes will not be accurately measured. See generally, Feminist Majority Foundation Online, *Feminist Daily News Wire, Dept. of Education Weakens Title IX Compliance Standards for College Athletics*, Mar. 23, 2005, <http://www.feminist.org/news/newsbyte/printnews.asp?id=8964>; Save Title IX, *supra* note 94; Womenssportsfoundation.org, *Loophole*, *supra* note 94.

who do not respond, however, the OCR will not presume that the Survey responses are an accurate measure of interest.⁹⁷

If a mandatory response method is used (i.e., students are required to complete or actively bypass the Survey), the school will not be confronted with the nonresponse concerns and the follow-up obligations that surround the non-mandatory email approach. Accordingly, the mandatory method may be viewed by schools as the preferred method of administration.

iv. Include all Sports in the Model Survey

The Model Survey must be administered so as to give students an opportunity to express interest in "all varsity sports, including 'emerging sports,' currently recognized by the three national intercollegiate athletic associations to which most schools belong."⁹⁸ In addition to recognizing twenty-three championship sports, the NCAA "recognizes 7 'emerging sports' that are intended to provide additional athletics opportunities to female student-athletes."⁹⁹ The current list of NCAA sports is provided in the User's Guide in connection with Screen 5 of the Model Survey.¹⁰⁰

v. Alternative Approaches to Interest Survey Administration

Of course, a school is not obligated to implement the Model Survey – much less to follow the above procedures for implementation – even if it seeks to comply with Title IX through the Third Prong.¹⁰¹ The Additional Clarification seeks to preserve schools' discretion to run their athletic departments in any non-discriminatory manner that they choose.¹⁰² But failure to use the Model Survey as part of an effort to demonstrate compliance with the Third Prong of Title IX has additional risk because student interest would then have to be gauged by some other method that does not enjoy the benefit of the OCR's deference. For example, if a school uses a census other than the Model

97. ADDITIONAL CLARIFICATION, *supra* note 1, at 6.

98. *Id.* at 7. The national intercollegiate athletic associations referred to are the National Collegiate Athletic Association (NCAA), the National Association of Intercollegiate Athletics (NAIA), and the National Junior College Athletic Association (NJCAA). *See, e.g.*, THE OFFICIAL NCAA WEBSITE, <http://www.ncaa.org/about/champs.html> (explaining that the NCAA administers eighty-eight championships in twenty-three sports for its member institutions).

99. USER'S GUIDE, *supra* note 16, at 13.

100. *Id.* at 19.

101. *See* ADDITIONAL CLARIFICATION, *supra* note 1, at 8 (stating that "surveys of this kind are only one method by which a school may obtain data on its students' interests").

102. *Id.*

Survey, the OCR will need to evaluate such census for reliability equivalent to the Model Survey and for compliance with the four factors for proper Model Survey administration discussed above.¹⁰³ Further, if a school does not use the Model Survey or an equivalent census, the results of any other survey tool will not be considered by the OCR as adequate to measure student interest. "Instead, OCR will look to a broader range of factors drawn from previous OCR guidance on the three-part test in determining whether the school has accurately measured student interest."¹⁰⁴

Thus, use of any survey tool other than the Model Survey appears to forego the benefit of OCR deference and the presumption of accuracy that use of the Model Survey provides.

c. Objectively Determining Whether Unmet Interest has been Demonstrated

After the Model Survey is administered, the school must determine whether the gross number of positive responses collected from the Model Survey for a given sport exceeds the level of requisite interest that the school has determined to be necessary for a new varsity team.¹⁰⁵ Unlike many components of Prong Three, this component involves a relatively objective exercise.

The number of positive responses that would comprise requisite unmet interest should not be difficult for a school to establish.¹⁰⁶ The User's Guide offers the following example:

An operational formulation of the problem is as follows: There are a minimal number of team members necessary to "field" a team in the given sport. The institution must specify this number. It depends on the sport and possibly contextual factors. For instance, a basketball team cannot play with fewer than five players, but this is not the minimal number of players needed for basketball. Instead, the minimal number is presumably in the range 10–15. NCAA or other association rules may provide other bounds for the number of players, but prevailing values in the conference to which the institution belongs are also relevant.¹⁰⁷

103. *Id.*

104. *Id.* at 9 (punctuation omitted).

105. The Additional Clarification does not mandate that a school determine the number of athletes necessary to field a team prior to conducting the Model Survey, although this would seem preferable from the standpoint of establishing the credibility of the school's compliance processes. See discussion *infra* Section II.A.2, for a discussion of how the OCR is more likely to defer to a school's decisions if they are made pursuant to a predetermined process designed to maximize the chances of achieving neutrality in the results.

106. USER'S GUIDE, *supra* note 16, at 24.

107. *Id.* at 9.

The OCR recognizes that practical factors involving particular sports may change the calculation of the minimum number of participants needed.¹⁰⁸ When evaluating the minimum number of athletes needed, the OCR "may consider factors such as: rate of substitutions, caused by factors such as intensity of play or injury; variety of skill sets required for competition; and effective practices for skill development."¹⁰⁹ Further, the OCR will defer to athletic administrators' decisions as to the minimum number of positive Model Survey responses that will be deemed to show requisite interest for each sport:

Athletic directors and coaches for a particular sport will generally have the experience with the mechanics and realities of operating a team to determine the impact of these factors and decide the number of students needed to establish teams by sport. In general, OCR defers to decisions of the athletic directors and coaches.¹¹⁰

Once a school sets its minimum number of participants for each sport, then it simply counts the number of positive responses to determine whether the Model Survey indicates sufficient unmet interest.¹¹¹ Unless a student selects on Screen 6 that her "interest in future participation at the institution" is at the "Varsity" level,¹¹² her survey response will not count towards the requisite number of positive responses. The Model Survey also requires students to provide a self-assessment of their level of ability. Here, too, the OCR will defer to the Model Survey's results: "OCR will presume that a student's self-assessment of lack of ability to compete at the intercollegiate varsity level in a particular sport is evidence of actual lack of ability."¹¹³

108. ADDITIONAL CLARIFICATION, *supra* note 1, at 11.

109. *Id.* (punctuation omitted); *see also id.* at 11-12 (discussing further the factors used to determine the minimum number of athletes).

110. *Id.* at 11. Although not mandated by the OCR, this requisite number should be selected by the school ahead of time to avoid any inference that it was influenced by the survey results.

111. *See, e.g.*, USER'S GUIDE, *supra* note 16, at 24.

112. *See id.* at 14.

113. ADDITIONAL CLARIFICATION, *supra* note 1, at 10. This is a somewhat surprising declaration of deference considering the OCR's suggested phraseology about ability in the Model Survey. Screen 6 of the Model Survey does not give students an option to honestly declare that they lack the ability to compete at the collegiate level. Rather, the only options with regard to ability are "Yes, I have the ability" and "No, I would need to develop the ability." USER'S GUIDE, *supra* note 16, at 20. The OCR expressly contemplates that athletes may be able to develop the ability to compete at the collegiate level:

[A] lack of experience or limited experience in a particular sport does not necessarily indicate the inability to compete in a particular sport at the intercollegiate level. For example, a student may have athletic skills, gained

Only if the properly-administered Model Survey results evidence that sufficient varsity-level interest exists among those in the underrepresented gender with the self-declared ability to compete intercollegiately in a sport not currently offered by the school must the school then take additional steps under the second part of the Prong Three analysis.

2. Step Two: Sufficient Ability to Sustain an Intercollegiate Team in a Sport

Conducting the Model Survey is the first, and potentially dispositive, step under the OCR's recommended approach to Prong Three compliance. If, after proper administration of the Model Survey to the entire student body, requisite interest is not demonstrated in any sport not currently offered to the underrepresented gender, then the school can have a high degree of comfort that it is in compliance with Title IX under Prong Three.¹¹⁴

If, however, requisite interest is demonstrated in a given sport, that, without more, does not mean that the sport must be instituted on a varsity level. Upon finding such requisite interest, the school would then proceed to the second step of the Prong Three test to assess whether those with interest in fact have sufficient ability to sustain an intercollegiate team.¹¹⁵ The Additional Clarification makes clear that this "assessment process" is a separate and independent

from experience in other sports, which are fundamental to the particular sport in which the student has expressed an interest.

ADDITIONAL CLARIFICATION, *supra* note 1, at 10. Yet, the OCR will apparently allow Survey results falling into this category to evidence lack of ability for purposes of analyzing Model Survey data at this stage.

While changing Screen 6 to allow a third option for self-assessment of ability might be helpful (such as "No, I do not have the ability"), such change might run the risk of drawing the OCR's review and losing the OCR's deference to the Survey's results, perversely for the same reasons outlined above. If a student lacks experience in a sport but has sufficient athleticism to compete intercollegiately, she may presume that she lacks ability and select such option on a Survey. By allowing a student to substitute her experience as a proxy for her ability, the OCR may see such a third option on Screen 6 as creating a certain bias in the results.

In any event, students' self-appraisals of ability become secondary to the opinions of coaches during the "assessment process" of measuring ability under the Prong Three analysis, as discussed further in the next section, *see also id.* at 9-11; USER'S GUIDE, *supra* note 16, at 24, so the benefits of altering the Model Survey may not be worth the major, but remote, risk of losing the OCR's deference.

114. ADDITIONAL CLARIFICATION, *supra* note 1, at 7-8. Such deference, of course, is in the absence of "other direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team," *id.* at 6, such as "[a] recent broad-based petition from an existing club team for elevation to varsity status," *id.* at 6 n.10.

115. *See, e.g., id.* at 4.

step in a Prong Three analysis. "Schools are not required to create a varsity team or elevate a club team to intercollegiate varsity status unless there are a sufficient number of interested students *that have the ability to sustain an intercollegiate varsity team.*"¹¹⁶

Students' self-appraisals of ability in their responses to the Model Survey serve only to begin the analysis relating to ability.¹¹⁷ Although the Model Survey "effectively captures information on interest, experience, and self-assessment of ability,"¹¹⁸ the Additional Clarification ultimately leaves to the school the qualitative determinations related to whether such ability reaches the level necessary for intercollegiate competition and whether such interest and ability is sustainable over a period of time.¹¹⁹

The opinions of coaches play a crucial role in determining whether interested students in fact possess the ability needed to play on the intercollegiate level. Further, the Additional Clarification provides that "[b]ecause athletic directors and coaches have unique expertise when assessing athletic ability, *their assessments will be presumed to be valid*, provided the methods used to assess ability are adequate and evaluate whether the students have sufficient ability to sustain an intercollegiate varsity team."¹²⁰

A school's assessment process under the second part of the Prong Three test may not differ significantly from the processes that would have been appropriate as part of a pre-Model Survey effort to demonstrate compliance with Prong Three.¹²¹ The User's Guide suggests the following process by which a school may further assess

116. *Id.* at 10 (emphasis added).

117. *Id.* Students' self-appraisals are of limited utility because they are confidential by default under the Model Survey. See, e.g., USER'S GUIDE, *supra* note 16, at 11, 15. Thus, a coach cannot connect a self-assessment to a given student unless that student opts to be contacted on Screens 7 and 8. See, e.g., *id.* at 21-22.

118. ADDITIONAL CLARIFICATION, *supra* note 1, at 5. Further, the Model Survey cannot adequately measure sustainability of an intercollegiate sport in a given year. It serves no role in this part of the analysis until its cumulative results can be analyzed after a school has administered it over a number of years.

119. See *id.* at 9-11.

120. *Id.* at 9 (emphasis added). Preserving the benefit of this presumption will be important to a school's success in any OCR investigation. Although loss of this presumption, if the OCR were to determine that a school's assessment methods were not "adequate" or unbiased, should not, in theory, shift the burden of proof in an investigation from the OCR to the school, *id.* at 4, the burden would effectively shift since the OCR would not be equipped to prove that the assessed players *are* sufficiently talented and/or that their interest and ability is sustainable. Thus, a loss of the presumption would also effectively shift the burden to the school to prove that its assessment (which, in this hypothetical, would have already been deemed biased by the OCR) was nonetheless accurate. This would be a heavy burden that no school would wish to take on.

121. See, e.g., *id.* at 9-11; 1996 CLARIFICATION, *supra* note 6, Pt. Three(b).

the "ability to sustain" a new varsity team – including assessing whether the interest is sustainable and evaluating the abilities of the interested student-athletes – after a Model Survey evidences unmet interest:

[A] next step might be for the institution to call a meeting of women students to see if there is enough interest to field a team. A desirable practice in obtaining attendance at the meeting would involve both direct contact with those women who had self-identified and provided contact information through the survey, as well as advertising the meeting through flyers or announcements in the campus paper. Given sufficient turnout, coaches could then conduct tryouts to evaluate the ability of prospective athletes. An evaluation of ability through a tryout would take precedence over a student's self-appraisal of ability on a survey.¹²²

During the tryouts, a school will likely want to maximize the transparency of its approach to assessing ability, in order to ensure that its impartiality cannot be questioned and to preserve the OCR's presumption of validity. For example, the school could make clear before the tryouts what it will consider to be "varsity-level" ability.¹²³ The school also could, for example, consult multiple individuals with experience coaching the sport to evaluate players' talents, rather than entrust this discretionary decision to a single coach. Although the assessments of ability will necessarily be subjective, these measures (or others) should be considered "adequate" so as to improve the chances that the assessments will be respected by the OCR.¹²⁴

Recognizing the difficulty of assessing ability levels – let alone of determining whether a showing of requisite ability level among interested students is sustainable over the course of several years – the OCR also allows for interim steps short of creating a new varsity team if a school suspects such a team *might* be required:

Because OCR considers participation in club and intramural sports to be an important indicator of interest and ability, schools that are unsure whether the interests and abilities they have measured will be sufficient to sustain a new

122. USER'S GUIDE, *supra* note 16, at 24. A school that, out of an abundance of caution, wishes to avoid any questions about whether the meeting was adequately publicized might separately provide notice of the meeting to members of any existing club or intramural team in the sport.

123. Perhaps an athletic department mission statement could declare that it aspires to be competitive within its conference in every sport. Such a school may seek to assess its potential student-athletes by reference to the abilities and credentials of student-athletes participating in that particular sport at other schools within the region or conference (with an allowance made for the fact that a start-up team may not be competitive in its first few seasons). Alternatively, an athletic department may seek to define "varsity-level" ability by reference to the relative abilities and credentials of its existing varsity athletes competing in other varsity programs, as compared to high school student-athletes (e.g., a college's varsity athletes are generally among the top ten percent of all high school athletes in the sport).

124. See ADDITIONAL CLARIFICATION, *supra* note 1, at 9.

varsity team are permitted – though not required – to create a club or intramural team to further assess those interests and abilities. . . . Just as an institution might conduct tryouts or hold organizational meetings after a survey or other initial assessment shows the potential interest and ability to create a new varsity team, an institution has the option to field a club or intramural team for a reasonable period of time to further assess the depth and breadth of the interests and abilities of the participating athletes. However, this option must be exercised as only a part of the assessment process, using standards that apply equally to male and female athletes. Once a school completes the assessment process by concluding that there is sufficient interest and ability to support a new varsity team, the school is under an obligation to create a varsity team within a reasonable period of time.¹²⁵

This express endorsement of starting a club or intramural sport provides schools a way to verify the existence on campus of sustainable interest and ability. By monitoring the interest and ability levels of club or intramural participants, the school will be able to observe whether the requisite levels are sustainable over time. Wide fluctuations in these levels would likely provide a school a safe harbor if it decides against implementing a varsity team on the basis of a lack of sustainability.

If the OCR's recommendations are followed, the OCR should, in an investigation, defer to the school's determinations. If deference is for some reason not indulged, however, the OCR will consider multiple factors in addition to the coaches' assessments:

When OCR is required to make this determination, it may consider such factors as the following —:

- the athletic experience and achievement — in interscholastic, club or intramural competition — of underrepresented students interested in playing the sport;
- participation in other sports, intercollegiate or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered;
- self-assessment of ability to compete in a particular interscholastic varsity sport;
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team;
- tryouts in the particular sport in which there is an interest;
- other direct observations of participation in the particular sport being considered; and
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students have the potential to sustain a varsity team.¹²⁶

125. *Id.* at 10-11. Note, however, what constitutes a "reasonable amount of time," *id.*, is not defined.

126. *Id.* at 10.

3. Step Three: Reasonable Expectation of Intercollegiate Competition for a Team in the Sport within the School's Normal Competitive Region

The third step of the Prong Three test – whether intercollegiate competition exists within the school's normal competitive region – is perhaps the easiest of the steps to assess. The school's other varsity athletic programs will provide guidance as to the school's normal competitive region, and information is readily available about the existence of other intercollegiate teams within any region. The OCR explains in the Additional Clarification that it "will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete."¹²⁷ Further, "if an institution's normal competitive region includes an area outside its own geographic area, OCR will not require the creation of a particular sport if, due to climate or topography, it would not be possible as a practical matter for students at the institution to practice that sport," such as a skiing program for a Big 12 school located outside of the Rocky Mountain area.¹²⁸ Schools ordinarily will have no obligation beyond the above, but if the OCR investigates a school for Title IX compliance and finds it to be in violation, "institutions may be required by the Title IX regulation to encourage the development of such competition as part of a resolution agreement or remedy."¹²⁹

B. Implementation

When a school has students of the underrepresented gender with "sufficient unmet interest and ability" to sustain an intercollegiate team in a sport that has sufficient intercollegiate competition within the school's normal region of competition, "the school is under *an obligation* to create a varsity team in that sport or elevate the club team to varsity status," if it has not otherwise proven compliance by means of Prongs One or Two.¹³⁰

This implementation, however, can take place gradually according to the Additional Clarification:

OCR recognizes that, for practical and financial reasons, a school may be unable to immediately create a new varsity team or elevate a team to varsity status. When determining whether the period of time to create or upgrade a team is reasonable, OCR will account for the steps necessary to establish the varsity

127. *Id.* at 12.

128. *Id.*

129. *Id.*

130. *Id.* (emphasis added).

team, which will vary by sport and by school and may include obtaining necessary approval and funding to establish the team, building or upgrading facilities, obtaining varsity level coach(es), and acquiring necessary equipment and supplies.¹³¹

Although it is unlikely that use of the Model Survey approach to Title IX compliance will result in a school having to start a new varsity sport that it would not otherwise have to start, that is one risk that administrators should nevertheless take into account in determining whether to follow the Additional Clarification. The following section will discuss this and other considerations that administrators should evaluate in deciding whether to use the Model Survey.

III. FACTORS TO CONSIDER IN DECIDING WHETHER TO IMPLEMENT THE MODEL SURVEY

Institutions have flexibility to demonstrate compliance by means of any one (or all) of the three prongs of Title IX, and each prong provides a sufficient basis to demonstrate compliance.¹³² Further, an institution need not make an election to comply with one particular prong. From the standpoint of defending a school against potential Title IX liability, therefore, it would seem advantageous for a school to be in a position to defend its athletic program on the basis of multiple prongs.

Institutions that seek to demonstrate Prong Three compliance (either of necessity or due to uncertainty about their ability to comply under Prongs One or Two) have always been obligated to evaluate the athletic interests and abilities of the underrepresented gender. Now that the OCR has delineated a method under Prong Three for reaching a safe harbor – and gaining the OCR's deference that it has, indeed, been reached – there are compelling reasons for such schools to avail themselves of this safe harbor.

The Model Survey approach, however, may not be appropriate for every school, as there are certain costs and risks associated with its implementation that may outweigh its potential benefits to a given school.

A. Considerations that Favor Using the Model Survey

The Model Survey need not be the only basis for evaluating interest under Prong Three. Because it is expressly sanctioned by the

131. *Id.* at 13.

132. *Id.* at 1.

OCR and is intended to help institutions achieve the Prong Three safe harbor, however, a good case can be made for using it as one method of measuring interest.

1. OCR's Deference

Although the OCR will accept several indicators of interest for purposes of Prong Three compliance efforts, none of them are expressly given the presumption of accuracy that the OCR has given the Model Survey.¹³³ Although the OCR professes to have the burden of proof to show that an institution is not in compliance with Prong Three,¹³⁴ this conflicts somewhat with the discussion in the Additional Clarification regarding non-Model Survey approaches to Prong Three compliance efforts.¹³⁵ For example, the Additional Clarification warns that when a school does not implement the Model Survey and administer it as recommended, "OCR will not presume that survey results (if any) alone are adequate to measure student interest under [Prong] three."¹³⁶ In other words, a school is not required to use the Model Survey, but any other tool it uses to measure student interest levels will not receive the benefit of the OCR's deference during an OCR investigation, effectively imposing on the school the burden of proving that the tool was equivalent to the Model Survey.¹³⁷ Unless such equivalence can be demonstrated, any evidence of the presence or absence of "unmet interest" generated by methods other than the Model Survey will not be presumed to be accurate but, rather, will be scrutinized subjectively with a number of other factors.¹³⁸ Schools that use such methods thus might find themselves subjected to a potentially burdensome OCR investigation

133. *Id.* at 8-9.

134. *Id.* at 4. The burden of proof has always been on the government since the 1979 Policy Interpretation. "The Department would [have] the burden of demonstrating that the institution was actually engaged in unlawful discrimination." 1979 Policy Interpretation, *supra* note 3, at 71,414.

135. The OCR has been careless in the past in discussing the burden of proof. Compare 1996 Cantú Letter, *supra* note 13 (stating that "if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated") (emphasis added) with 1996 CLARIFICATION, *supra* note 6, at Pt. Three (explaining that "[u]nder part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex") (emphasis added)

136. ADDITIONAL CLARIFICATION, *supra* note 1, at 9.

137. *Id.* at 8-9.

138. *Id.* at 9.

of their compliance methods,¹³⁹ and might ultimately be regarded by the OCR as out of compliance, notwithstanding their good faith efforts to comply.¹⁴⁰

What seems to be clear, however, is that, so long as the Model Survey is implemented and properly administered in accordance with the procedures explored in Section II.A.1.b., the OCR will defer to its results and will not conduct a compliance review if the results do not show sufficient unmet interest to sustain a new varsity team.¹⁴¹ Non-proportional schools – those not in compliance with Prong One – *must* measure and fully accommodate the athletic interests of the underrepresented gender to comply with Prong Three, unless they are confident that they can persuade a court or OCR investigator that they satisfy the vague and uncertain requirements of Prong Two. For these schools, failing to conduct the Model Survey expressly sanctioned by the OCR – or failing to administer it in the manner suggested by the OCR – foregoes important legal safeguards and an opportunity to demonstrate *with certainty* the absence of unmet interest for purposes of Prong Three.

Aside from the Model Survey, the Additional Clarification also outlines methods that schools may follow to gauge interested students' *abilities*.¹⁴² If those methods are properly followed, the OCR will defer to schools' assessments of students' abilities.¹⁴³ If those methods are not followed, however, the OCR will not defer but, as with the determination as to unmet interest, will consider multiple factors, an approach that may yield unpredictable results.¹⁴⁴

139. According to certain schools that have been investigated by the OCR, investigators can burden schools with voluminous and intrusive requests. *E.g.*, Letter from Estelle A. Fishbein, General Counsel, Johns Hopkins Univ., to Norma Cantú, Assistant Secretary, and Judith Winston, General Counsel, U.S. Dep't of Educ., at 2-3 (Dec. 8, 1994) (complaining that the OCR questioned the university on irrelevant issues, including the funding of a sports museum not affiliated with the university and the smaller size of women's basketballs compared to men's basketballs notwithstanding that NCAA and Olympic regulations set the official sizes); Letter from Estelle A. Fishbein, General Counsel, Johns Hopkins Univ., to Dr. Robert Smallwood, Regional Director, Office for Civil Rights, U.S. Dep't of Educ., at 2 (Dec. 8, 1994) ("[f]rom the beginning, OCR's investigation carried all the stigmata of a fishing expedition"); *id.* (counting athletic supporters, sports bras, and socks; contrary to OCR policy against analyzing information on undergarments) (quoting OFFICE FOR CIVIL RIGHTS, U.S. DEPT OF EDUC., TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 29 (1990)).

140. *See* ADDITIONAL CLARIFICATION, *supra* note 1, at 8-9.

141. *Id.* at 7.

142. *See id.* at 9-11.

143. *Id.* at 9.

144. *Id.* at 10.

2. Certainty of the "Safe Harbor"

Before the OCR issued the Additional Clarification, Prong Three was theoretically considered a safe harbor,¹⁴⁵ but schools faced uncertainty as to whether they had navigated into it. Schools did not know what methods of measuring unmet interest would be seen as valid in the OCR's eyes, or at what point evidence of unmet interest warranted further assessment or accommodation.¹⁴⁶ A principal purpose of the Additional Clarification is to encourage schools to consider reliance on Prong Three a viable compliance option by mapping a route into a more clearly defined safe harbor.¹⁴⁷ A school can now feel confident that it has complied with its Title IX obligations in connection with its athletic program if the Model Survey does not reveal requisite levels of unmet interest.

3. Identifying Trends in Students' Interests in Athletics

Responses to the Model Survey can help a school identify trends in undergraduate athletic interests as they emerge. The compilation of survey data should permit an athletic department to make more informed plans and decisions at an earlier stage.

Interest in a new sport seldom materializes overnight. Use of the Model Survey on a periodic basis can help a school identify nascent interest as it develops and evaluate whether such interest is sustainable, fleeting, or fluctuating. The school can then take steps to address such interest and monitor the abilities of the interested students, such as forming club or intramural teams or implementing other controlled measures. If data compiled over a few years shows that interest in a sport is not sustainable, the school will not be required to endorse a varsity team.

In addition, evidence as to the relative interests and abilities of members of both genders might have relevance to future determinations of Title IX compliance or of liability under a lawsuit brought by a private litigant (i.e., the absence or presence of actual discrimination).¹⁴⁸

145. See 1996 CLARIFICATION, *supra* note 6, at 1; 2003 FURTHER CLARIFICATION, *supra* note 6.

146. 2003 COMMISSION REPORT, *supra* note 15, at 23-24.

147. See ADDITIONAL CLARIFICATION, *supra* note 1, at 3-4.

148. See *id.* at 5-6; see also *id.* at 1 n.1. Although *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), held that the interests of the overrepresented gender were irrelevant to its Prong Three analysis, data showing the relative interests in athletics of both genders might prove persuasive, depending on the nature of the case, to a future jury, court or investigator.

Further, if the Model Survey results show significant interest in a sport among the *overrepresented* gender, a school may consider addressing such interest by offering club or intramural teams. Indeed, if a school is in compliance with Prong Three, it is then free to add popular *varsity* sports for either gender, even if doing so would result in the school becoming non-proportional.¹⁴⁹ This flexibility could be viewed as a benefit by athletic administrators who have felt compelled to maintain proportionality by limiting men's sports or participation levels.

B. Considerations that Disfavor Using the Model Survey

1. Costs of Implementation

All schools have concerns about costs. Use of the Model Survey will involve cost outlays, as it must be properly administered and the results analyzed. Then, if sufficient unmet interest is demonstrated, the school may be required to hold meetings and tryouts, which will also involve costs. Unless a school already meets the proportionality test of Prong One, however, many of these steps and expenses will also be required under any non-Model Survey effort to comply with Prong Two or Prong Three.

Although schools could, for financial reasons, forego the methods recommended in the Additional Clarification, such a decision may be shortsighted. Unless they satisfy the Prong One test of proportionality, schools will need to monitor the athletic interest and ability levels of the underrepresented gender in any event. Although non-Model Survey methods of monitoring may be less expensive at the outset, an OCR investigation, wherein the school's decisions will not receive deference from the OCR, will doubtless be much more costly. The certainty of knowing that a school is within the Prong Three safe harbor may be well worth the costs of implementing the processes suggested in the Additional Clarification, including the Model Survey. Furthermore, conducting the Model Survey should not involve a significant cost for most schools with in-house IT resources.

To save money, a school could employ only some, but not all, of the measures recommended in the Additional Clarification. For example, a school certainly could consider not surveying the *overrepresented* gender, if that approach, indeed, would be more cost-effective. It also could consider administering the Model Survey less

149. ADDITIONAL CLARIFICATION, *supra* note 1, at 5.

frequently,¹⁵⁰ although that might increase the risk of losing the OCR's approval.

Even if sufficient unmet interest and ability are demonstrated as to a given sport, a school need not start a varsity team immediately. The OCR permits a school to implement the sport at a club or intramural level as a means to verify whether sufficient interest and ability are sustainable.¹⁵¹ This interim measure would reduce the risk that a school would incur the expense of starting a new varsity sport in which sustained interest and ability levels are lacking. The OCR also will permit a school up to four years to fund the scholarship costs once a new varsity team is formed.¹⁵²

2. Possible Catalyst Effect

Under Prong Three, a school theoretically can avoid discovering unmet interest in athletics among its current students by not affirmatively trying to assess its existence. It may be argued that conducting the Model Survey might provide the catalyst for a group of students interested in a given sport to present the school with evidence of interest that might not otherwise have surfaced. Any results evidencing requisite unmet interest, in turn, would require the school to spend money to take the next steps to assess the prospects of forming a new team.

Even if this "catalyst effect" is real,¹⁵³ schools are better advised to be proactive in assessing interest. If use of the Model Survey proves to have some kind of catalyst effect, that would only show that schools that fail to adequately monitor the interests of their students are vulnerable. Existing, but latent, interest could surface at any time. Petitions by groups of athletes of the underrepresented gender have been part of the Title IX landscape for years. At any time, a group of athletes could organize and present the institution with a request to start a new varsity team. A school that does not use the Model Survey, but merely assumes that unmet interest does not

150. See USER'S GUIDE, *supra* note 16, at 11; see also discussion *supra*, Section II.A.1.b.i. (providing an example of a situation that may lend itself to less frequent surveying).

151. ADDITIONAL CLARIFICATION, *supra* note 1, at 10.

152. *Id.* at 12 n.15.

153. See 2003 COMMISSION REPORT, *supra* note 15, at 38 (recommending "interest surveys on a regular basis as a way of . . . stimulating student interest in varsity sports"). Also, "[t]he Department of Education says schools that use the surveys correctly may well find they have an obligation to add sports for women under Title IX." Erik Brady, *supra* note 43. At this point, however, any potential catalyst effect of the Model Survey cannot be measured.

exist on its campus, may have difficulty defending itself if faced with a student petition for that sport.

The catalyst effect concern, moreover, may be misplaced. A core of interested students likely already exists in an organized fashion in many schools' club or intramural sports programs. Athletes assembled on such a team would be more likely to petition the school for a varsity team than a group of previously non-organized individuals whose interest was piqued by responding to a survey. Further, students already competing on a club or intramural team are those that are most likely to have the interest and ability to participate at a varsity level. Thus, although use of the Model Survey could uncover unmet interest, it seems unlikely that a school, using the Model Survey, would ultimately be required to implement a new team, after the assessment process, that would not have been required but for the Model Survey.

Even under the Additional Clarification, the OCR will give consideration to a student petition notwithstanding Model Survey results demonstrating a lack of interest.¹⁵⁴ The OCR will consider "[a] recent broad-based petition from an existing club team for elevation to varsity status [to be] direct evidence of interest in that sport by students on the club team."¹⁵⁵ The burden of proof in such a situation will remain on the OCR or the petitioning students, however, to show that such direct evidence is sufficient to overcome the Model Survey results.¹⁵⁶

If a school is presented with a student petition and has not implemented the Model Survey, the school will have foregone an opportunity to establish its reputation for compliance and will have no *recognized* form of evidence to overcome the students' "direct evidence of interest." The institution will then face an uphill legal battle to avoid a finding of noncompliance and OCR sanctions.

3. Negative Publicity

The OCR's Model Survey has been widely criticized by certain Title IX activists and others in the ongoing policy debate.¹⁵⁷ It is possible that some in this group may target a school that decides to

154. ADDITIONAL CLARIFICATION, *supra* note 1, at 6 n.10.

155. *Id.*

156. *Id.* at 4.

157. *See, e.g.,* sources cited *supra* notes 7, 94.

use the Model Survey with a policy-based media campaign attacking the school's gender equity compliance efforts.¹⁵⁸

Making affirmative efforts to gauge students' interests in athletics, however, has always been a valid – and lawful – method of complying with Title IX,¹⁵⁹ and the use of interest surveys is a well-established technique for doing so.¹⁶⁰ The OCR adopted only the best practices from the various survey instruments created by individual schools "to develop suggestions for an improved process for conducting [the Model Survey]."¹⁶¹ Thus, the Model Survey tries to improve upon and make more accurate an already-valid method of complying with Title IX.

Furthermore, unless the Model Survey is the exclusive approach used by a school to comply with Title IX, the primary criticism of the Additional Clarification can be deflected by focusing the public (and the media) on the school's other compliance efforts.¹⁶² For example, a school that uses the Model Survey but also monitors participation in club and intramural sports, solicits views from coaches, tracks trends in local high school participation, or uses other factors to gauge interest should be able to point to these other compliance efforts to rebut any criticisms relating to its use of the Model Survey, including the criticism that students' failure to respond to the Model Survey was dispositive in the school's analysis.¹⁶³

158. Although, the same type of publicity campaign could be launched with or without Model Survey data.

159. See 1979 Policy Interpretation, *supra* note 3, at 71,414. Eighty-six out of 130 schools investigated by the OCR between 1992 and 2002 demonstrated their compliance with Title IX under Prong Three. USER'S GUIDE, *supra* note 16, at 3.

160. Indeed, sixty-seven out of eighty-six schools that demonstrated their compliance with Title IX under Prong Three between 1992 and 2002 employed some form of survey instrument. *Id.* at 3.

161. *Id.*

162. While administration of the Model Survey could help a school feel confident that it is meeting the athletic interests of its student body, it also could create discoverable evidence suggesting that a school is not. As long as a school is in compliance with the law, however, it should be able to rebut any such criticism.

163. See also discussion *supra* Section II.A.1.b.iii. (discussing that schools may desire to make the Model Survey mandatory, such as by requiring students to complete it or actively bypass it as part of the registration process, in order to avoid the criticisms associated with potential low response rates).

4. Legality of the Additional Clarification

Certain critics have intimated that schools might expose themselves to liability merely by following the Additional Clarification.¹⁶⁴ Such a result is highly unlikely.

In regard to an OCR investigation, a federal agency such as the OCR generally must follow its own regulations, procedures, and precedents until it amends or revokes them.¹⁶⁵ Although the OCR could change its procedures and disavow the Model Survey in the future, it is doubtful that a school could suffer negative inferences in the eyes of the OCR for following its current guidance.¹⁶⁶

A school should also be largely insulated from liability from any legal challenge by a third party to the Model Survey's accuracy or neutrality so long as the school follows the OCR's guidance. Although the Additional Clarification will likely be considered by a court to lack the binding force or effect of law, courts generally give deference to an agency's interpretation of its own regulations.¹⁶⁷

IV. IMPLEMENTATION AND RECOMMENDATIONS

Each school will face its own unique set of considerations in deciding whether to implement the Model Survey. For some schools, the question will turn on how confident their athletic departments are of their present Title IX compliance efforts. For other schools, it may

164. See, e.g., *Save Title IX*, *supra* note 94 ("Because the new Clarification authorizes an approach to providing equal opportunity for female athletes that falls far short of Title IX requirements, schools that choose to use the survey authorized by the Clarification as their sole means of evaluating compliance with the law could be vulnerable to legal challenges by students denied access to participation opportunities as a result. If those challenges are successful, students could be entitled to monetary relief, among other remedies.").

165. See 2 AM. JUR. 2D *Administrative Law* § 236 (2004).

166. *But see* Rick Taylor Statement, *supra* note 15, at 79 (testifying that the OCR refused to acknowledge Northwestern's efforts since 1987 to expand its women's programs under Prong Two because Northwestern cut women's sports between 1984 and 1987 when Title IX did not apply under the decision of *Grove City College v. Bell*, 465 U.S. 555 (1984)).

167. See, e.g., *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150 (1991) (quoting *Lyng v. Payne*, 476 U.S. 926, 939 (1986) and citing *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)); *see also* *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046-47 (8th Cir. 2002); *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996); *Kelley v. Bd. Of Trs., Univ. of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994); *Horner v. Ky. High Sch. Athletic Assn.*, 43 F.3d 265, 274-275 (6th Cir. 1994); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3rd Cir. 1993); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993). Note, however, that a school might be required to pay a prevailing plaintiff's attorneys' fees if she successfully attacks the school's use of the Model Survey. See, e.g., *Mercer v. Duke Univ.*, 401 F.3d 199, 212 (4th Cir. 2005).

depend on budgetary factors. For yet others, concerns about public relations or their views of the Model Survey in the context of the ongoing Title IX policy debate may assume greater importance. Factors that lead one school to use the Model Survey might not be very relevant to another institution's decision.

There are legal risks, however, for all schools – even those meeting the proportionality requirements of Prong One – that do not seek to measure and respond to the interests of their potential student-athletes.

Thus, most schools should seriously consider implementing the procedures recommended in the Additional Clarification, including the Model Survey, to gain certainty and the benefit of legal presumptions in a regulatory environment that is vague and subjective in many respects. The Additional Clarification's recommendations may be implemented as part of a multi-faceted Title IX compliance program – used in addition to, rather than as a substitute for, a school's existing Title IX compliance efforts. Such a proactive approach to compliance should enable a school to remain in the good graces of the OCR and should help avoid negative publicity from interest groups that oppose the Model Survey.

This recommendation applies especially to schools that are unable to comply with Prong One, as they should already be monitoring the interests and abilities of their students in any event in order to show compliance under either Prong Two or Prong Three. The opportunity offered by the Additional Clarification for such institutions to put themselves in a position to reap the benefit of the OCR's deference in this area seems too valuable to forego.

Furthermore, even those schools that currently comply with Title IX under Prong One cannot be assured of future Title IX compliance under Prong One as student demographics continue to change. Women became a majority of college students in the 1980s and today comprise roughly fifty-seven percent of all college students.¹⁶⁸ This changing population target makes sustaining proportionality under Prong One difficult. A one or two percent fluctuation in undergraduate population in any given school year could throw a school's athletic department out of the safe harbor of Prong One and expose it to civil litigation or an OCR investigation if it has not taken other steps to comply under Prong Three. Indeed, if a Prong One school at any point in the future attempts to rely on Prong

168. Karen Blumenthal, *Title IX's Next Hurdle: Three Decades After Its Passage, Rule That Leveled Field For Girls Faces Test From Administration*, WALL ST. J., Jul. 6, 2005, at B1.

Three in defending itself against an investigation, litigation, or a negative media campaign, it will be helpful if it can show that it has historically been cognizant of and responsive to the interests of the underrepresented gender, as demonstrated by its use of the Model Survey.

For a proportional school planning to maintain compliance under Prong One despite any change in demographics, the results of the Model Survey also will help it make the most informed allocation of departmental resources to preserve its proportionality. By continually monitoring its students' athletic interests, for example, a school will be able to assess which women's team would be most popular to add (and most successful if added). Further, if a school can rely on Prong Three's safe harbor, Title IX would not provide any reason for the school to eliminate a men's sport or to impose a "roster cap" on any men's team – steps disfavored by the OCR that schools sometimes take in an effort to achieve Prong One proportionality.¹⁶⁹

If a school now within Prong One's safe harbor chooses to implement the Model Survey for any of the reasons mentioned above, it will retain complete control over how to respond to Model Survey results demonstrating unmet interest. A proportional school need not even engage in an assessment of its interested students' abilities, much less implement any new varsity team in response to Model Survey interest, while using the Survey to collect valuable data for analysis and use when its student demographics change.

Any school that decides to implement the OCR's suggestions from the Additional Clarification, as part of a multi-faceted Title IX compliance program or alone, should do so with the goal of maintaining the credibility of its compliance program, which will help eliminate criticism and improve the school's prospects in the event of litigation. Further, the Additional Clarification seems to imply that the OCR will give more deference to a school conducting a proactive compliance program than to a school that simply reacts to requests to add new programs if and when they arise. Ways to maximize the transparency of a Prong Three compliance program, as discussed more fully throughout this Article, might include the following:

- Administer the Model Survey periodically.
- Survey all undergraduate students (male and female).
- Make sure that the Survey is administered in a manner designed to generate high response rates (such as making it a mandatory part of the registration process) and is adequately explained.

169. ADDITIONAL CLARIFICATION, *supra* note 1, at 5.

- Predetermine, for each sport, the level of requisite interest from Model Survey responses that will trigger proceeding to the assessment process.
- Predetermine the process for assessing ability for each sport, which will likely include well-publicized meetings and tryouts.
- Outline, for each sport, expectations for the prospective team's talent level, such as with an athletic department mission statement.
- During the assessment process, avoid consolidating the decisions about requisite ability level in the hands of a single coach, who could later be attacked (fairly or unfairly) for having an agenda. Instead, select a panel with varying vantage points, including disinterested third parties, to make the assessments.

V. CONCLUSION

The current debate surrounding Title IX and the Additional Clarification is policy-focused. Administrators of institutions seeking to comply with Title IX, however, need to focus not on the policy issues, but on protecting their institutions from OCR or third-party challenges to their Title IX compliance. The Model Survey is a tool that should not be ignored.

Use of the Model Survey as one component of an ongoing and comprehensive Title IX compliance program would likely be beneficial to most institutions. Indeed, if a non-proportional school chooses not to use the Model Survey, it will nevertheless need to employ some other tool to gauge its students' interests and abilities – the results of which would not receive the OCR's deference. The results of the Model Survey, on the other hand, can be objectively assessed within the framework suggested in the Additional Clarification, and can give the school assurance as to whether it has successfully navigated into the OCR's Prong Three safe harbor. Even if unmet interest is demonstrated by the Model Survey, a school can largely direct the manner in which it carries out its assessment process to evaluate the other Prong Three components – and receive the OCR's deference thereto – so long as it follows the OCR's procedural guidance.

Title IX compliance officers should seriously consider whether, by failing to implement the Model Survey, they are leaving their institution vulnerable to an OCR or third-party Title IX challenge – a challenge against which Model Survey results could provide a legal safe harbor.

Advocating for the Additional Clarification

"Model Surveys as a Title IX Compliance Tool—Legal Counsel's Perspective," John J. Almond and Daniel A. Cohen, <<http://www.rh-law.com/TitleIX/model.htm>>



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Model Interest Surveys as a Title IX Compliance Tool – Legal Counsel’s Perspective

By **John J. Almond** and **Daniel A. Cohen**

It has been one year since the Office for Civil Rights of the Department of Education issued its “Additional Clarification” and its “Model Survey” to provide guidance for measuring student interest in varsity-level sports programs for colleges and universities seeking to comply with Prong Three of Title IX.

The Additional Clarification and the Model Survey have been controversial. They have received strong criticism from some quarters and strong praise from others. For a university that has the goal of ensuring that it is in compliance with Title IX, though, the policy-based controversy should have limited relevance. Rather, a school that is deciding whether to employ the Model Survey as part of its Title IX compliance program should focus primarily on whether the Model Survey can help it achieve or maintain Title IX compliance.

Accordingly, schools need to gain a more detailed understanding of the Additional Clarification than media sound bites can provide, and then they must evaluate the benefits and risks of adding the Model Survey to their compliance programs. A failure to implement the Model Survey may forego an opportunity for a school to be considered in a legal “safe harbor,” which would protect the school from OCR sanctions or costly private litigation. This type of legal protection is currently available only to schools that are proportional under Prong One – all other schools are potentially exposed.

Background

Since 1979, schools have followed the “Three-Prong Test” in their attempts to demonstrate compliance with Title IX in the context of intercollegiate athletics. The Three-Prong Test gives institutions three alternative ways of showing compliance. The first of these, or Prong One, is the test of proportionality: Having male and female students participate in varsity athletics in numbers substantially proportionate to their respective enrollments. Prong Two gives schools the opportunity to show compliance by demonstrating a history and continuing practice of program expansion demonstrably responsive to female students’ athletic interests. Under Prong Three, compliance can be achieved by showing that a school’s athletic program fully and effectively accommodates the interests and abilities of the members of the underrepresented sex.

The OCR has referred to each of the three prongs as a “safe harbor” – if the requirements of any of the three prongs are met, the school will be insulated from OCR enforcement action. Before the issuance of the Additional Clarification, however, the only objective Title IX safe harbor was Prong One, the proportionality test. Prongs Two and Three lacked any objective criteria for determining whether those tests had been satisfied and, thus, Prongs Two and Three were not viewed as safe harbors in practice.

The Additional Clarification is intended to make Prong Three a true safe harbor and, therefore, an alternative to Prong One. It does this by setting forth an OCR-endorsed method for measuring student interest through administration of the Model Survey, which generates data that can be analyzed in a relatively objective fashion. The Additional Clarification states that, if the Model Survey is administered in accordance with the OCR’s

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recommendations, then "OCR will presume that the Model Survey is an accurate measure of student interest, absent other direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team." Thus, if the Model Survey results do not show a minimum level of interest necessary to sustain a varsity team in any intercollegiate sport that is not already sponsored by the school, the OCR ordinarily will defer to the Survey results and will consider the school to be in compliance with Prong Three.

If requisite interest is demonstrated by the Model Survey, the Additional Clarification outlines procedures for determining whether the interested students in fact have the ability to sustain a varsity team. Without evidence of requisite interest and ability, a school will not be required to start a new varsity team and will be considered in compliance with Title IX.

From a Legal Standpoint, the Model Survey Could be an Important Addition to Existing Compliance Programs

The principal objectives of a university's Title IX compliance program include: (1) to provide equal opportunities for participation in academic and extracurricular activities (including intercollegiate athletics) to male and female students alike; (2) to assure compliance with Title IX; and (3) to avoid (or to successfully defend against) costly OCR enforcement proceedings and other legal challenges relating to Title IX compliance.

Every school should evaluate whether using the Model Survey as a part of its Title IX compliance program could help it accomplish those objectives and others. The Model Survey can provide vital legal protections for schools, because the OCR ordinarily will defer to its results if it is properly administered and any private legal challenge to the school's program will be forced to overcome its presumably accurate data. Other approaches to measuring student interest - which measurement is required if the school intends to comply with Prongs Two or Three - do not have the benefit of this OCR deference. If schools merely assume that such interest does not exist on campus or attempt to measure it in some way not endorsed by the OCR, they will be vulnerable to an OCR or other legal challenge.

Even if the Model Survey reveals unmet interest in a particular sport, the Additional Clarification contemplates several further steps before the school must add that sport at a varsity level. There is no legal obligation to add a varsity sport for the underrepresented sex unless there is sufficient varsity-quality athletic ability among those expressing interest and a likelihood that such a varsity sport can be sustained in the appropriate geographical region. To this end, the Additional Clarification says that if a Model Survey indicates sufficient unmet interest in a particular varsity sport, the school then should take steps to confirm that interest, assess whether the requisite ability is present, and determine the sustainability of a varsity program in that particular sport. This approach may include the self-assessments of athletic ability by Survey respondents, organizational meetings and telephonic follow-up to confirm interest and gather further information as to the respondents' background and ability, and tryout sessions to analyze athletic ability.

If the Model Survey results and the further steps noted above leave the school with some uncertainty as to whether it is satisfying Prong Three, it may elect to organize a program in the particular sport on an intramural or club level to determine the sport's sustainability before instituting it as an intercollegiate sport. If, at the end of this process, there is sufficient interest, ability, sustainability and competition in the region, then, but only then, must the school add a new varsity sport.

Even if a school's athletic program satisfies the proportionality test of Prong One, there are reasons to consider using the Model Survey. The demographics of college student populations continue to change, with women approaching a sixty-percent majority on many campuses. As a result, schools that are proportional today might find themselves

falling out of Prong One compliance in the near future. Schools that employ the Model Survey and can demonstrate compliance by way of Prong Three in addition to Prong One gain the additional assurance that changing demographics will not cause them to fall out of compliance. These schools would also gain flexibility to avoid the need to implement "roster caps" or to impose other limitations on men's athletic programs.

Further, for schools that currently meet Prong One, use of the Model Survey carries no risk of creating any affirmative obligation on the part of the school to consider instituting any new varsity sport, even if the Survey identifies significant unmet interest.

Common Criticisms of the Model Survey Can Be Avoided

The NCAA has asked the Department of Education to repeal the Additional Clarification because the NCAA contends that it is inconsistent with Title IX and earlier OCR guidance, in that it permits schools to use the Model Survey as the sole basis for measuring student interest. Schools, however, need not look solely at the Model Survey results to evaluate unmet interest. Schools are free to consider other indicators of interests, such as petitions, the level of interest in intramural or club sports, and the like. The Model Survey can simply provide additional data as to student interest.

The Additional Clarification has also been criticized based on the fact that the Model Survey may be distributed via email, which may be overlooked by students who have the interest and ability to compete intercollegiately. Although the OCR has approved distributing the Model Survey via email, a school has the option of administering the Survey as a part of the class registration process or via another mandatory procedure in which students must respond to or actively bypass the Survey. By administering the Model Survey in this way, a school will ensure a higher response rate and more accurate results, thus blunting this common criticism of the Additional Clarification methodology.

The use of surveys has long been an accepted method of determining the existence of unmet interest for purposes of analyzing Title IX compliance. The Model Survey has the added benefit of producing data that the OCR will view as reliable for Title IX compliance purposes. Furthermore, administering the Model Survey periodically will allow schools to develop additional sources of data as to students' interests and abilities, which can benefit them in their proactive efforts to comply with Title IX.

In view of the material legal benefits achievable through the Model Survey, schools should give serious consideration to whether the Model Survey should be implemented as part of their Title IX compliance programs. If other factors suggest that the Model Survey should not be employed, those factors should be weighed against the potential legal benefits of developing the Survey data.

The decision whether or not to use the Model Survey has significant consequences and requires a fuller understanding than the policy debate's talking points can provide.

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Advocating for the Additional Clarification

"The New Interpretation of Title IX," Ted Witulski, NCEP Manager, USA Wrestling,
<<http://www.savefreshowrestling.com/titleix.html>>

10/18/2005
USA TODAY

The New Interpretation of Title IX

Ted Witulski
NCEP Manager
USA Wrestling

In March of 2005 supporters of Olympic sports received a glimmer of hope from the Department of Education. Though it wasn't the hoped for total elimination of proportionality as a "test" that many in the wrestling community have worked for, the new interpretation clearly stated that schools could use surveys to prove that they were meeting the needs and interests of the under-represented gender.

This was clearly stated deviation from Noma Cantu's interpretation of Title IX that decreed proportionality was the only "safe harbor" for schools, and later that schools had to meet strict proportionality---staying within in 1% of proportion of enrollment to athlete participation.

Now if colleges survey the school's students and the survey shows that the under-represented gender does not have as strong an interest in athletic participation than the school can use that as evidence that it meets the requirements of Title IX.

So, there is a glimmer of hope. Could we return wrestling back to Syracuse? What about Kansas State or Colorado or even Washington at the Division One level? Or, dare to dream actually getting a new program started at the Division One level in Texas?

Schools must be encouraged to use surveys to protect against a wrong-headed interpretation of Title IX. As a coach, being educated and actively involved in this issue is important. Right now, there are many young wrestlers at the high school level that aren't receiving scholarships to get an education because Title IX's misinterpretation nearly destroyed wrestling along with other Olympic sports.

We have a glimmer of hope. We can get these programs back and start new ones, but your involvement is absolutely necessary. Teach your team about Title IX. Let others now how to get involved and lead by example on this issue.

<http://www.savefresnowrestling.com/titleix.html>

Advocating for the Additional Clarification

"Coaches Praise New Title IX Reform," March 22, 2005

<http://www.savingsports.org/newsroom/display_release.cfm?id=2>

Coaches Praise New Title IX Reform

College Sports Council Says Interest Survey Solution is "Breakthrough Alternative to Gender Quota"

March 22, 2005

WASHINGTON, D.C. - March 22, 2005 - The College Sports Council, a national coalition of coaches, parents and athletes is praising action taken by the Department of Education to reform the way Title IX is being enforced.

"This clarification now gives schools a viable, common-sense alternative to the gender quota that has wreaked havoc on college athletics," said Eric Pearson, CSC Executive Director. "There is still work to be done but this is a positive step toward restoring Title IX to its original intent, fairness for all student athletes. Schools will no longer feel bound to proportionality and forced to eliminate sports opportunities for male athletes now that they can accurately measure and meet interest for male and female student athletes."

On March 17 the Department of Education issued a clarification of Title IX's three-part compliance test. The CSC sees this announcement as a significant reform breakthrough since, for the first time, there is now specific, straightforward guidance that enables schools to comply with the interest and abilities requirement of Title IX's regulations.

"For years now, athletes, parents, coaches and supporters have been pressing a heartfelt case that athletic teams were being sized down and eliminated all over the country," said Pearson. "At long last, the Department of Education has heard those voices and we are now passing an important milestone toward protecting athletes from the ravages of the artificial quota system called 'proportionality.'"

Additional Background and Sources: www.collegesportscouncil.org

Advocating for the Additional Clarification

"Is the Title Clarification Your Path to Compliance with the Law?," *College Athletics and the Law*, Volume 3, Issue 1, April 2006, pp. 7-8

College Athletics and the Law, Volume 3, Issue 1, April 2006, pp. 7-8.

Is the Title IX clarification your path to compliance with the law?

2 attorneys have tips on following the ED clarification

The media hasn't given much practical advice on using last year's additional clarification of Title IX to comply with prong three of the Title IX test, according to Daniel J. Cohen and John J. Almond, attorneys at the Rogers & Hardin LLP in Atlanta. They tried to fill that void by writing *Navigating into the New "Safe Harbor"-Model Interest Surveys as a New Tool for Title IX Compliance Programs*.

It was recently published in the *Vanderbilt Journal of Entertainment and Technology Law*. The article offers tips on using the clarification properly so the Office for Civil Rights will consider you in compliance with prong three. However, they recommend meeting with your general counsel to decide if the clarification is a viable option for Title IX compliance.

Even though Title IX advocates want the ED clarification withdrawn, Cohen and Almond emphasize that it offers a definitive way to comply with prong three. "We're encouraging a more reasoned analysis of the clarification," Cohen said.

Here are some best practices that Almond and Cohen recommended for properly following the additional clarification:

- **Measure athletic interests.** If you use the model survey and find insufficient interest among female students at your institution in competing in a sport your institution doesn't offer, you're in compliance, according to OCR.
- **Predetermine the level of interest that would make you assess whether to create another varsity sport.** OCR defers to athletic administrators' decisions as to the minimum number of positive responses that will show requisite interest, according to the clarification. But if 10 women are interested in playing a sport and you only need five to field a team, there's sufficient interest in the sport, Almond said.
- **Predetermine the process for assessing sufficient ability for each sport.** You should try to maximize the transparency of your approach so OCR will consider it legitimate, according to the article. OCR will defer to AD's and coaches expertise in this area. For instance, you could have well-publicized meetings and tryouts. Make it clear before tryouts what's considered to be varsity level ability. You could also outline the expectations for a prospective teams' talent level in an athletics department mission statement.
- **Don't let a single coach make decisions about requisite ability.** She might be attacked in the future for having an agenda. Instead, select a panel with varying vantage points, including disinterested third parties, to make the assessments.

- **Administer the model survey periodically.** Cohen and Almond recommend conducting the survey on a biannual basis. However, if you administer the survey and six months later there's a deluge of petitions from intramural or club sports teams to create a particular sport, you still need to assess that interest, according to Almond.
- **Survey male and female undergraduate students.** It would probably be more difficult to just survey female students, Cohen and Almond state in the article. Also, you would lose a chance to collect potentially useful data that could help you track students' athletic interests.
- **Administer the survey so you generate high response rates.** You could make it a mandatory part of the registration process, according to Almond. Critics of the clarification have referred to the model survey as e-mail based, but it's actually Internet-based. And if you administer it only by e-mail, OCR won't defer to the results, unless you do it in a way that establishes a high response rate, Cohen said. "It's not like you can just e-mail this thing and be done with it," Cohen said.
- **Adequately explain the survey to students.** OCR will assume nonresponses to the survey indicate lack of interest only if all students have had an easy opportunity to respond to it, the purpose of the census has been made clear, and students are informed that nonresponses indicate a lack of interest, according to the additional clarification.

Contact Daniel J. Cohen at dcohen@rh-law.com and John J. Almond at jalmond@rh-law.com. Download a PDF copy of Cohen and Almond's article at www.rh-law.com/titleix.

Helpful Hints

Do more than the model survey to deflect criticism about using the clarification

There are a few things that might be deterring you from using the Department of Education's additional clarification to comply with prong three of the Title IX three-part test.

First, a group opposing the clarification might target your institution with a policy-based media campaign attacking your institution's Title IX compliance efforts, according to article Navigating into the New "Safe Harbor" -- Model Interest Surveys as a New Tool for Title IX. This was written by attorneys Daniel J. Cohen and John J. Almond.

But you might deflect this criticism by monitoring participation in club and intramural sports, using other factors besides model survey, getting the views of coaches, or tracking trends in local high school participation.

Second, the clarification could be challenged in court, according to National Women's Law Center senior counsel Neena Chaudhry.

"Courts generally give deference to an agency's interpretation of its own regulations," according to the article.

Usually courts can't easily jump in and second-guess interpretations of statutes by agencies, such as OCR, according to Almond. But he agrees it could be challenged in court.

Finally, what about the bipartisan resolution in Congress calling on the ED to withdraw the clarification?

"It's a statement by Congress of their concern about this issue," Chaudhry said. So even if it's approved, the clarification won't be overturned.

Advocating for the Additional Clarification

**"Advocacy Group Urges Executive Committee to Use Title IX Survey," August 30, 2006,
National Collegiate Athletic Association**

NCAA - National Collegiate Athletic Association

Advocacy group urges Executive Committee to use Title IX survey

August 30, 2006

The College Sports Council, a coalition of national sports organizations that has challenged the application of Title IX, urged the members of the NCAA Executive Committee to use surveys to gain Title IX compliance.

In March 2005, the U.S. Department of Education's Office for Civil Rights issued a clarification to Title IX policy that allows institutions to use a survey to determine interest among potential student-athletes. The clarification also provided a model survey. Title IX advocates believe the survey provides a way for institutions to skirt their obligations to female students.

A month after the clarification was issued, the Executive Committee passed a resolution urging schools not to use the survey and asking the Office for Civil Rights to rescind the clarification. The resolution cited flaws in the survey methodology and a shift in the burden to female students to show that they are entitled to equal opportunity as reasons the presidents opposed the clarification and accompanying survey.

The August 29 letter from College Sports Council Executive Director Eric Pearson to the members of the Executive Committee refers presidents to a legal analysis of the survey in the Vanderbilt Journal of Entertainment and Technology Law that analyzed the pros and cons of the survey. Authors John Almond and Dan Cohen, attorneys from Atlanta, said they believe schools should consider the survey as a path to Title IX compliance (see NCAA News story).

Pearson asked the presidents to survey both men and women as part of their institutions' registration process. "The (College Sports Council) believes that it is both a reasonable way to provide opportunity and a prudent legal course of action," he wrote. "Men and women both deserve the opportunity to voice their interest. There is no method that could be more fair and straight forward for students to demonstrate their interest than simply to be asked."

In addition to the Executive Committee's resolution opposing the use of the survey, other Title IX advocates, including the National Women's Law Center, the Women's Sports Foundation and the National Association of Collegiate Women Athletics Administrators all spoke out against the clarification.

[http://www.ncaa.org/wps/portal!/ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_Qjz...+group+urges+Executive+Committee+to+use+Title+IX+survey+-+08-30-06+update \(2 of 2\)9/1/2006 10:56:42 AM \(last accessed April 19, 2007\).](http://www.ncaa.org/wps/portal!/ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_Qjz...+group+urges+Executive+Committee+to+use+Title+IX+survey+-+08-30-06+update+(2+of+2)9/1/2006+10:56:42+AM+(last+accessed+April+19,+2007).)

Opposing the Additional Clarification

Position of the National Coalition for Women and Girls in Education on the March 17, 2005 Department of Education Title IX "Additional Clarification"
<http://www.savetitleix.com/position_paper.html>.



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POSITION OF THE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION ON THE MARCH 17, 2005 DEPARTMENT OF EDUCATION TITLE IX "ADDITIONAL CLARIFICATION"

On March 17, 2005, the U.S. Department of Education ("DOE") issued a new Title IX policy that threatens to reverse the decades of progress women and girls have made in sports. Under the "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test - Part Three" and the model survey accompanying it, schools can now claim they are fully meeting women's interests in sports based simply on the responses, or lack of responses, to an e-mail survey asking female students about their interests in sports. This under-the-radar attack on Title IX's application to athletics was issued without public notice or opportunity for public comment



It is the position of the National Coalition for Women and Girls in Education (NCWGE) that the Clarification violates basic principles of equality under Title IX and will perpetuate the cycle of discrimination to which female athletes have been subjected. In particular:

- The Clarification creates a major loophole through which schools can evade their obligation to provide equal opportunity in sports. It conflicts with a key purpose of Title IX-to encourage women's interest in sports and eliminate stereotypes that discourage them from participating-and inappropriately puts the burden on female students to show that they are entitled to equal opportunity, instead of on schools to demonstrate that they are in compliance with Title IX.
- The Clarification eliminates schools' responsibility to look broadly and proactively at whether they are satisfying women's interests in sports by allowing schools to rely solely on an e-mail survey of enrolled and admitted students. Such a survey is likely to measure only the discrimination that limited women's opportunities in sports
- The Clarification authorizes a survey methodology that is scientifically flawed and inconsistent with prior Department policies. For example, the Department states that failure to respond to the survey is evidence of a lack of interest in playing sports.

For these reasons, the NCWGE calls on the Secretary of Education to withdraw the Clarification

Opposing the Additional Clarification

Statement from NCAA President Myles Brand Regarding Department of Education Title IX Clarification, March 22, 2005

Statement from NCAA President Myles Brand Regarding Department of Education Title IX Clarification

For Immediate Release

Tuesday, March 22, 2005

Contact

Bob Williams

Managing Director of Public
and Media Relations

317/917-6117

INDIANAPOLIS---The following is a statement from NCAA President Myles Brand regarding the Department of Education's clarification of Title IX with respect to the use of an e-mail survey to enrolled undergraduate students as a measure of interest in athletics:

"I am disappointed in the way the Department of Education promulgated its clarification of Title IX regulations with regard to determining the interest level of females in athletics. The department issued its clarification without benefit of public discussion and input.

"The e-mail survey suggested in the clarification will not provide an adequate indicator of interest among young women to participate in college sports, nor does it encourage young women to participate – a failure that will likely stymie the growth of women's athletics and could reverse the progress made over the last three decades. One need only observe the Division I Women's Basketball Championship that is underway to understand the effect of encouragement for women to participate, the high level of play at which women compete and the public interest in women's athletics."

Opposing the Additional Clarification

Statement of the National Center for Lesbian Rights, April 2005

<http://www.nclrights.org/projects/sp-titleix_factsheets.htm>



The National Center for Lesbian Rights

is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education.

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THE DEPARTMENT OF EDUCATION'S "CLARIFICATION" OF TITLE IX POLICY UNDERMINES THE LAW AND THREATENS THE GAINS WOMEN AND GIRLS HAVE MADE IN SPORTS

National Women's Law Center, April 2005



The Department of Education, without any notice or public input, has issued a new Title IX policy—under the guise of a "Clarification"—that creates a major loophole through which schools can evade their obligation to provide equal opportunity in sports. This new policy allows schools to gauge female students' interest in athletics simply by conducting e-mail surveys and to claim—in these days of excessive e-mail spam—that a failure to respond to the survey shows a lack of interest in playing sports. It eliminates schools' obligation to look broadly and proactively at whether they are satisfying women's interests in sports, and will thereby perpetuate the cycle of discrimination which women have been subjected to. The new "Clarification"—an under-the-radar revision of Title IX's application to athletics following public rejection of the Administration's prior efforts to weaken the law—violates basic principles of equality and threatens to reverse the enormous progress women and girls have made in sports since the enactment of Title IX.

The new "Clarification" is inconsistent with long-standing Department policies and with fundamental principles of equality under Title IX.

Title IX requires schools to provide young women with equal sports participation opportunities. The long-standing athletics policies reaffirmed by the Department of Education less than two years ago¹ provide three independent ways—the "three prong test"—for schools to satisfy this requirement. Specifically, a school can demonstrate compliance if:

- The percentages of male and female athletes are about the same as the percentages of male and female students enrolled in the school (the "proportionality" prong); **or**
- The school has a history and continuing practice of expanding opportunities for the gender that has been excluded from sports—usually women; **or**
- The school is fully and effectively meeting the interests and abilities of the underrepresented gender—usually women—to participate in sports.²

The Department's new "Clarification" allows schools not meeting either the first or second prong to show that they are nonetheless in compliance with Title IX by doing nothing more than sending a "model" e-mail survey to their female students asking about their interest in additional sports opportunities. The Department will presume that schools comply with Title IX if they administer this survey and find insufficient interest to support additional opportunities for women—even if schools get very low response rates—unless female students can provide "direct and very persuasive evidence" to the contrary. This policy change makes a mockery of the third prong requirement that schools show full and effective accommodation of their female students' athletic interests. Among the problems with the new policy are the following:

- **The new "Clarification" allows schools to use surveys alone to demonstrate compliance with the law.** Under prior and longstanding Department policies, a survey of student interest is only one of many factors

a school must evaluate to show that it is fully meeting women's interests is the third prong of the three-part test. Other factors that schools must consider include: requests by students to add a particular sport; participation rates in intramural sports; participation rates in sports in high schools, amateur athletic associations, and community sports leagues in areas from which the school draws its students; and interviews with students, coaches, and administrators.³ The new "Clarification" eliminates the obligation to consider these important criteria.

- **Surveys are likely only to provide a measure of the discrimination that has limited, and continues to limit, sports opportunities for women and girls.** Courts have recognized that interest cannot be measured apart from opportunity⁴; women's interests in sports have been artificially limited by discrimination to which they have been subjected, and women's interests have grown as Title IX has opened new sports participation opportunities for them. As a result, basing women's future opportunities on their responses to a survey to measure their prior lack of exposure will only perpetuate the cycle of discrimination.
- **The new "Clarification" conflicts with a key purpose of Title IX—to encourage women's interest in sports and eliminate stereotypes that discourage them from participating.**⁵ The new "Clarification" is particularly damaging for students in high school, where female students are likely to have had few or no sports opportunities that would inform their responses to an interest survey, and where students should be encouraged to try many different sports, not have their future opportunities limited by what they might have experienced or be interested in at that time.
- **The new "Clarification" allows schools to restrict their surveys to only enrolled and admitted students, thereby permitting schools to evade their legal obligation to measure interest broadly.** The "Clarification" ignores the reality that students interested in a sport not offered by a school are unlikely to attend that school. By not requiring schools to evaluate interest exists beyond their own campuses—such as in high school, community, and recreational programs in the areas from which a school typically draws its students—the new policy allows schools to evade their legal obligation to look broadly for interest in certain sports by women. Instead, the policy rewards schools with a presumption of compliance for wearing blinders—that is, for restricting their sports offerings and then claiming that they are satisfying the interests of those who are content with those restricted offerings.
- **The survey methodology authorized under the new "Clarification" is flawed and inconsistent with the requirements of prior Department of Education policy. For example:**
 - **Schools may e-mail the survey to all female students and interpret a lack of response as evidence of lack of interest.** Given the notoriously low response rates to surveys in general, let alone to ones sent via email, this authorization will allow schools to avoid adding new sports opportunities for women even where interest does in fact exist on campus.
 - **Schools may presume that young women's self-assessment of ability to compete at the varsity level reflects an actual lack of ability.** Young women who have played sports at the club level, or who have played sports other than the particular ones being considered for varsity status, may well have the ability to compete at a varsity level in the sport at issue. Tennis players, for example, may also be able to play squash, and many female athletes can become expert rowers. But under the new "Clarification"—and contrary to the Department's prior policy—schools are relieved of any obligation to seek the opinions of coaches

other experts on this issue.

- **The new "Clarification" shifts the burden to female students to show that they are entitled to equal opportunity.** Where schools are not providing equal participation opportunities for women, long-standing Department of Education policies make clear that schools have the burden of showing-an Office for Civil Rights the burden of rigorously evaluating-that they are nevertheless fully meeting the interests and abilities of their female students. The new "Clarification" instead forces women to prove that their schools are satisfying their interests and that they are entitled to additional opportunities.
- **The new "Clarification" makes no provision for the Department to monitor schools' implementation of the model survey or its results.** Adding insult to injury, the Department's new policy does not require that Office for Civil Rights monitor compliance to ensure that schools meet even minimal requirements for survey use or interpret the results accurately.

The new policy threatens to reverse the enormous progress women and girls have made in sports since the enactment of Title IX and to perpetuate further discrimination against them.

Title IX has opened the door for millions of women and girls to participate in sports. While fewer than 32,000 women participated in college sports prior to the enactment of Title IX, today that number has expanded nearly five fold-or 400%-to more than 150,000 women. Female participation in high school athletics has increased from less than 300,000 to over 2.8 million.⁶

These increased sports opportunities have provided immense benefits to a new generation of female athletes. Playing sports promotes responsible social behavior, greater academic success, and increased personal skills. Compared to their non-athletic peers, athletes are less likely to smoke or use drugs; have lower rates of sexual activity and teen pregnancy; have higher grades; and learn important life skills including the ability to work with a team, perform under pressure, set goals, and accept criticism.⁷

Despite these important benefits, critics of gender equity continue to attack Title IX's requirement that women be provided equal participation opportunities and claim instead that women are inherently less interested in sports than are men. Claims like these, as well as wide-spread non-compliance with Title IX in schools across the country, have resulted in women being treated like second-class citizens on the field. For example, although women in Division I colleges are 53% of the student body, they receive only 41% of the sports participation opportunities, 36% of athletic operating dollars, and 32% of the money spent on recruitment.⁸ At the high school level, girls represent only 42% of varsity athletes.⁹

* * *

This is not the first time that the Bush Administration has attempted to undermine equal opportunities for female athletes. Its attempts to do so through its 2002 Commission on Opportunity in Athletics were stalled by a massive public outcry in defense of Title IX. Unable to achieve its goals in the light of day, the Administration has now resorted to stealth tactics by unilaterally adopting this dangerous new policy without public announcement or opportunity for public comment. **The Department should withdraw this misguided and illegal "Clarification" and honor its promise to enforce long-standing policies that reflect Title IX's goals and requirements.**

NOTES:

1. United States Department of Education, Office for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003).

2. United States Department of Health, Education, and Welfare, Office for Civil Rights, *Title IX of the Education Amendments of 1972; a Policy Interpretation of Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (December 11, 1979).
3. United States Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996).
4. *Cohen v. Brown University*, 101 F.3d 155, 179-80 (1st Cir. 1996).
5. *Neal v. Board of Trustees of the California State Universities*, 198 F.3d 763 (9th Cir. 1999).
6. National Collegiate Athletic Association (NCAA), *1982-2002 Sponsorship and Participation Report 65*, available at http://ncaa.org/library/research/participation_rates/1982-2002/participation_rates.htm; National Federation of State High School Associations (NFHS), *2002 High School Athletics Participation Survey*, available at http://www.nfhs.org/nf_survey_resources.asp.
7. See, e.g., Carnegie Corporation, *The Role of Sports in Youth Development* (March 1996); NFHS, *The Case for High School Activities* (2002) at 3, 9; T National Campaign to Prevent Teen Pregnancy, *Fact Sheet: Not Just Another Single Issue: Teen Pregnancy and Athletic Involvement* (July 2003); *The Women's Sports Foundation Report: Sport and Teen Pregnancy* (1998) at . The President's Council on Physical Fitness and Sports, *Physical Activity & in the Lives of Girls* (Spring 1997); and *Black Female Athletes Show Grad-Gains*, *The NCAA News* (June 28, 1995).
8. NCAA, *1999-00 Gender Equity Report* (2002).
9. NFHS, *2002 High School Athletics Participation Survey*.

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Opposing the Additional Clarification

Department of Education Creates Huge Title IX Compliance Loophole: The Foundation
Position, Women's Sports Foundation, Jun. 16, 2005,
<<http://www.womenssportsfoundation.org>>



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ISSUES & ACTION

Department of Education Creates Huge Title IX Compliance Loophole: The Foundation Position

Thu 16-Jun-2005

Executive Summary

The Department of Education's March 17, 2005, letter announcing "additional clarification" of its policy for collegiate compliance with Title IX in athletic programs, issued without public input or comment, "clarifies" nothing and, instead, marks a dramatic and unprecedented reversal of the department's previous policy that violates practically every legal principle upon which Title IX's 30-year jurisprudence is based and shifts the burden of compliance from schools to female athletes.



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Specifically, the letter and accompanying "model survey" are contrary to established case law, contradict the Department's prior pronouncements and its Title IX Athletics Investigator's Manual, and ignore the reality that high schools and colleges create their sports teams and sports offerings sometimes years in advance by encouraging (in the case of high schools) and recruiting (in the case of colleges) prospective athletes to their campuses. The "model survey" ignores this reality by measuring only the interest of current, existing students, who were neither encouraged nor recruited for teams or sports beyond those the schools or colleges provided at the time. As such, the survey is an inherently biased and illogical methodology that merely entrenches the inequalities in the institutions' predetermined, existing sports programs.

The gist of the letter is that schools in which females are underrepresented in athletics compared to their proportion in the general student body (Prong 1 of Title IX's participation requirement) and that have not demonstrated a history and continuing practice of expanding opportunities for the underrepresented sex (Prong 2) would be deemed in compliance with the law under Prong 3 of the athletic participation provision if they simply e-mailed a "model survey" to current students to determine their interests and abilities and found interest by the underrepresented sex to be lacking.

This survey would create a presumption of compliance with Title IX, as long as the school did not recently drop a women's team or had a recent request for elevation of women's club sport to varsity status. Once the survey is administered, the burden of demonstrating compliance with Prong 3 would shift from the college or school to the athlete. In essence, the institution would enjoy a presumption of compliance, a difficult hurdle for an athlete to surmount.

In summary, the letter and "model survey" contravene the basic principles of Title IX and its long-standing jurisprudence. Every legal authority -- including the department's own prior policies and interpretations -- agree that surveys of existing students are an inaccurate, biased, and invalid method of determining compliance under Title IX's third prong. The letter confirms that the department has become the "fox guarding the henhouse" by thumbing its nose at the law and the female athletes it is charged with protecting. The Department, which has conducted no Title IX investigations since 2002, has now taken a startling step that protects the status quo in college sports.

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Accordingly, the Women's Sports Foundation calls upon the Secretary of Education to withdraw the March 17 letter and model survey.

A "Survey" Is an Invalid Measure of Interest in Participation

The Department's "model survey" fails to provide a valid measure of women's interest in sports and, instead, institutionalizes the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. The use of surveys rests on the stereotyped notion that women are inherently less interested in sports than men, which is contradicted by the country's experience of Title IX and fundamental principles of civil rights law.

Some experts in the use of survey instruments have found that surveys measure attitude, rather than predicting behavior. They assert that male respondents are simply more likely than women to profess an interest in sport, regardless of their eventual willingness to show up for a team and play. In other words, professing interest does not predict behavior well and should not be used to predict actual levels of participation when nondiscriminatory opportunities are made available to boys and girls. To use the results of interest surveys as the sole justification for withholding participation opportunities is an improper use of attitude survey methodology that the courts and policy-makers have repeatedly rejected due to their irrelevance and bias.

And what if the students do not respond to the e-mailed "model survey"? The letter says, "Although rates of nonresponse may be high with the e-mail procedure, under these conditions, OCR will interpret such nonresponse as a lack of interest." To get a chance to play, females have to respond to their e-mails, a requirement that male athletes never have to meet. Experts in survey methodology confirm that inferring nonresponses as "no interest" turns survey empiricism on its ear. A general rule of thumb is that only around 20% of persons who receive a survey respond to it. The results of the respondents are then generalized to the population of interest. If half of the respondents indicated they were interested in sports, then the school should assume that half of the female students are interested. To demonstrate the bias in the proposed model survey, reverse the OCR approach. A school would send out an e-mail survey and ask students if they have NO interest in a given sport. Nonresponses would then be interpreted as affirmative interest.

Male Athletes Have Never Been Required to Prove Interest in Order to Obtain Participation Opportunities

Male athletes have never had to prove they were interested in sports to receive opportunities to play. Schools simply assumed male athletes were interested in sports, hired a coach who recruited athletes to play, and offered varsity athletic experiences. If you do the same for women, they too will play. We know of no instance in which a high school or college started a varsity women's team, hired a coach and then had the coach return his or her paycheck because he or she could not find enough women to play.

Reliance on Existing Student Body for Assessment is Wrong

At the college level, athletes are only rarely recruited from the existing student body, but rather are recruited from the region or country at large. At the high school level, the coach finds students with and without experience or skill who are big enough or fast enough and urges them to come out for the team. Now, a college that goes out and recruits male athletes from all over the country and not from its existing student body, is not required to do the same for female athletes and can eliminate this obligation by administering an e-mail survey. Now, a high school is not obligated to encourage female athletes to come out for teams in the same way it encourages male athletes to come out for teams, so long as it administers an e-mail survey.

This result reflects an absence of common sense and a dereliction of the

Department's authority. A huge Title IX compliance loophole has been created despite a similar analysis by the courts on why surveys of the interest of the existing student body or even a pool of applicants to the university are patently wrong. In the most comprehensive and accepted case on the topic, *Cohen v. Brown University*, a federal appeals court stated that the type of survey the department has proposed to gauge compliance under the third prong was "illogical" and "circular" in its reasoning.

The court expressly rejected the practice of surveying current students, noting that Brown actively recruits most students who end up playing on its varsity teams. The court stated: "What students are present on campus to participate in a survey of interests has already been predetermined through the recruiting practices of the coaches. What teams are established and can recruit or qualify for admissions preferences has already been predetermined by Brown. Thus, the interest present on campus is controlled by Brown; to then suggest that Brown must only satisfy the relative interests of students present on campus is circular."

Further, the court rejected surveying the pool of applicants to Brown. The court stated: "Using the pool of actual Brown applicants fails to consider the fact that college applicants interested in a sport not offered as a varsity sport at Brown may not even apply to Brown. A survey of actual Brown applicants would thus fail to capture the interest of those student-athletes who choose not to apply due to the limits of Brown's program offerings. To suggest that Brown need only satisfy the interests of actual applicants where Brown's selection of program offerings affects who applies to the school in the first place is illogical."

Model Survey as Sole Litmus Test Defines Current Legal Authority

Every legal authority has disallowed using surveys of existing students as the sole measure of compliance, including:

- IX Policy Interpretation, 44 Fed. Reg. 71415 (1979 policy)
- Valerie M. Bonnette & Lamar Daniel, Department of Education, Title IX Athletics Investigator's Manual (1990)
- 1996 OCR Clarification of Intercollegiate Athletics Policy Guidance; The Three-Part Test, available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>
- *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996) at 178-179.

While these legal authorities have held that this survey practice cannot be made the sole litmus test for compliance under Prong 3 of Title IX, the letter sets up just a situation, totally reversing the current standard. The letter states that only if the "model survey" is not administered will it look at the following other factors which the courts have maintained must all be examined:

- Requests for the addition of a varsity team (even if no club team currently exists) or elevation of an existing club sport to varsity status
- Participation in club or intramural sports
- Participation in high school sports, amateur athletic associations and community sports leagues that operate in areas from which the institution draws its students
- Intercollegiate varsity participation rates, as identified by national and regional intercollegiate sports governing bodies, in the institution's competitive region

Yet these are the same factors that schools formerly had to adhere to under the former policy.

Dependence on a single survey methodology cancels the Department of Education's 1979 Policy Interpretation, which states that schools are permitted to

determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing, provided that all of the following standards are met: ○

- a. The process take into account the nationally increasing levels of women's interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and
- d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

The letter and "model survey" also conflict with the department's Title IX Athletics Investigator's Manual, which instructs investigating officials to consider other factors reflecting interests and abilities, such as sports programs at "feeder" schools and community and regional sports programs. More importantly the investigator's manual states that a student survey may be a remedial tool to be used after a determination that an institution has failed the third prong; a survey is not utilized to determine compliance in the first instance, however. While a student survey may be part of a remedy to determine what sports to add when an institution's current program fails Prong Three, it is not a proper test upon which to base compliance.

In summary, the letter and "model survey" contravene the basic principles of Title IX and its long-standing jurisprudence. Every legal authority – including the Department's prior policies and interpretations – agree that surveys of existing students are an inaccurate, biased and invalid method of determining compliance under Title IX's third prong. It ignores the effect of recruiting and the self-selection of athletes with existing desired sports programs. Yet the Department's letter and "model survey" contravene the law's very purpose by further disadvantaging women via a biased and rejected methodology. ○

References

- 1** Authored by Nancy Hogshead-Makar, Professor of Law, Florida Coastal School of Law, Olympic gold medalist swimmer, and Donna Lopiano, Ph.D., Chief Executive Officer, Women's Sports Foundation. First published as commentary on *InsideHigherEd.com*, March 24, 2005: (<http://www.insidehighered.com/views/2005/03/24/lopiano>)
- 2** Full text located at: <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.htm>
- 3** *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996) at 198-179.
- 4** 1996 OCR Clarification of Intercollegiate Athletics Policy Guidance; *The Three-Part Test*, available at <http://www.ed.gov/offices/OCR/docs/clarific.html>.
- 5** Department of Education's Title IX Athletics Investigator's Manual (1990).
- 6** This point has been made by, for example, Donald Sabo, Ph.D., Professor of Sociology, D'Youville College, Director of the Center for Research on Physical Activity, Sport & Health. Former President, North American Society for the Sociology of Sport. Professor Sabo was an expert witness on research methodology for *Cohen v. Brown University*, and has extensively analyzed the methodological problems with such surveys. ○
- 7** *Cohen v. Brown University*, 879 F.Supp. 185 at 206
- 8** *Id.* at 207
- 9** "OCR will determine whether there is sufficient unmet interest among

the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

requests by students and admitted students that a particular sport be added;
requests that an existing club sport be elevated to intercollegiate team status;
participation in particular club or intramural sports;
interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
results of questionnaires of students and admitted students regarding interests in particular sports; and
participation in particular interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).⁵ For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex."

10 44 Fed. Reg. at 71, 417

11 Valerie M. Bonnette & Lamar Daniel, Department of Education, Title IX Athletics Investigator's Manual (1990)

12 *Id.*

13 *Id.* at 27 "[a] survey or assessment may be required as a part of a remedy when OCR has concluded that an institution's current program does not equally effectively accommodate the interests and abilities of students.

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Opposing the Additional Clarification

"Sen. Murray, Colleagues Sign Letter to Protect Title IX," *US Fed News*, Nov. 10, 2005

opportunities for participation in the future. Under the Department's new guidance, schools that provide fewer sports opportunities to women can be considered to have accommodated female students and complied with Title IX, based solely on the results of a student survey. If female students do not reply to a survey emailed to them, the Department will assume that they are not interested in additional sports activities. We are concerned that a survey alone cannot reliably measure students' interest in sports. Many students may not respond to, or even open, email surveys.

The new guidance also does not require colleges to weigh other factors they have traditionally had to consider, such as coaches' and administrators' opinions, or women's athletic participation at nearby high schools or in recreational leagues, even though these factors are important guides to female students' interest and potential. By contrast, in answering a survey, students who have been denied equal opportunity in sports may express only tentative interest in sports or confidence in their skills. Such surveys may actually do little more than reflect the current denial of equal opportunity, rather than the students' true interest and potential. We are concerned that such surveys would provide colleges an easy means of evading Title IX's goal of equal opportunity.

The proposed Senate report language responds to these concerns by requiring the Department of Education to prepare a report on the use of surveys by institutions of higher education. The report will include what other information was considered in assessing student interest and the decisions made about athletic opportunities at these institutions. The report further directs the Department of Education not to expend funds on activities associated with this guidance until the conferees have adequate time to review the report.

Title IX has been an extraordinary success in opening up new worlds of participation in sports by young women and girls, and it would be a serious mistake to roll back that progress. We urge you to accept the Senate language regarding **Title IX and the Additional Clarification** to ensure that the new guidance does not weaken enforcement of Title IX in athletics. Thank you.

Sincerely,

Senator Patty Murray

Senator Hillary Rodham Clinton

Senator Jim Jeffords

Senator Edward Kennedy

Senator Joe Lieberman

Senator Gordon Smith

Senator Olympia Snowe

LOAD-DATE: November 14, 2005

LANGUAGE: ENGLISH

PUBLICATION-TYPE: Newswire

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US Fed News

November 10, 2005 Thursday 12:53 AM EST

SEN. MURRAY, COLLEAGUES SIGN LETTER TO PROTECT TITLE IX

BYLINE: US Fed News**LENGTH:** 862 words**DATELINE:** WASHINGTON

The office of Sen. Patty Murray, D-Wash., issued the following press release:

Sen. Patty Murray (D-Wash.) today joined with six of her Senate colleagues in sending a letter to the House and Senate managers of the Labor, HHS and Education Appropriations conference report, to urge them to accept Senate language protecting Title IX.

Senators Hillary Rodham Clinton (D-NY), Jim Jeffords (I-VT), Edward Kennedy (D-MA), Joe Lieberman (D-CT), Gordon Smith (R-OR) and Olympia Snowe (R-ME) also signed the letter.

"Title IX has been an extraordinary success in opening up new worlds of participation in sports by young women and girls, and it would be a serious mistake to roll back that progress," the Senators wrote in their letter. "We urge you to accept the Senate language regarding **Title IX and the Additional Clarification** to ensure that the new guidance does not weaken enforcement of Title IX athletics."

On March 17, 2005, the U.S. Department of Education issued a new Title IX policy that threatens to reverse the decades of progress women and girls have made in sports. Under the Administration's "Clarification," schools can now claim they are fully meeting women's interests in sports based simply on the responses - or lack of responses - to an e-mail survey asking female students about their interests in sports. This under-the-radar attack on Title IX's application to athletics was issued without public notice or opportunity for public comment.

The proposed Senate report language requires the Department of Education to prepare a report on the use of surveys by institutions of higher education. The report will include what other information was considered in assessing student interest and the decisions made about athletic opportunities at these institutions. The report further directs the Department of Education not to expend funds on activities associated with this guidance until the conferees have adequate time to review the process.

A full transcript of the letter to the LHHS conference managers follows:

November 10, 2005

Dear Chairman Specter, Ranking Member Harkin, Chairman Regula and Ranking Member Obey:

We urge you to accept the Senate language regarding Title IX of the Education Amendments of 1972 and the Department of Education's March 17, 2005 policy guidance entitled "Additional Clarification of the Intercollegiate Athletic Policy: Three Part Test - Part Three" in the final 2006 Labor, Health and Human Services, and Education Appropriations Conference Report.

For over thirty years, Title IX has opened doors by giving women and girls an equal opportunity to participate in student sports, and we are concerned that the Department's proposal could unfairly reduce their

Opposing the Additional Clarification

"Senate Panel Says More Proof Needed for Colleges' Compliance with Title IX," Jamie Schuman, *Chronicle for Higher Education*, July 29, 2005

THE CHRONICLE OF HIGHER EDUCATION

Athletics

<http://chronicle.com/weekly/v51/i47/47a03802.htm>

From the issue dated July 29, 2005

SIDELINES

Senate Panel Says More Proof Needed for Colleges' Compliance With Title IX

By JAMIE SCHUMAN

How should colleges prove that they are complying with a key federal gender-equity law?

This month the Senate Appropriations Committee said the U.S. Department of Education should rescind a guideline that allows colleges to use the results of a single e-mail survey to measure the demand for women's sports on their campuses. Colleges use those surveys to demonstrate compliance with Title IX of the Education Amendments of 1972.

Calling such survey results an insufficient measurement, committee members said colleges should seek out additional evidence when trying to determine the level of interest in women's athletics as a means of compliance with the law. Title IX bars sex discrimination at institutions receiving federal funds and requires, among other things, that men and women have equal opportunities to play college sports.

Colleges can demonstrate that they meet the terms of Title IX in several ways. One is to prove that their women's sports programs fully accommodate the interests of female students. In March the department said colleges could prove that they are meeting those interests through one test: e-mail surveys of all students or all female students.

The committee expressed its views on the guideline in a report accompanying a bill to finance the Education Department in the 2006 fiscal year. The bill itself, which was adopted this month with no major changes from legislation passed earlier by an appropriations subcommittee (*The Chronicle*, July 13), now moves to the Senate floor.

Some members of the Appropriations Committee hope to amend the bill at that point to include their sentiments on the Title IX guideline, said Alex S. Glass, a spokeswoman for Sen. Patty Murray, a Democrat from Washington State, who helped write the report's language.

The report asks the Education Department to require colleges to make "reasonable, good-faith efforts" to gather other evidence of women's interest in sports.

"The committee believes survey results are not sufficient to demonstrate compliance if other evidence exists, such as requests for athletic teams, that contradicts the conclusions drawn from the survey," the report says.

It also asks the department to produce a report by March 17, 2006, on how and to what extent colleges that use the survey option also seek out additional information.

The committee wrote that the department had intended to provide colleges with more guidance on how to comply with Title IX, but that in practice, the new guideline created a loophole that allows institutions to bypass the comprehensive analysis of interest in women's sports.

Last month more than 140 Democrats in the U.S. House of Representatives sent a letter to President Bush, urging him to withdraw the guideline.

<http://chronicle.com>

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Volume 51, Issue 47, Page A38

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Opposing the Additional Clarification

"The Testimony of Donna De Varona before the Senate Committee on Commerce, Science, and Transportation," February 1, 2006, <<http://commerce.senate.gov>>

							
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The Testimony of
Ms. Donna de Varona
U.S. Olympian and Sports Commentator,

**TESTIMONY OF DONNA DE VARONA
BEFORE THE SENATE COMMITTEE
ON COMMERCE, SCIENCE, AND TRANSPORTATION**

February 1, 2006

Good Morning, I am Donna de Varona. I want to thank the Senate Committee on Commerce, Science and Transportation for inviting me to testify today, and I ask that my written statement and attachments be included in the record.

My relationship with Washington and Congress dates back to the 1960s, when after returning from the 1964 Olympic games in Tokyo, I was appointed to my first of four terms on the President's Council on Physical Fitness. Back then I spent my summers working in intercity programs with children. I have also served on the United States Olympic Committee and the Boards of the Special Olympics, the Women's Sports Foundation, and the U.S. Soccer Foundation. I was a member of President Ford's Commission on Olympic Sports and President Carter's Women's Advisory Commission. From 1976 to 1978, I was a special consultant to the U.S. Senate on sports matters, and most recently I served as a Commissioner on Secretary of Education Roderick Paige's Opportunity in Athletics Commission. Subsequently, I was appointed to a Senate task force to help recommend a comprehensive plan to restructure the United States Olympic Committee.

Today we have been asked to address the status of women in sport both in the areas of promotion and opportunities. Although women and young girls have come a long way since the passage of Title IX some thirty four years ago, there is still a lot to do. The framers of the legislation and later on the guidelines understood that mandating equality in opportunity could not happen overnight, and that is the reason why the guidelines and the three-part participation test are crafted the way they are. The guidelines and the test are flexible and fair. History has painted a picture of tremendous growth and acceptance of the female athlete, but she still battles the perception that girls and women are inherently less interested in sports than men and that providing women with opportunities cheats men out of resources. The argument pits young men and women against each other, and claims like these, as well as widespread non-compliance with Title IX in schools across the country have resulted in women being treated like second-class citizens on the playing field. For example, although on average women are 54% of the students in colleges, they receive only 43% of the sports participation opportunities, 38% of athletic operating dollars and 33% of the money spent on recruitment. At the high school level, girls represent only 42% of varsity athletes. In addition, women and girls continue to face discrimination at all levels of education and in community, recreational and professional sports programs, including in

coverage of these programs by the media. With respect to promotion, the lifeblood of any sport, a study of national and regional papers revealed that women receive only about 7 to 9 percent of the space in the sports sections and less than that in air time.

While girls and women can perform on the athletic stage, they still do not run a major sports broadcast network, nor make many important broadcast programming decisions. In educational institutions, the number of women head coaches and sports administrators has stagnated. In the past decade, we have seen two women's sports magazines fold, two professional leagues go out of business, and numerous established women's sports leaders leave the sporting profession. Softball has been taken off the Olympic program. In the broadcast profession, two well-known sports personalities—Robyn Roberts and Hanna Storm—have moved over to news departments. On the collegiate level, many female sports administrators have been let go with no future hope of employment in a sporting world too often controlled by a huge boys' club with sports boosters pulling the strings. For example, take a look at the story of 1972 Olympic gold medalist swimmer, Karen Moe. Karen has spent more than twenty years at the University of California. A winning and honored athlete and coach, she mentored 49 All-Americans and 9 Olympians. Fourteen years ago she was promoted to the athletics department and has consistently been given high performance ratings as an administrator. This year she was let go from her job with no explanation. Her departure is a loss to the University, to the students, and to those women who have lost a role model and are now wondering about pursuing a profession as sports administrator.

Yet with the stunning success of events like the 1999 Women's World Cup, when America's largest and most prestigious stadiums were packed with young vibrant fans to watch women compete, one might get the impression that all is healthy in women's sports. After all, since the passage of Title IX, we have witnessed an unprecedented increase in participation. Before Title IX was enacted, fewer than 32,000 took part in collegiate sports. Now more than 150,000 take part. In high school, the number has gone from 300,000 to over 2.8 million. With this increased participation has come the ability to research the true benefits of sport for women, and the results show huge benefits such as the promotion of responsible social behavior, greater academic success, and increased personal skills. According to published research such as the Carnegie Corporation's "The Role of Sports in Youth Development," compared to their non-athletic peers, athletes are less likely to smoke or use drugs; have lower rates of sexual activity and teen pregnancy; have higher grades; and learn how to work with a team, perform under pressure, set goals, and take criticism. Since health costs are soaring in this country and the nation faces a serious problem with morbid obesity and diabetes, I would be remiss if I did not mention the health benefits to those who are fit and much more able lead by example and teach the values of a healthy lifestyle to their peers and someday their children.

However, it is dangerous to assume that just because some exceptional efforts attract a nationwide spotlight all is healthy in women's sports. In fact, despite the fact that sports for girls and women have proven to be so beneficial, there is still an unfortunate debate going on as to the merits of the law that created those opportunities: In June 2002, a 15 member commission was appointed by Secretary of Education Roderick Paige to review opportunities in athletics. I was a member and I am disappointed to say that most of our time was spent on longstanding Title IX policies governing athletics and whether they should be revised. To this day, I feel that we all missed an important opportunity to address the larger issue of how to provide more sports and fitness opportunities to all students in all our schools. As you have heard from others today, Title IX has been the engine that has created an explosion of sports opportunities for women over the last three decades. But Title IX has also been under constant attack and scrutiny since it was enacted, and today is unfortunately no different. The impetus for the Commission centered on claims by some that the way in which Title IX has always been enforced by the Department "needlessly results in the

elimination of some men's teams." The Department spent a year and about \$700,000 of taxpayers' money and heard from thousands of experts and citizens nationwide through public meetings, emails, reports, and letters, ultimately adopting 23 recommendations. A USA Today/CNN/Gallup poll conducted during the Commission's tenure indicated that seven of 10 adults who are familiar with Title IX think the federal law should be strengthened or left alone. Yet many of the Commission's ultimate recommendations would have seriously weakened Title IX's protections and substantially reduced the opportunities to which women and girls are entitled under current law.

For this reason, and because the Commission's report failed to address key issues regarding the discrimination women and girls still face in obtaining equal opportunities in athletics, Co-Commissioner Julie Foudy and I released a Minority Report setting forth our views. We felt an obligation to all those who testified to produce a Minority Report because, contrary to what we were promised at the beginning of our deliberations, we were not permitted to include within the Commission's report a full discussion of the issues and our position on the recommendations that were adopted.

In our Minority Report, we pointed out that the Title IX athletics policies have been critical to the effort to expand opportunities for women and girls, have been in place through Republican and Democratic Administrations, and have been upheld unanimously by the federal appellate courts. We also noted that advances for women and girls have not resulted in an overall decrease in opportunities for men, and that in the cases where men's teams have been cut, budgetary decisions and the athletics arms race are the true culprits. Even the Division I athletic directors who served on the Commission testified that revenue producing sports in big-time colleges are "headed for a train wreck." Based on these findings, we recommended that the current Title IX athletics policies not be changed but enforced to eliminate the continuing discrimination against women and girls in athletics. We also recommended that schools and the public be educated about the flexible nature of the law, reminded that cutting men's teams to achieve compliance is not necessary or favored, and encouraged to rein in escalating athletics costs to give more female and male athletes chances to play. The outcome of this lengthy and costly Opportunity in Athletics debate was that the Department of Education rejected the Commission's proposals and strongly reaffirmed the longstanding Title IX athletics policies. In its July 11, 2003 "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance," the Department of Education stated: "After eight months of discussion and an extensive and inclusive fact-finding process, the Commission found very broad support throughout the country for the goals and spirit of Title IX. With that in mind, OCR today issues this Further Clarification in order to strengthen Title IX's promise of non-discrimination in the athletic programs of our nation's schools." The document goes on to say that Title IX's three-part participation test provides schools with three separate ways to comply and that nothing in that test requires or encourages schools to cut men's teams; it also promised that OCR would aggressively enforce the longstanding Title IX standards, including implementing sanctions for institutions that do not comply.

However, less than two years after strongly reaffirming the longstanding Title IX athletics policies, and without any notice or public input, the Department of Education did an about-face and posted on its website, late in the afternoon of Friday, March 17, 2005, a new Title IX policy that threatens to reverse the enormous progress women and girls have made in sports since the enactment of Title IX. This new policy, called an "Additional Clarification," creates a major loophole through which schools can evade their obligation to provide equal sports opportunities to women and girls. The bottom line is that the policy allows schools to gauge female students' interest in athletics by doing nothing more than conducting an e-mail survey and to claim—in these days of excessive e-mail spam—that a failure to respond to the survey shows a lack of interest in playing sports. It eliminates

schools' obligation to look broadly and proactively at whether they are satisfying women's interests in sports, and will thereby perpetuate the cycle of discrimination to which women have been subjected. The new Clarification violates basic principles of equality, as I explain further below.

As a member of the Commission that spent a year carefully analyzing these issues, I am deeply troubled that the Department would change its 2003 stated position, in which it reaffirmed the longstanding Title IX policies and pledged to enforce them. Instead, the Administration has unilaterally adopted this dangerous new policy without public announcement or opportunity for public comment. Five of my fellow Commissioners and I are so concerned about this new Clarification that we recently sent a letter to athletic administrators around the country warning them about the flaws of the survey procedure endorsed in it, and urging them to decline to use such procedures and instead to join us in asking for it to be withdrawn. To fully understand why this new Clarification is so dangerous, it is important to review the relevant longstanding Title IX athletics policies. Title IX requires schools to provide males and females with equal sports participation opportunities. A 1979 Policy Interpretation elaborates on this requirement by providing three independent ways that schools can meet it – by showing that:

The percentages of male and female athletes are about the same as the percentages of male and female students enrolled in the school (the “proportionality” prong); or

The school has a history and continuing practice of expanding opportunities for the underrepresented sex—usually women; or

The school is fully and effectively meeting the athletic interests and abilities of the underrepresented sex. The Department's new Clarification allows schools not meeting the first or second prongs --that is, schools that are not providing equal opportunities to their female students and that have not consistently improved opportunities for them--to show that they are nonetheless in compliance with Title IX by doing nothing more than sending a “model” e-mail survey to their female students asking about their interest in additional sports opportunities. According to the Clarification, the Department will presume that schools comply with Title IX if they use this survey and find insufficient interest to support additional opportunities for women, unless female students can provide “direct and very persuasive evidence” to the contrary.

This new policy dramatically weakens existing law. First, it allows schools to use surveys alone to demonstrate compliance with the law. Under prior Department policies, schools must consider many other factors besides surveys to show compliance with prong three, including: requests by students to add a particular sport; participation rates in club or intramural sports; participation rates in sports in high schools, amateur athletic associations, and community sports leagues in areas from which the school draws its students; and interviews with students, coaches, and administrators. The new Clarification eliminates the obligation to consider these important criteria. Second, surveys are problematic because they are likely only to measure the discrimination that has limited, and continues to limit, sports opportunities for women and girls. Courts have recognized that interest cannot be measured apart from opportunity. In other words, to quote the movie *Field of Dreams*, “If you build it, they will come.” Basing women's opportunities on their responses to surveys that measure their prior lack of exposure will only perpetuate the cycle of discrimination. The new Clarification is particularly damaging for students in high school, where female students are likely to have had even fewer sports opportunities that would inform their responses to a survey, and where students should be encouraged to try many different sports, not have their opportunities limited by what they might have experienced or be interested in at that time.

Third, by allowing schools to restrict surveys to enrolled and admitted students, the Clarification lets schools off the hook from having to measure interest broadly. The Clarification ignores the reality that students interested in a sport not offered by a school are unlikely to attend that school. By not requiring schools to evaluate interest that exists beyond their own campuses—such as in high school, community, and recreational programs in the areas from which a school typically draws its students—the new policy allows schools to select the universe of people who will be able to respond from those who have already signaled their willingness to accept limited opportunities.

Fourth, the Clarification authorizes flawed survey methodology. For example, schools may e-mail the survey to all female students and interpret a lack of response as evidence of lack of interest. Given the notoriously low response rates to surveys in general, let alone to anything sent via email, this authorization will allow schools to avoid adding new opportunities for women even where interest does in fact exist on campus. In addition, schools may presume that young women's self-assessment of lack of ability to compete at the varsity level reflects an actual lack of ability. Young women who have played sports at the club level or sports other than the ones being considered for varsity status may well have the ability to compete at a varsity level in the sport at issue. Tennis players, for example, may also be able to play squash, and many female athletes can become expert rowers. But under the new Clarification, schools are relieved of any obligation to seek the opinions of coaches or other experts on this issue.

Fifth, the new Clarification shifts the burden to female students to show that they are entitled to equal opportunity. Longstanding Title IX policies put the burden on schools to show that they are fully meeting the interests and abilities of their female students. The new Clarification forces women to prove that their schools are not satisfying their interests and that they are entitled to additional opportunities.

Finally, the Department's new policy does not even require that the Office for Civil Rights monitor schools' use of the survey to ensure that they meet minimal requirements for survey use or interpret the results accurately. For all these reasons, the Department's new Clarification represents a giant step backwards in the progress that women and girls have made in the past three decades. If left in place and used by schools, the new Clarification will lead to a reduction in opportunities for our nation's daughters. We call on Congress to do everything within its power ensure that this does not happen.

Title IX has opened the door for millions of women and girls to participate in sports, but much work remains to be done to fulfill its promise and vision. We welcome Congress' focus on the promotion and advancement of women in sports and look forward to working together to expand athletic opportunities for women and girls.

Footnotes

1. NCAA, 2002-03 Gender Equity Report (2004).
2. NFHS, 2002 High School Athletics Participation Survey.
3. See, e.g., Priest, Laurie and Liane M. Summerfield, "Promoting Gender Equity in Middle and Secondary School Sports Programs," ERIC Digest, 1994; Rebecca Vesely, "California Takes Lead in Sports Equity," Women's eNews, Sept. 13, 2004 (regarding bill banning gender bias in youth athletics programs run by cities and counties), available at <http://www.womensenews.org/article.cfm/dyn/aid/1988/context/archive>; Sarah J. Murray, "Posting Up in the Pink Ghetto," Women's Sports Foundation, available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/body/article.html?record=884>.

4. Judith Jenkins George, "Lack of News Coverage for Women's Athletics: A Questionable Practice of Newspaper Priorities," Aug. 20, 2001, available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/media/article.html?record=807>.
5. National Collegiate Athletic Association (NCAA), 1982-2002 Sponsorship and Participation Report 65, available at http://ncaa.org/library/research/participation_rates/1982-2002/participation.pdf; National Federation of State High School Associations (NFHS), 2002 High School Athletics Participation Survey, available at http://www.nfhs.org/nf_survey_resources.asp.
6. See, e.g., Carnegie Corporation, *The Role of Sports in Youth Development* 9 (March 1996); NFHS, *The Case for High School Activities* (2002) at 3, 9; *The National Campaign to Prevent Teen Pregnancy, Fact Sheet: Not Just Another Single Issue: Teen Pregnancy and Athletic Involvement* (July 2003); *The Women's Sports Foundation Report: Sport and Teen Pregnancy* (1998) at 5-7; *The President's Council on Physical Fitness and Sports, Physical Activity & Sports in the Lives of Girls* (Spring 1997); and *Black Female Athletes Show Grad-Rate Gains*, *The NCAA News* (June 28, 1995).
7. See "Open to All": Title IX at Thirty, *The Secretary of Education's Commission on Opportunity in Athletics*, Feb. 28, 2003, available at <http://www.ed.gov/about/bdscomm/list/athletics/report.html>.
8. Erik Brady, "Poll: Most adults want Title IX law left alone," *USA TODAY*, Jan. 7, 2003.
9. See *Minority Views on the Report of the Commission on Opportunity in Athletics*, Report Submitted by Donna de Varona and Julie Foudy, Feb. 2003 (attached).
10. Office for Civil Rights, United States Department of Education, "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance," July 11, 2003 (attached).
11. Office for Civil Rights, United States Department of Education, "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test ? Part Three," Mar. 17, 2005 (attached).
12. "Dear Colleague" Letter from Ted Leland et al., Oct. 11, 2005 (attached).
13. United States Department of Health, Education, and Welfare, Office for Civil Rights, *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (December 11, 1979).
14. United States Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996).
15. *Cohen v. Brown University*, 101 F.3d 155, 179-80 (1st Cir. 1996).

Opposing the Additional Clarification

"Athletic Opportunity for All," *US Fed News*, February 3, 2006

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US Fed News

February 3, 2006 Friday 3:17 AM EST

ATHLETIC OPPORTUNITY FOR ALL

BYLINE: US Fed News**LENGTH:** 631 words**DATELINE:** WASHINGTON

Sen. Olympia J. Snowe, R-Maine, issued the following column:

Until about 34 years ago, girls and boys did not have equal opportunities to participate in sports. In 1972, Congress passed the Educational Amendments and one section of this law, Title IX, prohibited discrimination against girls and women in federally-funded education, including in athletics programs. A landmark civil rights law, Title IX has been the driving factor in allowing thousands of women and girls the opportunity to benefit from intercollegiate and high school sports. And many have gone on to prosper; according to a 2002 study, 81 percent of executive businesswomen played organized team sports growing up.

As a result of Title IX, women and girls have benefited from more opportunities and equitable facilities. Indeed, prior to Title IX, only 1 in 27 high school girls - fewer than 300,000 - played sports. Today, the number is 1 in 3 - for a total of nearly 2.8 million, an increase of 800 percent. Because of Title IX, more women have received athletic scholarships, and thus the opportunity for higher education than would have been possible otherwise. In fact, many women Olympic athletes credit Title IX for the opportunity to attend college through athletic scholarships and to participate in sports.

In less than two weeks, many of us will tune in to watch the 2006 Winter Olympics, and I am especially proud of the women from Maine who will represent our country. Kirsten Clark from Raymond, Maine, who grew up skiing at Sugarloaf/USA, will compete in the downhill and Super-G skiing events. Twin sisters Lanny and Tracy Barnes, who train at the Maine Winter Sports Center and study at the University of Maine in Fort Kent, will both compete in the biathlon - and I wish them all the best of luck.

From the very first day I set foot in Washington in 1979, I have been a stalwart supporter of Title IX and women's athletics. As a member of the U.S. House of Representatives, I sponsored the first "National Women in Sports Day" Resolution in 1986 and then continued to sponsor or cosponsor the same resolution every successive year while I was in the House. The pen President Reagan used to sign the measure along with his letter of appreciation still hangs on my office wall.

We must continue to preserve the efficacy of Title IX. I have expressed concern that a March 17, 2005 clarification of the law by the U.S. Department of Education may undermine Title IX by allowing schools to use unreliable internet-based surveys to determine whether or not it is "fully and effectively" **accommodating the interests and abilities** of women. Under the Department's new guidance, schools that provide fewer sports opportunities to women can be considered to have accommodated female students and complied with Title IX based solely on the results of a student survey. If female students do not reply to a survey e-mailed to them, the Department will assume that they are not interested in additional sports activities. Following this decision, I joined in a letter with some of my Senate colleagues opposing the clarification and urging that it be rescinded. With all the progress we have made in dramatically increasing girls' participation in sports, we can't afford to turn back the clock.

Athletics help cultivate the kind of positive, competitive spirit that develops self-confidence and dedication and makes for more successful, well-rounded individuals. Given its overwhelming success, Congress must

Opposing the Additional Clarification

"Lack of Interest?" Michelle Brutlag, *The NCAA News*, April 10, 2006



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Lack of interest?

College athletics community stands back from new Title IX compliance tool

April 10, 2006

**By Michelle Brutlag
Hosick
The NCAA News**

Since the release of the federal government's 2005 clarification to Title IX policy and its accompanying model survey, Title IX advocates have been crying foul. The survey provides a way for institutions to skirt their obligations to female students, they say, instead of ensuring that all interested women have an opportunity to participate in intercollegiate athletics.

The NCAA Executive Committee even urged Association members not to use the procedures set forth in the clarification and called on the U.S. Department of Education to rescind the new analysis.

However, the government has not made any move to reconsider its clarification, and the model survey remains an permissible method of complying with Title IX.

Whether institutions are inclined to use that option, though, is unclear. A report released by the Department of Education's Office for Civil Rights (OCR) last month indicated that before the model survey, interest surveys alone were not a safe harbor.

Many advocates for female athletes believe that practice should continue — if institutions do decide to use the model survey or any survey at all, they should use a method that will garner the highest response rate possible, such as making it mandatory to fill out the questionnaire in order to register for classes. Also, they believe the survey results should be considered along with other factors, such as participation in club or intramural sports, sports played in an institution's recruiting area and the availability of viable competition in the conference or geographic area.

Right now, most institutions don't seem to be using the model survey at all, either alone or in conjunction with an assessment of other factors. Many people involved in the debate believe that the NCAA position has been a major influence.

Atlanta attorneys John Almond and Dan Cohen believe that schools should consider the OCR model survey as a way to gain compliance. In an article recently published in the Vanderbilt Journal of Entertainment and Technology Law, the Rogers and Hardin LLP attorneys analyzed the pros and cons of the survey.

"We had not seen much coverage that is very detailed in terms of what the additional clarification can provide, and also a lot of the coverage is more for general audiences," Cohen said. "Our article really takes a more practical approach than has been done before. Presumably each individual school is making a choice (not to use the survey), but we're not even sure that's happening. A lot of schools are not even sitting down and analyzing this thing, and we don't know why. Call it inertia."

Others, however, hope that schools have considered the tool and have chosen to discard it because they believe it ineffectively measures true interest. But the survey is still only a year old, and some institutions might consider its use. Advocates for female athletes say that if an institution does decide to use the model survey as an avenue to compliance, those results should not be the only factor considered.

Jennifer Alley, executive director of the National Association of Collegiate Women Athletics Administrators, said she would advise any institution looking at the survey not to use it as a stand-alone cure-all for Title IX compliance.



The March 2005 clarification to Title IX policy provides a model survey that institutions can use to prove compliance with Prong Three of the anti-gender discrimination law. The survey can be distributed in a variety of ways, including via e-mail or as a requirement to register for classes. Advocates hope that in addition to the survey, institutions will find other ways to measure athletics interest among female students on their campuses. Photo by Marcia Stubbeman/ NCAA News.

"The only justification in using the survey is to do some other types of communication as well," Alley said. "That would include face-to-face conversations with students on the club or intramural teams, or taking a look at your recruiting territories to determine what sports are appropriate to consider. Normally, students go to schools that offer the sports they are interested in, but a lot of times, students can get interested in sports through some other venue, whether it's club or intramural teams. You don't realize that they've never been exposed to something."

Christine Grant, former director of women's athletics at the University of Iowa, said she had no problem with the model survey itself, but like Alley, she believes it should be used in conjunction with other factors the OCR endorsed under a previous administration.

"If you want to use the survey, fine, but also use the other ideas listed in the 1996 clarification under President Clinton," Grant said. "There are other factors that the OCR said at that time ought to be taken into consideration."

However, some advocates believe the survey method of gauging interest is ineffective.

Neena Chaudhry, senior counsel at the National Women's Law Center, said that surveys in general, not just the model survey, are inadequate tools to determine interest in athletics among women, especially when used without any supporting information.

"There is no perfect survey. You can take the results of the survey and interpret them, but they have to be interpreted in the light of other factors," she said. "And there needs to be follow up, like other evaluations, talking to students and coaches and looking around and seeing what sports people in the area are playing that we don't have. I don't think you can rely entirely on a survey."

Janet Judge, a sports law attorney with Verrill Dana LLP, said even the OCR in its recent report concedes that some schools used other factors to determine interest in addition to the survey — at least before the clarification was issued. Judge also said the model survey is flawed, pointing to language within the survey that sets forth the pros and cons of athletics participation as an example. The survey specifically mentions the fact that most student-athletes would receive academic support not available to their peers, but also points out the missed class time and long hours spent practicing each week.

"It would appear that the better approach would be to design a survey with language that does not stereotype athletes and distribute it in such a way as to ensure interested or not interested responses," she said. "No interest is a valid response — just make sure that is what students are saying. Some schools are doing just that. They have tweaked the survey and make students respond in order to register, for example. In this way, they have made the survey more reliable and accessible."

"The survey can be tweaked, but be aware that if a school modifies the survey, there is no

guarantee that the OCR will approve it or give it the presumption of compliance. The OCR makes clear that schools may look to other indicia of interest to assess interest, but does not require it," she said.

The lack of a minimum response rate is also troubling, she said, suggesting that an improved survey with enhanced administration techniques might garner more accurate results.

"It would appear that the better approach would be to use a survey with better language in such a way that guarantees responses. Some schools have taken that approach. They make students respond to the survey to register for school. They have made the survey instrument more accessible," she said.

Chaudhry took particular issue with the coding of non-responses as non-interest.

"You want to try to administer any survey you're doing in a way that you get a high response rate," she said. "One of the clear problems is that you can determine a non-response as non-interest. That just doesn't make any sense."

While Almond said he couldn't say how he would advise individual clients because each case was unique, he couldn't imagine telling a school not to do everything possible to achieve a high response rate.

"If you didn't want to respond, you would need to do that consciously and maybe through repeated screens," he said. "That way, one can be comfortable that you're getting the highest level of response. That is the best way to do it, and if you really want to get the benefit of OCR deference, you better go as far as you can to comply with the recommendations."

Jeff Orleans, executive director of the Ivy Group, said he wouldn't advise any of the institutions in his league to use a survey at all, but in the event that a school was committed to the survey method of complying, he would recommend a different survey.

"If you're going to use a survey, go talk to someone who can talk to you about non-response rates and how you deal with non-responses and what's the most effective way to get a high response rate," he said. "If you're going to do a survey, do it as professionally as possible."

Surveys are particularly ineffective in Division I, he said, because the recruitment of athletes could eventually drive out the students who said they were interested in a sport in the first place.

"You do a survey of non-recruited athletes, they tell you what they want to play, and three years later none of them could make the team because you're recruiting athletes," he said.

Orleans said he believes the issue is not compliance with the law, but providing "real, equitable opportunity within our budget constraints."

Institutions should naturally be concerned with providing equal opportunities for both genders, he said, and compliance with Title IX will follow.

OCR report shows surveys alone historically inadequate

A report presented to the Senate Appropriations Committee by the Department of Education's Office for Civil Rights (OCR) indicates that interest surveys alone have not historically been an adequate method of ensuring compliance with Title IX.

The report, requested by the Senate committee in response to an OCR clarification issued in March 2005 that provided a model survey designed to gauge interest in athletics, was submitted on March 17, 2006, exactly one year after the clarification was released.

The OCR staff analyzed 63 case files involving institutions that used interest surveys at least in part to gain compliance with Title IX. All of the files included in the examination were opened before the March 2005 clarification was issued and were in the system because OCR was investigating a complaint against the institution.

The analysis of the case files found that in about half of those cases, the surveys were fortified by other factors, including current student participation in club or intramural sports, sports offered and participation rates at local and feeder high schools, and intercollegiate sports sanctioned by the institution's athletics conference.

However, the report said that the 54 institutions involved in the analysis added a total of 70 athletics teams — 28 regardless of the results of the assessment and 42 because of the assessments.

Many of the surveys analyzed in the case file had limited or selective distribution and low response rates, though the OCR report points out that even those surveys resulted in the addition of teams.

The report indicates that the OCR has never allowed only an interest survey to serve as a method of compliance for Title IX. However, it also said that if the OCR model survey were administered correctly, it "has the potential to maximize the possibility of obtaining correct information and generating high response rates."

In a written statement, Donna Lopiano, executive director of the Women's Sports Foundation, said the report offers "no proof that it does either."

Neena Chaudhry, senior counsel with the National Women's Law Center, said the report proves that the clarification and its model survey are a clear break with previous policy of not allowing survey results alone to provide institutions with the presumption of Title IX compliance.

"I think the report confirms that in fact this is a substantive change, a change in the way they've been doing things and a change in policy, not just guidance on how to do a good survey," she said. "They talk about these cases they reviewed over a 14-year period, and there's no case in which they allow a school to use a survey alone to deny adding opportunities for women. They admit that in most cases, schools considered factors other than the survey. The report does not support their claim that this is not a change in policy."

Janet Judge, a sports law attorney with Verrill Dana LLP, said the report attempts to assert that surveys alone are sufficient, but history and the data presented in the report itself show that isn't the case.

"(The report) is a good summary of past behavior that realistically sheds little light on current practices," she said. "More than anything else, it tends to show that additional indicia of interest, while maybe not the major factor in adding sport programs in the sample examined, did result in the discovery of unmet interest in at least 10 percent of the cases, if not more. That appears to be significant if the purpose of Title IX is to accommodate such interest and ability."

Judge pointed out that while some athletics teams were added even for surveys that had low response rates, if the survey isn't accurately measuring interest and ability, it's not an effective tool and another method should be considered.

However, Eric Pearson, executive director of the College Sports Council (a coalition of coaching organizations), said the report paints a clearer picture of the historical use of surveys and clarifies the use of the model survey for institutions that were interested in it as a means of obtaining or keeping Title IX compliance. The model survey, he said, provides a true safe harbor from Department of Education repercussions. Pearson said that while the model survey is still a new device, he thinks it will grow more popular.

"Over time, more colleges and universities will look toward Prong Three (of Title IX, which allows schools to demonstrate compliance with the law by proving they are meeting the interests of the under-represented gender) and surveys," he said. "It just makes sense when it comes to losing your vulnerability to litigation and as a matter of covering all your bases."

Mike Moyer, executive director of the National Wrestling Coaches Association, said he was "encouraged" by the report.

"We hope the clarification stands," he said. "It's certainly a step in the right direction."

However, Jennifer Alley, executive director of the National Association of Collegiate Women Athletics Administrators, said she believes the report to Congress could be a step toward her organization's ultimate goal — the repeal of the clarification.

"I certainly think it provides grounds that electronic surveys or surveys alone have not been very productive or informative," she said. "In general, students don't respond very well."

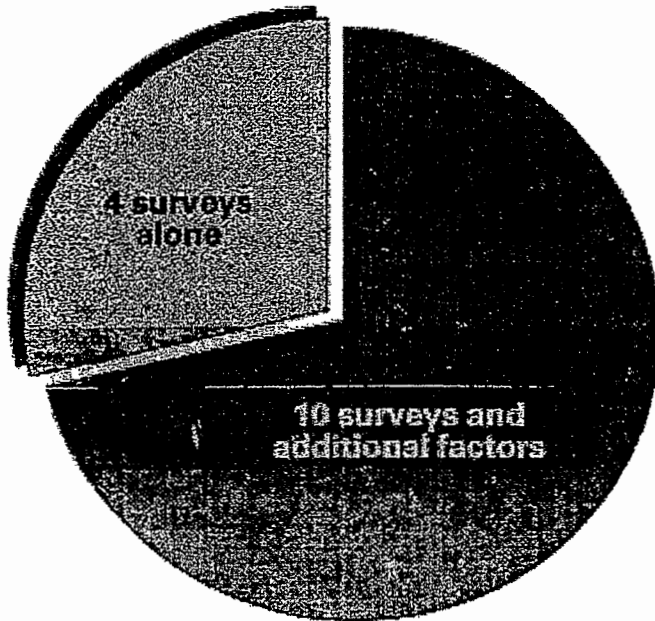
Chaudhry said using the latest report as evidence in any lawsuit brought to challenge the clarification was "certainly possible," though officials at the NWLC don't know yet what individual schools are doing and whether a case will present itself in which such a challenge would be appropriate.

The report showed that some schools are indeed doing a comprehensive assessment of the interests and abilities of their students, and the OCR noted the past importance of evaluating those other factors as well. Judge said she hopes that all athletes benefit from such an assessment.

Despite the report, Judge expressed concern that some general counsels are recommending their institutions administer the survey exactly as suggested by OCR, simply because it is now a simple way to gain compliance with Title IX through the third prong. Though institutions that use the model survey may consider other factors, the survey itself will be the proof of Title IX compliance. Judge said that she believes the third prong will gain popularity, especially with schools that field football teams. Advocates would like any assessment of interest to be accurate and complete, and they don't believe the model survey gets that job done.

"In light of the number of high school girls participating in high school athletics, it just seems like all athletes deserve a meaningful evaluation of their interest and ability — it just isn't mandated by OCR right now," she said.

Use of surveys in adding athletics teams

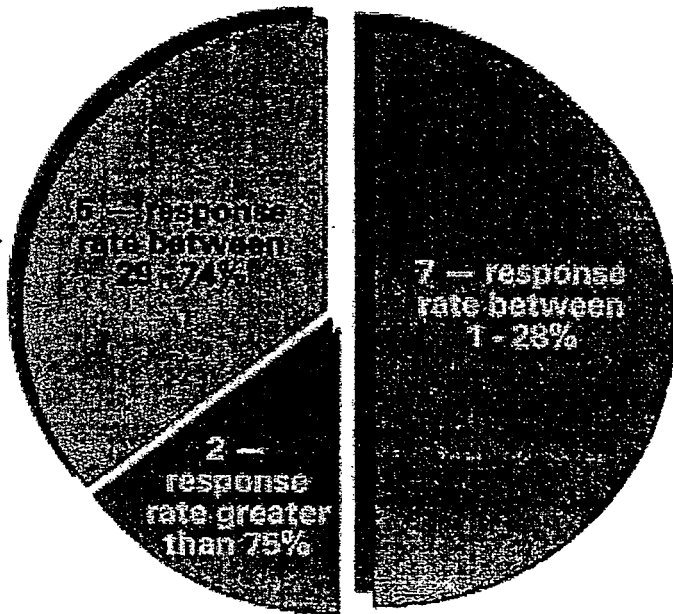


14 total surveys

Source:
ED OCR

According to the OCR report issued March 17, 2006, the examination of 54 case files over the last 13 years showed that 10 of the assessments resulted in the addition of 14 total new teams. The vast majority of teams were added as the result of a combination of an interest survey and additional factors, possibly including interviews with coaches or athletes, participation on club or intramural teams, sports offered by local and feeder high schools and the availability of sufficient competition.

Response rate of surveys used to add athletics teams



14 total surveys

Source: OCR

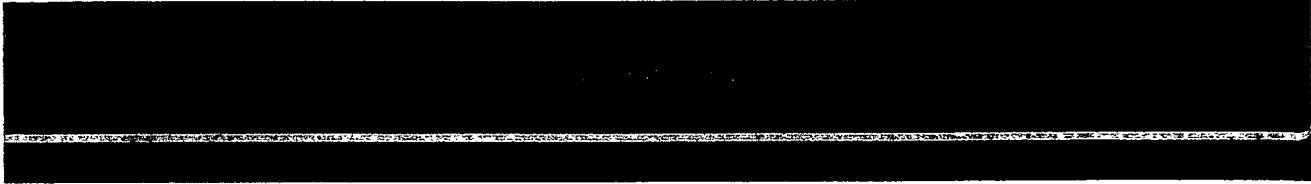
Additionally, the surveys used to add those 14 teams had a wide range of response rates, with half added as the result of a survey with a 28 percent response rate or less. While OCR pointed to these figures as a successful use of a survey, Janet Judge of Verrill Dana LLP questioned that assessment. Judge wondered whether a low response rate adequately fulfills the spirit of Title IX with an accurate measure of interest. She suggested that if another method would be more accurate, that should be standard practice.

Graphic by Marcia Stubbeman/NCAA News

Opposing the Additional Clarification

"Survey says: E-mails No Way to Judge Title IX," Christine Brennan, *USA Today*, Mar. 24, 2005

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Survey says: E-mails no way to judge Title IX

It seemed too good to be true, nearly two years of peace and quiet on the Title IX front. No more fighting, no more brinkmanship, no more pitting the boys against the girls, just all-around American delight over the 33-year-old law that opened the playing fields of this country to the other 50% of our population.

It seemed too good to be true, and it was. Last Friday, the Department of Education posted a surprise on its Web site: a new Title IX guideline that allows for the use of controversial Internet surveys that also can be distributed via e-mail. The surveys are supposed to gauge students' sports interest as a way to be in compliance with the law, a move that experts on both sides believe could weaken Title IX.

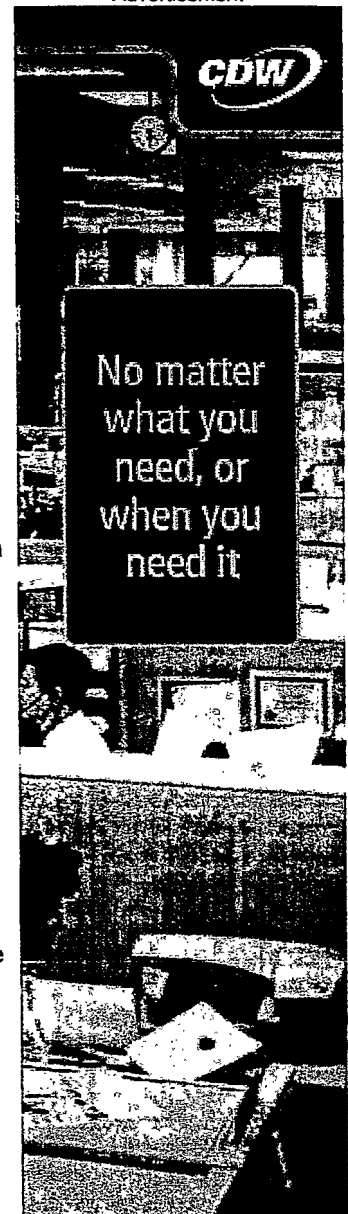
"I can hear it now," said Julie Foudy, captain of the gold medal-winning U.S. Olympic women's soccer team who served on the Title IX commission in 2002-03. "We lost a women's team because the e-mail survey got stuck in my spam folder for six months."

"I have serious concerns about an omnibus test to judge the interest and abilities of students," said Stanford athletics director Ted Leland, who was co-chair of the Title IX commission. "It sounds like if a student doesn't respond to an e-mail, that's coded as a lack of interest in athletics. I'm concerned that this lowers the bar for institutions to comply with Title IX."

At first blush, you hear the word survey and you say, what's the big deal? What could be wrong with a questionnaire to determine what women's sports are missing from a campus, and then add them? In theory, it sounds wonderful. But in practice, especially for girls and women who have not been given enough opportunity in sports, it's a notoriously flawed tool.

Cary Groth, the athletics director at Nevada-Reno, was another of the 15 Title IX commissioners. She recounted a story from the commission hearings that she said was "staggering." The Illinois high school athletic association said it sent out surveys asking girls if they would be interested in playing volleyball. The surveys came back showing little or no interest in the sport. Lacking confidence in their own abilities, perhaps, and never having played the sport before, the girls by a resounding margin said, no, they didn't have any interest in volleyball.

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But the athletic association, seeking more opportunities for female athletes, took it upon itself nonetheless to start volleyball for high school girls in Illinois. And, wouldn't you know, volleyball became one of the state's most popular girls sports, with more than 300 high school teams in the state.

"If they had judged by the survey," Groth said, "they would have thought there was no interest."

Officials at the Department of Education heard this story as well. But instead of heeding it, instead of learning from the six months of Title IX commission hearings at a cost of \$700,000 to taxpayers, those officials apparently chose to ignore it.

Groth and Leland, however, were paying attention. Both said Wednesday that they would not be using surveys on their campuses as a way to prove compliance with Title IX. So, six days into Title IX's new rule, two ADs with vast knowledge of the subject have already turned thumbs down on the Department of Education's new idea. So much for a roaring start.

This is just another in a series of twists and turns for the Bush administration and this law. President Bush has been gunning for Title IX since he came into office and appeared all set to weaken the law after the commission issued a fractured report two years ago.

But something happened that stunned the administration: Tens of thousands of e-mails and phone calls from soccer moms and soccer dads, voters all, as well as female athletes young and old, telling the administration not to touch Title IX.

"They were caught off guard by the public's response and the public outcry," Foudy said.

So, not wanting to commit political suicide before the 2004 election, the administration reaffirmed Title IX completely. And that was it — until last Friday.

"You just kind of felt something was brewing," said Groth, "particularly after the re-election."

Perhaps fearing thousands more e-mails from parents, the Department of Education this time allowed for no public comment. "I'm concerned that it wasn't a more open, transparent process," Leland said.


Unfortunately, this is a done deal. Nothing can stop the Department of Education now. The next stop, apparently, is the courts. Said Foudy, "I think they've once again underestimated how much this means to people, to young girls and to their parents."

Find this article at:

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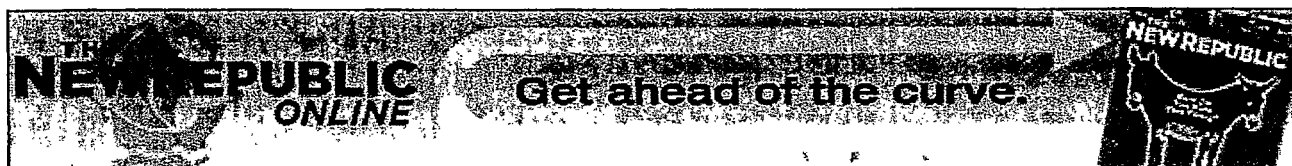
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Opposing the Additional Clarification

"Foul Play," Nancy Hogshead-Makar and Donna Lopiano, *Inside Higher Ed*. Mar. 24, 2005, <<http://www.insidehighered.com/layout/set/print/views/205/03/24/lopiano>>

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March 24, 2005

Foul Play

By Nancy Hogshead-Makar and Donna Lopiano

The Department of Education's March 17 letter announcing "additional clarification" of its policy for collegiate compliance with Title IX in athletic programs, issued without public input or comment, "clarifies" nothing and, instead, marks a dramatic and unprecedented reversal of the department's previous policy. It violates practically every legal principle upon which Title IX's 30-year jurisprudence is based and shifts the burden of compliance from schools to female athletes.

Specifically, the letter and accompanying "model survey" are contrary to established case law, contradict the department's prior pronouncements and its Title IX Athletics Investigator's Manual, and ignore the reality that high schools and colleges create sports teams by predetermining sports offerings and encouraging (in the case of high schools) and recruiting prospective athletes (in the case of colleges) rather than requiring a demonstration of interest by existing students.

The gist of the letter is that schools in which females are underrepresented in athletics compared to their proportion in the general student body (Prong 1 of Title IX's participation requirement) and that have not demonstrated a history and continuing practice of expanding opportunities for the underrepresented sex (Prong 2) would be deemed in compliance with the law under Prong 3 of the athletic participation provision if they simply e-mailed a "model survey" to *current* students to determine their interests and abilities and found interest by the underrepresented sex to be lacking.

This survey would create a presumption of compliance with Title IX, as long as the college or school did not recently drop a women's team or receive a recent request to elevate a women's club sport to varsity status. Once the survey is administered, the burden of demonstrating compliance with Prong 3 would shift from the college or school to the athlete. In essence, the institution would enjoy a presumption of compliance, a difficult hurdle for an athlete to surmount.

The "model survey" issued by the department fails to provide a valid measure of women's interest in sports and, instead, institutionalizes the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. The use of surveys rests on the stereotyped notion that women are inherently less interested in sports than men, which is contradicted by the country's experience of Title IX and fundamental principles of civil rights law.

Male athletes have never had to prove they were interested in sports to receive opportunities to play. Schools simply assumed male athletes were interested in sports, hired a coach who recruited athletes to play and offered varsity athletic experiences. Lo and behold, if you do the same for women, they too will play. We know of no instance in which a high school or college started a varsity women's team, hired a coach and then had the coach return his or her paycheck because they could not find enough women to play.

At the college level, athletes are only rarely recruited from the existing student body, but from the region or country at large. At the high school level, the coach finds students with and without experience or skill who are big enough or fast enough and urges them to come out for the team. Now, a college that goes out and recruits male athletes from all over the country and not from its existing student body, is not required to do the same for female athletes and can eliminate this obligation by administering an e-mail survey. Now, a high school is not obligated to encourage female athletes to come out for teams in the same way they encourage male athletes to come out for teams, so long as they administer an e-mail survey.

What an absence of common sense and abuse of power! A huge Title IX compliance loophole has been created despite a clear analysis by the courts on why surveys of the interest of the existing student body or even a pool of applicants to the university are patently wrong. In the most comprehensive and accepted case on the topic, Cohen v. Brown University, a federal appeals court stated that the type of survey the department has proposed to gauge compliance under the third prong was "illogical" and "circular" in its reasoning.

The court expressly rejected the practice of surveying current students, noting that Brown actively recruits most students who end up playing on its varsity teams. The court stated: "What students are present on campus to participate in a survey of interests has already been predetermined through the recruiting practices of the coaches. What teams are established and can recruit or qualify for admissions preferences has already been predetermined by Brown. Thus, *the interest present on campus is controlled by Brown; to then suggest that Brown must only satisfy the relative interests of students present on campus is circular.*"

Further, the court rejected surveying the pool of applicants to Brown. The court stated: "Using the pool of actual Brown applicants fails to consider the fact that college applicants interested in a sport not offered as a varsity sport at Brown may not even apply to Brown. A survey of actual Brown applicants would thus fail to capture the interest of those student-athletes who choose not to apply due to the limits of Brown's program offerings. To suggest that Brown need only satisfy the interests of actual applicants where Brown's selection of program offerings affects who applies to the school in the first place is illogical."

The letter also creates a disincentive for schools to develop their women's sports club programs — exactly the opposite of the intent of the law. The letter explains that the presumption of compliance can be overcome only if the Office for Civil Rights finds direct and very persuasive evidence of unmet interest, such as if a college either discontinues a viable existing team or fails to upgrade a club team to varsity status when there is a recent, "broad-based petition from an existing club team." It does not explain how a student could overcome the presumption in an effort to start a new sport, such as crew, thereby freezing current inequities into place. If the club team doesn't exist, there cannot be a "broad-based petition from an existing club team," a new standard established by the letter.

And what if the students do not respond to the e-mailed "model survey"? The letter says, "Although rates of nonresponse may be high with the e-mail procedure, under these conditions, OCR will interpret such nonresponse as a lack of interest." To get a chance to play, females have to respond to their emails,

a requirement that male athletes never have to meet.

Experts in the use of survey instruments have condemned the use of surveys of interest — which measure attitude — as a way to predict behavior. Culturally, men are simply more likely than women to profess an interest in sport. They are chastised if they fail to exhibit interest. It's just the opposite for women, who are more likely to be criticized for their interest. Given their historic and current exclusion from a fair share of participation opportunities and this cultural bias, women are less likely to profess an interest in sports, even if they are interested! However, professing interest does not predict behavior and cannot be used to predict actual levels of participation when nondiscriminatory opportunities are made available. To use the results of interest surveys as a justification for withholding participation opportunities is an improper use of attitude survey methodology that the courts and policy-makers have repeatedly rejected due to irrelevance and bias.

While every legal authority has held that this survey practice cannot be made the sole litmus test for compliance under Prong 3 of Title IX, the letter sets up just a situation, totally reversing the current standard. The letter states that only if the “model survey” is not administered will it look at the following other factors which the courts have maintained must all be examined:

- Requests for the addition of a varsity team (even if no club team currently exists) or elevation of an existing club sport to varsity status
- Participation in club or intramural sports
- Participation in high school sports, amateur athletic associations and community sports leagues that operate in areas from which the institution draws its students
- Intercollegiate varsity participation rates, as identified by national and regional intercollegiate sports governing bodies, in the institution's competitive region

Dependence on a single survey methodology also cancels the Department of Education's own 1979 Policy Interpretation, which states that schools are permitted to determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing, provided that all of the following standards are met:

- The process take into account the nationally increasing levels of women's interests and abilities;
- The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- The methods of determining ability take into account team performance records; and
- The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

The letter and “model survey” also conflict with the department's Title IX Athletics Investigator's Manual, which instructs investigating officials to consider other factors reflecting interests and abilities, such as sports programs at “feeder” schools and community and regional sports programs. More importantly, the investigator's manual states that a student survey may be a remedial tool to be used after a determination that an institution has failed the third prong; a survey is not utilized to determine compliance in the first instance, however. While a student survey may be part of a remedy to determine

what sports to add when an institution's current program fails Prong 3, it is not a proper test upon which to base compliance. ○

In summary, the letter and "model survey" contravene the basic principles of Title IX and its long-standing jurisprudence. Every legal authority — including the department's own prior policies and interpretations — agree that surveys of existing students are an inaccurate, biased and invalid method of determining compliance under Title IX's third prong. The letter confirms that the department has become the "fox guarding the henhouse" by thumbing its nose at the law and the female athletes it is charged with protecting.

The department, which has conducted no Title IX investigations since 2002, has now taken a startling step that protects the status quo in college sports.

Nancy Hogshead-Makar is an assistant professor of law at Florida Coastal School of Law and an Olympic gold-medal swimmer. Donna Lopiano is executive director of the Women's Sports Foundation.

*The original story and user comments can be viewed online at
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Opposing the Additional Clarification

"Limitations of the Department of Education's Online Survey Method For Measuring Athletic Interest and Ability on U.S.A. Campuses," Don Sabo, Ph. D. and Christine H.B. Grant, Ph. D., June 2005.

**LIMITATIONS OF THE DEPARTMENT OF
EDUCATION'S
ONLINE SURVEY METHOD FOR MEASURING
ATHLETIC INTEREST AND ABILITY ON U.S.A. CAMPUSES**

Don Sabo, Ph.D. and Christine H.B. Grant, Ph.D.

June 2005

LIMITATIONS OF THE DEPARTMENT OF EDUCATION'S ONLINE SURVEY METHOD FOR MEASURING ATHLETIC INTEREST AND ABILITY ON U.S.A. CAMPUSES¹

Don Sabo, Ph.D. and Christine H.B. Grant, Ph. D.²

The Department of Education has endorsed using an online survey method as the sole means of assessing student interest in additional athletic participation opportunities. The March 17, 2005 *Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test—Part Three* would allow colleges and universities to use a “Model Survey” alone to claim compliance with Title IX’s mandate that schools provide equal participation opportunities to male and female students. In particular, the results of the Department’s survey could be used to determine institutional compliance with the third prong of Title IX’s three-part participation test.³ Under this prong, an institution may comply if it can show that its athletics program fully and effectively accommodates the interests and abilities of the underrepresented sex.

Until it issued its new Clarification, the Department had interpreted the third prong of the test to require a systematic evaluation of a host of factors, beyond surveys, to assess whether institutions had fully met the interests and abilities of their female students. *See Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (January 1996). The Department’s new “Additional” Clarification would eviscerate that interpretation and allow educational institutions to rely exclusively on a survey to measure unmet interest. But it would be methodologically misguided for institutions to utilize the Department’s on-line survey method as the sole measure of compliance with Prong 3. Instead, sound methodological guidelines dictate that multiple approaches to assessing the athletic interests and abilities of students be deployed. Moreover, the online survey authorized by the new Clarification suffers from serious methodological flaws.

¹ Preferred citation: Sabo, D. & Grant, C.H.B. (June, 2005). *Limitations of the Department of Education's Online Survey Method for Measuring Athletic Interest and Ability on U.S.A. Campuses*. Buffalo, NY: Center for Research on Physical Activity, Sport & Health, D'Youville Collège.

² Don Sabo is the Director of the Center for Research on Physical Activity, Sport & Health at D'Youville College. Christine H.B. Grant is an Associate Professor of Health and Sports Studies and the Women's Athletics Director Emerita at the University of Iowa.

³ Under Prong 1 of the three-part test, a school will be in compliance if its representation of male and female athletes is substantially proportionate to its male and female enrollment. For example, if females comprise 54% of the student body, the school will comply with Prong 1 if about 54% of its athletes are female. Under Prong 2, a school will be in compliance if it demonstrates a history and continuing practice of expanding opportunities for the underrepresented gender. Adding teams for women in order to balance team offerings for men, for example, would support compliance. Prong 3 requires a demonstration that the interests and abilities of the underrepresented sex have been fully and effectively accommodated by the school's existing program.

Sound Methodology Requires the Use of Multiple Measures to Evaluate Interest and Ability and Shows the Limitations of a Survey

Basic methodological principles, as well as substantial research, demonstrate that exclusive reliance on a survey to evaluate women's interests and ability to participate in sports is not likely to fairly reveal the true extent of those interests and abilities. This is so for several reasons:

1. Research shows that an individual's disposition and willingness to express personal interest in athletics is influenced by social norms, culture, gender, race, and ethnicity. For example:
 - a. Boys and men are apt to express interest in sports and identify as athletes because these interests are traditionally associated with appropriately "masculine" behavior and identity.⁴
 - b. Girls and women often have a higher set of behavioral standards for what it means to be an "athlete." Researcher and author Catherine McKinnon, for example, practiced the martial arts for five years, two hours per night, and five nights a week before she began to consider herself an "athlete."⁵ For many young women, increased involvement with sports entails rethinking traditional cultural notions about femininity.⁶
 - c. The pervasiveness of "Marianisma" in some Latina/Hispanic cultures (which emphasizes conformity to housewife-motherhood and discourages nontraditional roles for girls and women) can lead some Latinas to downplay interest and involvement in athletics.⁷

⁴ See Connell, R. W. (2000), The Men and the Boys, Berkeley, CA: University of California Press; Messner, M. A. (2002), Taking the Field: Women, Men, and Sports, Minneapolis, MN: University of Minnesota Press; Pollack, W. (1998), Real Boys: Rescuing Our Sons from the Myths of Boyhood, New York: Henry Holt and Company; Senay, E. & Waters, R. (2004), From Boys to Men: A Woman's Guide to the Health of Husbands, Partners, Sons, Fathers, and Brothers, New York: Scribner.

⁵ Stimpson, C. R. (2004), The Atalanta syndrome: Women, sports, and cultural values, Inaugural Helen Pond McIntyre Lecture, *Scholar & Feminist Online*, October 20.

⁶ See The President's Council on Physical Fitness and Sports Report (1997), Physical Activity & Sport in the Lives of Girls: Physical and Mental Health Dimensions from an Interdisciplinary Approach, Washington, D.C.: Department of Health and Human Services; Sabo, D., Miller, K.E., Melnick, M.J. & Heywood, L. (2004), Her Life Depends On It: Sport, Physical Activity, and the Health and Well-Being of American Girls, East Meadow, N.Y.: Women's Sports Foundation.

⁷ Melnick, M., Sabo, D. & Vanfossen, B. (1992), Educational effects of interscholastic athletic participation on African-American and Hispanic youth, *Journal of Adolescence*, 27(106):295-308; Melnick, M., Sabo, D. & Vanfossen, B. (1992), Effects of interscholastic athletic participation on the social, educational, and career mobility of Hispanic boys and girls, *International Review of Sport Sociology*, 17(1):57-75; Sabo, D., Melnick M. & Vanfossen, B. (1993), The influence of high school

2. Any failure to express interest likely reflects a lack of prior exposure, which in turn is the result of discriminatory limitations on women's opportunities. Interest cannot be measured apart from opportunity, particularly in the context of sports, where women's interest in athletics has been limited by the discrimination to which they have been – and continue to be – subjected. As a result, surveys cannot measure the extent to which women would show interest and ability if non-discriminatory opportunities were made available to them.
3. As a related matter, any survey of athletic interests is based on the problematic theoretical assumption that surveys of interest can be used to predict athletic behavior. Behavioral scientists have long observed the discrepancy between attitude and behavior. For example, millions of Americans who profess a keen interest in quitting smoking or losing weight continue to smoke and overeat. Particularly in the context of athletics, where women's opportunities have historically been limited, the converse is also true: individuals who fail to express interest in participating in sports will often embrace the chance to play if offered the opportunity. Many girls who would have expressed no interest in sports, for example, become enthusiastic participants after joining a team because a friend did so, because they were actively recruited by an enthusiastic coach, or because they were taken to tryouts by a pro-sport parent.

For all of these reasons, the Department's long-standing prior policies, including its 1996 Clarification, make clear that a survey of students is only one of many factors that schools must consider in evaluating whether they are fully meeting the interests and abilities of their female students. The 1996 Clarification also requires schools to consider requests by students to add a sport; participation rates in club or intramural sports; participation rates in sports in high schools, amateur athletic associations and community sports leagues in areas from which the school draws its students; and interviews with students, coaches, teachers and administrators.

The use of multiple measures, as set forth in the Department's 1996 Clarification, is methodologically sound and enhances the likelihood that schools will accurately assess the extent of their students' interest in additional sports opportunities. Moreover, this approach has worked as a practical matter. According to the Additional Clarification, between 1992 and 2002, approximately two-thirds of schools complied with Title IX's athletic participation requirements under the third prong of the three-part test.⁸ The evidence thus supports the overall efficacy of the Department's long-standing policies, and their reliance on a multiple-measure approach, for promoting athletic opportunity and assessing compliance with Title IX for both sexes.

athletic participation on post-secondary educational and occupational mobility: A focus on race and gender, *Sociology of Sport Journal* (Winter, 1993).

⁸ Additional Clarification at 2.

The Department's Survey Suffers from Methodological Flaws

Although the Department's Additional Clarification was issued with 177 pages of policy and text, the methodological procedures it authorizes and the rationales for those procedures need systematic review and assessment. Even a preliminary review of the Clarification, however, reveals serious concerns about the methodological efficacy of the Department's proposed survey.

1. *The Department's Survey is Likely to Generate Low Response Rates.* Online surveys often result in low response rates, thereby creating the risk of drawing conclusions based on inadequate sample sizes. Many campuses experience difficulty generating full responses to online surveys, which makes it likely that relatively few students would participate in the Department's online survey.

The problem of low response rates is exacerbated because the Department's survey does not take into account variation in student access to or use of e-mail. The Department's design deploys erroneous sampling logic by assuming that use of campus-based e-mail services is either supplied or utilized uniformly across student populations. But student access to and use of university and college e-mail services is varied and uneven. Some students frequently use college-based online services for e-mail; others do not use it at all. At institutions where frequent disruptions or periodic shutdowns of e-mail services occur, students may seek and secure commercial e-mail suppliers. Students who work full-time or part-time jobs may spend less time online and/or check e-mail less frequently. Poor students may not own a computer or be able to pay for convenient e-mail services. And numerous students may ignore campus e-mail systems in order to avoid real or perceived encounters with what they regard as bureaucratic or commercially invasive spam.

Some (but not all) campuses maintain policies requiring students to check email at certain intervals--for example, once a week or once a day. But even on campuses that do have policies that require students to check email regularly, one cannot guarantee that students actually conform to such policies, or that the institution maintains current (and reliably accurate) directories of e-mail.

Moreover, the Department's survey methodology does not take into account the accelerating diversity in telecommunication preferences among college students. The campus-based online survey design ignores both national and international trends among young and tech-savvy consumers to increasingly rely on text messaging through cell phones as a vehicle for interpersonal communication. Those students who are opting for these regional, "off-campus" communication vehicles would likely not be included in campus-based online surveys.

For all of these reasons, the Department's survey is likely to yield a low response rate. Additionally, nothing in the new Clarification makes clear how policymakers will determine when a large enough sample has been generated by a particular administration of the Department's survey.

2. *The Department's Methodological Procedure to Count Nonrespondents is Misguided.* The User's Guide for the Department's survey recommends that institutions conduct a "census" of the student population. Under a census methodology, there is no attempt to draw a sample from the student population. Rather, a census involves polling *all* students. But unless completing the online survey is somehow made mandatory (e.g., student registration is blocked until the survey is completed),⁹ it is highly unlikely that all students will complete it, based on the reasons set forth above, among others.

Recognizing this reality, the Department's survey guidelines treat the survey methodology as a "census" if all students are simply contacted and asked to go to a website and complete the questionnaire. If a student does not respond to the request, the Clarification specifically states that schools may interpret the nonresponse as evidence of lack of interest—in other words, that student is still "counted" as a respondent and, furthermore, operationally defined as someone with no interest in athletics. By equating nonresponses to a lack of athletic interest (past, present, and future), the Office for Civil Rights' methodological procedures do not meet basic scientific criteria for establishing reliable and valid survey results and interpretations.

Furthermore, even if students are screened at the point of registration using a campus ID, one cannot be certain that the person completing the registration is the student who is being targeted; e.g., it is not uncommon for students to have other people register for them. On many campuses, some students, faculty, and staff share their campus IDs and passwords, even though doing so is against University policy.

3. *The Department's Survey is Properly Understood to Embody a Sampling Methodology, but is Unlikely to Generate a Representative Sample.* Based on the foregoing analysis, what the Department's survey really relies on is a sampling methodology. But unfortunately, there is nothing in the new Clarification that ensures that the sample that responds to the on-line survey will be representative of the student population. One major problem is referred to as the "coverage error," which occurs, for example, when a researcher assumes that those who did not respond to the survey are similar in all other respects to those who did respond. In many instances, however, the respondents may be very different from the nonrespondents in ways that remain hidden or are not measured. When this occurs, the sample is compromised and the empirical results become suspect.

In addition, the Department's survey suffers from blind recruitment of respondents. A methodological bias often inherent in an online survey method is that participants are blind-recruited online, and thus, respondents self-select for participation rather than being randomly or strategically pre-selected from an existing population roster and individually

⁹ Even if the online survey is made mandatory, students who do not want to participate (irrespective of their interest or participation in athletics) may "protest" the requirement by providing inaccurate information (e.g., indicating "no interest/experience" at the beginning). This may be particularly likely since the survey will probably take many students more time to complete than is stated in the Clarification. The difficulty is that analysts would not know the extent of the inaccuracy.

targeted for recruitment by researchers. Much on-line survey research is done by posting a link to a survey on web pages visited by the target demographic--e.g., a link to the National Basketball Association website, a website for cat or dog lovers, or CNN.com. Analysis and inferences based on resulting data are limited in value because the respondents are entirely self-selected, compared to research designs in which respondents are contacted directly by phone, e-mail, or face-to-face and then enlisted in a study.

4. *Some Students May Misinterpret the Purpose of the Department's Survey.* The Department of Education survey is called "Assessment of Students' Athletic Interests & Abilities." Because those terms are undefined, some students may misinterpret the goal of the survey as an assessment of their interest in participating in intercollegiate sports rather than the broad spectrum of real and potential recreational, intramural, club, or junior varsity activities that might be part of campus life. But schools have an obligation to ensure gender equity in all athletic offerings, not just intercollegiate teams. Moreover, to the extent that these latter athletic activities are historically marginalized or comparatively under-funded within a specific campus community, students could fail to see them as viable or realistic choices in comparison with the notoriety and institutional centrality of the major intercollegiate sports. Personal interest in participating in a wide array of athletic activities could be skewed or dampened by a realistic assessment of the institutional inequalities that actually exist on campus. As a result, surveys are unlikely to capture the full range of athletic interests that institutions should consider in structuring each level of their sports programs.

Conclusion

The above deficits of the Department's online survey method call into question its empirical efficacy. As a result, it would be methodologically misguided for institutions to utilize the Department's online survey method as a sole measure of compliance with Prong 3. Moreover, the Clarification states that the Department "is not requiring that individual schools conduct elaborate scientific validation" of the procedures and results of the online survey.¹⁰ But the procedures and results are suspect unless they are validated based on established scientific and methodological criteria.

We encourage policymakers, government officials, educators, and researchers to fully evaluate the Department's proposed use of the online survey method to further elucidate these and other methodological concerns.

¹⁰ See <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf>

Opposing the Additional Clarification

"Ex-members of Title IX Panel Urge Schools Not to Use the Surveys," Erik Brady, *USA Today*, Oct. 18, 2005

Ex-members of Title IX panel urge schools not to use surveys

By Erik Brady
10/18/2005
USA TODAY

A letter sent to college administrators this month by six former members of a presidential commission on Title IX asks schools to ignore a new method for determining compliance with the law. The Department of Education issued a clarification letter in March that allows schools to use interest surveys alone to determine if they are meeting the athletic interests and abilities of women on campus.

Critics say the e-mail surveys allow schools an easy out because a non-response can be interpreted as non-interest. The Department of Education says schools that use the surveys correctly may well find they have an obligation to add sports for women under Title IX, which bans sex discrimination at schools receiving federal funds.

The sentiment expressed in the Oct. 11 letter is not new; the NCAA executive council passed a resolution in April asking member schools not to use surveys. But the letter is important because it shows some former commissioners feel their service was for naught. The clarification letter "has made me feel our time on the commission was not well spent," Nevada athletics director Cary Groth says. "What did we do all that work for, if this is the end result?"

Groth says she called outgoing Stanford athletics director Ted Leland and they came up with the idea to send a letter to administrators at NCAA and NAIA schools across the country asking them not to use the March guidance. Leland was co-chair of the 15-member Commission on Opportunity in Athletics that was named by the Bush administration in 2002 and that met in 2002 and 2003.

Groth says she and Leland sent copies to other former commissioners to see if they wanted to sign the letter. Four others did: Notre Dame women's basketball coach Muffet McGraw, Michigan faculty athletic representative Percy Bates, former U.S. women's soccer captain Julie Foudy and former Olympic swimmer Donna de Varona.

Iowa athletics director Bob Bowlsby says he decided not to sign. "I'm keeping my powder dry," he says. "Reasonable people can disagree" on the use of surveys. Maryland athletics director Deborah Yow says she does not recall receiving the letter to sign. She says she probably did receive it but has not yet had time to read it because of more important business. She declined to say if she would have signed it if she had seen it sooner.

"That was a long time ago," she says of her time on the commission. "I've moved on."

The letter cites a unanimous recommendation passed by the commission that says any "substantive adjustments to current enforcement of Title IX should be developed through the normal federal rulemaking process."

The letter goes on to say the Department of Education ignored that recommendation when it issued its March clarification "without benefit of public notice or comment." It says the guidance has "the potential of undermining the goal of providing equal opportunity."

Susan Aspey, spokeswoman for the Department of Education, wrote in an e-mail: "The guidance is simply that — guidance. Schools can choose to use the model survey or not, it's their choice."

It is unclear how many schools are using the new surveys to determine if they pass the third part of Title IX's so-called three-part test. Schools are in compliance with the participation requirements of Title IX if they pass any one of the tests:

•Test 1: A school's male and female athletes are substantially proportionate to enrollment.

<http://www.savefresnowrestling.com/titleix.html>

•Test 2: A school has a history and continuing practice of expanding opportunities for women.

•Test 3: A school can demonstrate the interests and abilities of women have been fully and effectively accommodated. This is where the March clarification comes in. Schools that use the model survey and say they find no interest in adding sports are presumed to be in compliance.

<http://www.savefresnowrestling.com/titleix.html>

Public Comment

Public Comment of Lisa Maatz, Director of Public Policy and Government Relations,
American Association of University Women, May 11, 2007



**Public Comment of Lisa Maatz
Director of Public Policy and Government Relations
American Association of University Women**

**U.S. Commission on Civil Rights
"Title IX Athletics: Accommodating Interests and Abilities"
May 11, 2007**

Members of the Commission on Civil Rights, on behalf of the over 100,000 bipartisan members of the American Association of University Women, I thank you for the opportunity to submit public comments on the "Title IX Athletics: Accommodating Interests and Abilities" briefing.

AAUW has grave concerns regarding the U.S. Department of Education's March 17, 2005 Title IX policy guidance, "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three." We believe this guidance undermines the law and the 35 years of progress made by women and girls as a result of this landmark legislation.

Since Title IX's enactment, women's participation in sports has increased. In 1971, 7 percent of high school varsity athletes were young women.¹ But by the 2005-2006 academic year, 41.2 percent of high school varsity athletes were young women.² This law has opened up not only opportunities to play sports but the chance to receive college scholarships and the significant health, emotional, and academic benefits that flow from sports participation.³ Meanwhile, Title IX's goal of equal opportunity has yet to be fully realized. Female athletes continue to be shortchanged. Women's teams receive 33 percent of recruiting dollars (or \$43 million less than men's teams), 38 percent of athletic operating dollars (or \$1.17 billion less), and 45 percent of college athletic scholarship dollars (or \$148 million less).⁴ To reach the full potential of the law, the Department of Education should vigorously enforce Title IX rather than weakening any measure of compliance.

In particular, AAUW is deeply concerned that the clarification is a dramatic departure from the previous standards under which schools could demonstrate compliance with Title IX. We believe the March 2005 clarification lowers the bar for schools, making it easier for schools to prove compliance by using a less rigorous e-mail-based model survey.

AAUW firmly believes that the model survey does not accurately measure students' interests. If students do not respond to the email it is assumed they are not interested. It does not make sense to assume that if students do not respond to an email they are not interested. People often ignore emails, and AAUW does not believe that SPAM is an effective or appropriate civil rights enforcement tool. Prong three of Title IX states that

schools must "demonstrate that interests and abilities of the members of that [underrepresented] sex have been fully and effectively accommodated by the present program."⁵ AAUW firmly believes that there is no way that email, such as the model survey, can accurately demonstrate that students' interests and abilities have been fully and effectively accommodated.

The March 2005 clarification could seriously jeopardize the number of athletic opportunities that are available to women on campus and it threatens to turn back the clock on much of the progress that has been made in increasing women's athletic participation.

Research experts maintain that the results of interest surveys should not be used to limit athletic opportunities. In addition, the use of interest surveys to justify offering fewer opportunities to females has been rejected by the courts. Despite this, suggestions regarding the use of such surveys have consistently been used to advance the argument that institutions should be able to provide fewer athletics opportunities for women at the college level because they are "less interested in sports." However, this argument cannot stand against the evidence: 2.9 million high school girls compete for less than 200,000 college female athletic participation opportunities.⁶ In addition, while women comprise 57 percent of the college student population,⁷ they receive just 43 percent of the opportunities to play intercollegiate sports.⁸ But more importantly, it is simply logical to assume that inherent athletic ability, like intelligence, is equally distributed by gender. As a result, fair distribution of athletic participation opportunities followed by rigorous enforcement of compliance must be determined by a broad set of indicators rather than a reliance on one flawed measure of interest and ability.

Before the March 2005 clarification, schools had to take other factors into consideration, such as the opinions of coaches and administrators and participation rates in sports in surrounding high schools or recreational leagues. These methods are more accurate measures of the demand for athletic opportunities among girls and women. The NCAA also supports considering additional factors. In June 2005, the NCAA Executive Committee urged the Department of Education to rescind the March 17, 2005 clarification and instead honor the Department's 2003 commitment to enforce long-standing Title IX athletics policies.⁹ In addition, the NCAA Executive Committee urged colleges and universities to not use the procedures set forth in the March 17, 2005 clarification.¹⁰ This is a telling action from the main governing body for collegiate athletics, and should inform policy makers as to the wrongheaded-ness of the 2005 clarification.

The public overwhelmingly supports strong Title IX standards. A USA Today/CNN poll done in January 2003 found that seven of ten adults familiar with Title IX think the law should be strengthened or left alone.¹¹ Indeed, prior to the 2005 clarification, the policies have been in place through Republican and Democratic administrations and have been uniformly upheld by all eight of the federal appeals courts that have considered them.

Despite the public support Title IX enjoys, the issuance of the March 2005 guidance appears to be the latest in a series of attempts to weaken Title IX.

AAUW was encouraged by the Department of Education's July 2003 clarification letter that clearly reaffirmed Title IX and its enforcement mechanisms, as well as Secretary Spellings' supportive comments about Title IX during her confirmation hearings. However, the March 2005 action appears to signal the willingness of the U.S. Department of Education to undermine Title IX's effectiveness. AAUW has strongly urged the Department of Education to reconsider the guidance issued on March 17, 2005 and urges the U.S. Commission on Civil Rights to do the same.

Thank you for your consideration. If you have any questions, please contact Lisa Maatz, director of public policy and government relations, at 202/785-7793, or Tracy Sherman, government relations manager, at 202/785-7730.

¹ Women's Sports Foundation. "Playing Fair: A Guide to Title IX in High School & College Sports." October 2001.

<http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/geena/record.html?record=829>
Accessed January 18, 2007.

² National Federation of State High School Associations. 2005-2006.

http://www.nfhs.org/web/2006/09/participation_in_high_school_sports_increases_again_confirms_nf.aspx. Accessed January 18, 2007.

³ Women's Sports Foundation. "Benefits—Why Sports Participation for Girls and Women: The Foundation Position, 2000." Research Report: Health Risks and the Teen Athlete, 2001.

<http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/body/index.html> Accessed December 19, 2006.

⁴ National Collegiate Athletic Association. *NCAA Gender Equity Report, 2003-2004*. Statistics available from Women's Sports Foundation. <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/article.html?record=1017>. Accessed December 18, 2006.

⁵ 44 Fed. Reg. 71,481. December 11, 1979.

⁶ National Federation of State High School Associations. 2005-2006.

http://www.nfhs.org/web/2006/09/participation_in_high_school_sports_increases_again_confirms_nf.aspx. Accessed January 18, 2007.

⁷ National Center for Education Statistics. 2005 Digest of Education Statistics, Table 185. (Data is from 2004.)

http://nces.ed.gov/programs/digest/d05/tables/dt05_185.asp Accessed January 16, 2007.

⁸ National Collegiate Athletic Association. *Sports Sponsorship Report, 2004-2005*. Statistics available from Women's Sports Foundation. <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/article.html?record=1017> Accessed December 18, 2006.

⁹ NCAA News Release. "NCAA Leadership Groups Urge Department of Education to Rescind Additional Clarification for Title IX and Maintain 1996 Clarification." June 28, 2005.

¹⁰ NCAA News Release. "NCAA Leadership Groups Urge Department of Education to Rescind Additional Clarification for Title IX and Maintain 1996 Clarification." June 28, 2005.

¹¹ Brady, Erik. "Poll: Most Adults Want Title IX Law Left Alone." *USA Today*. January 7, 2003. http://www.usatoday.com/sports/college/other/2003-01-07-title-ix_x.htm Accessed December 19, 2006.

Appendix:

1. Title IX, Education Amendments of 1972 (Title 20 U. S. C. Sections 1681–1688)
2. US Department of Education, Office for Civil Rights, Letter to Chief of State Schools, Title IX Obligations in Athletics, December 11, 1975
3. A Policy Interpretation: Title IX and Intercollegiate Athletics, Federal Register, Vol. 44, No. 239-Tuesday, Dec. 11, 1979
4. US Department of Education, Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test: The Part Three, Jan. 16, 1996
5. US Department of Education, Office for Civil Rights, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance, July 11, 2003
6. US Department of Education, Office for Civil Rights, Requirements Under Title IX of the Education Amendments of 1972, *no date*

Appendix

Title IX, Education Amendments of 1972 (Title 20 U. S. C. Sections 1681–1688)

Title IX, Education Amendments of 1972

(Title 20 U.S.C. Sections 1681-1688)

Sec. 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations this section shall not apply to membership practices -

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences this section shall not apply to -

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for -

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other on discrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

Sec. 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or

(2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full

written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Sec. 1683. Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

Sec. 1684. Blindness or visual impairment; prohibition against discrimination

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

Sec. 1685. Authority under other laws unaffected

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

Sec. 1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

Sec. 1687. Interpretation of "program or activity"

For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of -

- (1)
 - (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
 - (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
- (2)
 - (A) a college, university, or other postsecondary institution, or a public system of higher education; or
 - (B) a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system;
- (3)
 - (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship -
 - (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
 - (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
 - (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
- (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.

Sec. 1688. Neutrality with respect to abortion

Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any

person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

Appendix

US Department of Education, Office for Civil Rights, Letter to Chief of State Schools,
Title IX Obligations in Athletics, December 11, 1975



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Letter to Chief State School Officers, Title IX Obligations in Athletics

U.S. Department of Education, Office for Civil Rights

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Chief State School Officers FR

Elimination of sex discrimination in athletic programs sept. 1975 Memo to Chief State School Officers, LEA Superintendents, and PSE Presidents on Title IX obligations in athletics, including athletic scholarships; intercollegiate, club, and intramural programs. Cheerleading and drill teams are covered by extracurricular activities provision of Title IX. Physical education and health classes are covered by instructional programs provisions. Required first year activities are obsolete except for institutions covered by Title IX for the first time. Should be read in conjunction with 1979 intercollegiate athletics policy interpretation.

Doc. No. 00036 DATE: November 11, 1975

Typed From Original Copy

September 1975

TO : Chief State School Officers, Superintendents of Local Educational Agencies and College and University Presidents

FROM : Director, Office for Civil Rights

SUBJECT: Elimination of Sex Discrimination in Athletic Programs

Title IX of the Education Amendments of 1972 and the Departmental Regulation (45 CFR Part 86) promulgated thereunder prohibit discrimination on the basis of sex in the operation of most federally-assisted education programs. The regulation became effective on July 21, 1975.

During the forty-five day period immediately following approval by the President and publication of the regulation on June 4, 1975, concerns were raised about the immediate obligations of educational institutions to comply with certain sections of the Departmental Regulation as they relate to athletic programs. These concerns, in part, focus on the application of the adjustment period provision (86.41 (d)) to the various non-discrimination requirements, and additionally, on how educational institutions can carry out the self-evaluation requirement (86.3(c)).

This memorandum provides guidance with respect to the major first year responsibilities of an educational institution to ensure equal opportunity in the operation of both its athletic activities and its athletic scholarship programs. Practical experience derived from actual on-site compliance reviews and the concomitant development of greater governmental expertise on the application of the Regulation to athletic activities may, of course, result in further or revised guidance being issued in the future. Thus, as affected institutions proceed to conform their programs with the Department's regulation, they and other interested persons are encouraged to review carefully the operation of these guidelines and to provide the Department with the benefit of their views.

Basic Requirements

There are two major substantive provisions of the regulation which define the basic responsibility of educational institutions to provide equal opportunity to members of both sexes interested in participating in the athletics programs institutions offer.

Section 86.41 prohibits discrimination on the basis of sex in the operation of any interscholastic, intercollegiate, club or intramural athletic program offered by an educational institution. Section 86.37(c) sets forth requirements for ensuring equal opportunity in the provision of athletic scholarships.

These sections apply to each segment of the athletic program of a federally assisted educational institution whether or not that segment is the subject of direct financial support through the Department. Thus, the fact that a particular segment of an athletic program is supported by funds received from various other sources (such as student fees, general revenues, gate receipts, alumni donations, booster clubs, and non-profit foundations) does not remove it from the reach of the statute and hence of the regulatory requirements. However, drill teams, cheerleaders and the like, which are covered more generally as extracurricular activities under section 86.31, and instructional offerings such as physical education and health classes, which are covered under section 86.34, are not a part of the institution's "athletic program" within the meaning of the regulation.

Section 86.41 does not address the administrative structure(s) which are used by educational institutions for athletic programs. Accordingly, institutions are not precluded from employing separate administrative structures for men's and women's sports (if separate teams exist) or a unitary structure. However, when educational institutions evaluate whether they are in compliance with the provisions of the regulation relating to non-discrimination in employment, they must carefully assess the effects on employees of both sexes of current and any proposed administrative structure and related coaching assignments. Changes in current administrative structure(s) or coaching assignments which have a disproportionately adverse effect on the employment opportunities of employees of one sex are prohibited by the regulation.

Self-Evaluation and Adjustment Periods

Section 86.3(c) generally requires that by July 21, 1976, educational institutions (1) carefully evaluate current policies and practices (including those related to the operation of athletic programs) in terms of compliance with those provisions and (2) where such policies or practices are inconsistent with the regulation, conform current policies and practices to the requirements of the regulation.

An institution's evaluation of its athletic program must include every area of the program covered by the regulation. All sports are to be included in this overall assessment, whether they are contact or non-contact sports.

With respect to athletic programs, section 86.41 (d) sets specific time limitations on the attainment of total conformity of institutional policies and practices with the requirements of the regulation up to one year for elementary schools and up to three years for all other educational institutions.

Because of the integral relationship of the provision relating to athletic scholarships and the provision relating to the operation of athletic programs, the adjustment periods for both are the same.

The adjustment period is not a waiting period. Institutions must begin now to take whatever steps are necessary to ensure full compliance as quickly as possible. Schools may design an approach for achieving full compliance tailored to their own circumstances; however, self-evaluation, as required by section 86.3 (c) is a very important step for every institution to assure compliance with the entire Title IX regulation, as well as with the athletics provisions.

Required First Year Actions

School districts, as well as colleges and universities, are obligated to perform a self-evaluation of their entire education program, including the athletics program, prior to July 21, 1976. School districts which offer interscholastic or intramural athletics at the elementary school level must immediately take significant steps to accommodate the interests and abilities of elementary school pupils of both sexes, including steps to eliminate obstacles to compliance such as inequities in the provision of equipment, scheduling and the assignment of coaches and other supervisory personnel. As indicated earlier, school districts must conform their total athletic program at the elementary level to the requirements of section 86.41 no later than July 21, 1976.

In order to comply with the various requirements of the regulation addressed to nondiscrimination in athletic programs, educational institutions operating athletic programs above the elementary level should:

(1) Compare the requirements of the regulation addressed to nondiscrimination in athletic programs and equal opportunity in the provision of athletic scholarships with current policies and practices;

(2) Determine the interests of both sexes in the sports to be offered by the institution and, where the sport is a contact sport or where participants are selected on the basis of competition, also determine the relative abilities of members of each sex for each such sport offered, in order to decide whether to have single sex teams or teams composed of both sexes. (Abilities might be determined through try-outs or by relying upon the

knowledge of athletic teaching staff, administrators and athletic conference and league representatives.)

(3) Develop a plan to accommodate effectively the interests and abilities of both sexes, which plan must be fully implemented as expeditiously as possible and in no event later than July 21, 1978. Although the plan need not be submitted to the Office for Civil Rights, institutions should consider publicizing such plans so as to gain the assistance of students, faculty, etc. in complying with them.

Assessment of Interests and Abilities

In determining student interests and abilities as described in (2) above, educational institutions as part of the self-evaluation process should draw the broadest possible base of information. An effort should be made to obtain the participation of all segments of the educational community affected by the athletics program, and any reasonable method adopted by an institution to obtain such participation will be acceptable.

Separate Teams

The second type of determination discussed in (2) above relates to the manner in which a given sports activity is to be offered. Contact sports and sports for which teams are chosen by competition may be offered either separately or on a unitary basis.

Contact sports are defined as football, basketball, boxing, wrestling, rugby, ice hockey and any other sport the purpose or major activity of which involves bodily contact. Such sports may be offered separately.

If by opening a team to both sexes in a contact sport an educational institution does not effectively accommodate the abilities of members of both sexes (see 86.41(c) (1)), separate teams in that sport will be required if both men and women express interest in the sport and the interests of both sexes are not otherwise accommodated. For example an institution would not be effectively accommodating the interests and abilities of women if it abolished all its women's teams and opened up its men's teams to women, but only a few women were able to qualify for the men's teams.

Equal Opportunity

In the development of the total athletic program referred to in (3) above, educational institutions, in order to accommodate effectively the interests and abilities of both sexes, must ensure that equal opportunity exists in both the conduct of athletic programs and the provision of athletic scholarships.

Section 86.41(c) requires equal opportunity in athletic programs for men and women. Specific factors which should be used by an educational institution during its self-evaluative planning to determine whether equal opportunity exists in its plan for its total athletic program are:

- the nature and extent of the sports programs to be offered (including the levels of competition, such as varsity, club, etc.),
- the provision of equipment and supplies.

- the scheduling of games and practice time;
- the provision of travel and per diem allowances;
- the nature and extent of the opportunity to receive coaching and academic tutoring;
- the assignment and compensation of coaches and tutors;
- the provision of locker rooms, practice and competitive facilities;
- the provision of medical and training facilities and services;
- the provision of housing and dining facilities and services;
- the nature and extent of publicity.

Overall Objective

The point of the regulation is not to be so inflexible as to require identical treatment in each of the matters listed under section 86.41(c). During the process of self-evaluation, institutions should examine all of the athletic opportunities for men and women and make a determination as to whether each has an equal opportunity to compete in athletics in a meaningful way. The equal opportunity emphasis in the regulation addresses the totality of the athletic program of the institution rather than each sport offered.

Educational institutions are not required to duplicate their men's program for women. The thrust of the effort should be on the contribution of each of the categories to the overall goal of equal opportunity in athletics rather than on the details related to each of the categories.

While the impact of expenditures for sex identifiable sports programs should be carefully considered in determining whether equal opportunity in athletics exists for both sexes, equal aggregate expenditures for male and female teams are not required. Rather, the pattern of expenditures should not result in a disparate effect on opportunity. Recipients must not discriminate on the basis of sex in the provision of necessary equipment, supplies, facilities, and publicity for sports programs. The fact that differences in expenditures may occur because of varying costs attributable to differences in equipment requirements and levels of spectator interest does not obviate in any way the responsibility of educational institutions to provide equal opportunity.

Athletic Scholarships

As part of the self-evaluation and planning process discussed above, educational institutions must also ensure that equal opportunity exists in the provision of athletic scholarships. Section 86.37(c) provides that "reasonable opportunities" for athletic scholarships should be "in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."

Following the approach of permitting separate teams, section 86.37(c) of the regulation permits the overall allocation of athletic scholarships on the basis of sex. No such separate treatment is permitted for non-athletic scholarships.

The thrust of the athletic scholarship section is the concept of reasonableness, not strict proportionality in the allocation of scholarships. The degree of interest and participation of male and female students in athletics is the critical factor in determining whether the allocation of athletic scholarships conforms to the requirements of the regulation.

Neither quotas nor fixed percentages of any type are required under the regulation. Rather, the institution is required to take a reasonable approach in its award of athletic scholarships, considering the participation and relative interests and athletic proficiency of its student of both sexes.

Institutions should assess whether male and female athletes in sports at comparable levels of competition are afforded approximately the same opportunities to obtain scholarships. Where the sports offered or the levels of competition differ for male and female students, the institution should assess its athletic scholarship program to determine whether overall opportunities to receive athletic scholarships are roughly proportionate to the number of students of each sex participating in intercollegiate athletics.

If an educational institution decides not to make an overall proportionate allocation of athletic scholarships on the basis of sex, and thus, decides to award such scholarships by other means such as applying general standards to applicants of both sexes, institutions should determine whether the standards used to award scholarships are neutral, i.e., based on criteria which do not inherently disadvantage members of either sex. There are a number of "neutral" standards which might be used including financial need, athletic proficiency or a combination of both. For example, an institution may wish to award its athletic scholarships to all applicants on the basis of need after a determination of a certain level of athletic proficiency. This would be permissible even if it results in a pattern of award which differs from the relative levels of interests or participation of men and women students so long as the initial determination of athletic proficiency is based on neutral standards. However, if such standards are not neutral in substance or in application then different standards would have to be developed and the use of the discriminatory standard discontinued. For example, when "ability" is used as a basis for scholarship award and the range of ability in a particular sport, at the time, differs widely between the sexes, separate norms must be developed for each sex.

Availability of Assistance

We in the Office for Civil Rights will be pleased to do everything possible to assist school officials to meet their Title IX responsibilities. The names, addresses and telephone numbers of Regional Offices for Civil Rights are attached.

/s/

Peter E. Holmes

[Top](#)

Appendix

A Policy Interpretation: Title IX and Intercollegiate Athletics, Federal Register, Vol. 44, No. 239-Tuesday, Dec. 11, 1979



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A Policy Interpretation: Title IX and Intercollegiate Athletics

Federal Register, Vol.44, No. 239 - Tuesday, Dec. 11, 1979

Intercollegiate athletics policy interpretation; provides more specific factors to be reviewed by OCR under program factors listed at Section 106.41 Of the Title IX regulation; explains OCR's approach to determining compliance in inter-collegiate athletics; adds two program factors, recruitment and support services to be reviewed; clarifies requirement for athletic scholarships - 34 C.F.R. Section 106.37(C). The document contains dated references, and footnote 6 is out of date; however, the policy is still current.

Federal Register / Vol. 44, No. 239 / Tuesday, December 11, 1979 / Rules and Regulations

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 26

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW.

ACTION: Policy interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits

EFFECTIVE DATE: December 11, 1979

FOR FURTHER INFORMATION CONTACT: Colleen O'Connor, 330 Independence Avenue, Washington, D.C. (202) 245-6671

SUPPLEMENTARY INFORMATION:

1. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 844 of the Education Amendments of 1974 further provides:

- The Secretary of [of HEW] shall 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 athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

- Compliance in Financial Assistance (Scholarships) Based on Athletic Ability: 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.
- Compliance in Other Program Areas (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 practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.
- Compliance in Meeting the Interests and Abilities of Male and Female Students: 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.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they 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."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or
- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

(1) Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilitate an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of stating actual compliance factors would be more useful to all concerned.

(3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive

documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditure patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

● VI. Historic Patterns of Intercollegiate Athletics Program Development and Operations

In its proposed Policy Interpretation of December 11, 1978, the Department published a summary of historic patterns affecting the relative status of men's and women's athletic programs. The Department has modified that summary to reflect additional information obtained during the comment and consultation process. The summary is set forth at Appendix A to this document.

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 88.37(c) and 88.4a(c).

A. Athletic Financial Assistance (Scholarships)

1. The Regulation. Section 86.37(c) of the regulation provides:

- [Institutions] must provide reasonable opportunities for such award (of financial assistance) for member of each sex in proportion to the number of students of each sex participating in !!! inter-collegiate athletics.

2. The Policy - The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

a. At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men's and women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require spreading scholarships over as much as a full generation [four years] of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

3. Application of the Policy - a. This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.

b. When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

4. Definition - For purposes of examining compliance with this Section, the participants will be defined as those athletes:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport, or
- d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

B. Equivalence in Other Athletic Benefits and Opportunities

1. The Regulation C The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club or intramural athletics. "provide equal athletic opportunities for members of both sexes." In determining whether an institution is providing equal opportunity in intercollegiate athletics the regulation requires the Department to consider, among others, the following factors:

- (1)
- (2) Provision and maintenance of equipment and supplies;
- (3) Scheduling of games and practice times;
- (4) Travel and per diem expenses;
- (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 services and facilities;
- (9) Provision of housing and dining services and facilities; and
- (10) Publicity

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.

2. The Policy - The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effects of any differences is negligible.

If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors. Some of the factors that may justify these differences are as follows:

a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits' Amendment" to Title IX which instructed HEW to make "reasonable (regulatory) provisions considering the nature of particular sports" in intercollegiate athletics.

Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/ upkeep requirements of those facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable.

b. Some aspects of athletic programs may not be equivalent for men and women because of legitimately sex-neutral factors related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Such differences are justifiable to the extent that they do not reduce overall equality of opportunity.

c. The activities directly associated with the operation of a competitive event in a single-sex sport may, under some circumstances, create unique demands or imbalances in particular program components. Provided any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree, the resulting differences may be found nondiscriminatory. At many schools, for example, certain sports (notably football and men's basketball) traditionally draw large crowds. Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind. These differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in spectator appeal and if the levels of event management support available to both programs are based on sex-neutral criteria (e.g., facilities used, projected attendance, and staffing needs).

d. Some aspects of athletic programs may not be equivalent for men and women because institutions are undertaking voluntary affirmative actions to overcome effects of historical conditions that have limited participation in athletics by the members of one sex. This is authorized at ' 86.3(b) of the regulation.

3. Application of the Policy - General Athletic Program Components C

a. Equipment and Supplies (' 86.41(c)(2)). Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment.

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) The quality of equipment and supplies;
- (2) The amount of equipment and supplies;
- (3) The suitability of equipment and supplies;
- (4) The maintenance and replacement of the equipment and supplies; and
- (5) The availability of equipment and supplies.

b. Scheduling of Games and Practice Times (' 86.41(c)(3)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) The number of competitive events per sport;
- (2) The number and length of practice opportunities;
- (3) The time of day competitive events are scheduled;
- (4) The time of day practice opportunities are scheduled; and
- (5) The opportunities to engage in available pre-season and post-season competition.

c. Travel and Per Diem Allowances.(' 86.41(c)(4)) Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Modes of transportation;

- (2) Housing furnished during travel:
- (3) Length of stay before and after competitive events:
- (4) Per diem allowances: and
- (5) Dining arrangements.

d. Opportunity to Receive Coaching and Academic Tutoring (' 86.41(c)(5)). (1) Coaching Compliance will be assessed by examining, among other factors:

- (a) Relative availability of full-time coaches:
- (b) Relative availability of part-time and assistant coaches; and
- (c) Relative availability of graduate assistants.

(2) Academic tutoring-Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (a) The availability of tutoring; and
- (b) Procedures and criteria for obtaining tutorial assistance.

e. Assignment and Compensation of Coaches and Tutors (' 86.41(c)(6)). In general, a violation of Section 86.41(c)(6) will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.

Nondiscriminatory factors can affect the compensation of coaches. In determining whether differences are caused by permissible factors, the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition will be considered.

Where these or similar factors represent valid differences in skill, effort, responsibility or working conditions they may, in specific circumstances, justify differences in compensation. Similarly, there may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary.

(1) Assignment of Coaches - Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

- (a) Training, experience, and other professional qualifications;
- (b) Professional standing.

(2) Assignment of Tutors-Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

- (a) Tutor qualifications;
- (b) Training, experience, and other qualifications.

(3) Compensation of Coaches - Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

- (a) Rate of compensation (per sport, per season);
- (b) Duration of contracts;
- (c) Conditions relating to contract renewal;
- (d) Experience;
- (e) Nature of coaching duties performed;
- (f) Working conditions; and
- (g) Other terms and conditions of employment.

(4) Compensation of Tutors - Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

- (a) Hourly rate of payment by nature subjects tutored;
- (b) Pupil loads per tutoring season;
- (c) Tutor qualifications;
- (d) Experience;
- (e) Other terms and conditions of employment.

f. Provision of Locker Rooms, Practice and Competitive Facilities.(' 86.41(c)(7)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Quality and availability of the facilities provided for practice and competitive events;
- (2) Exclusivity of use of facilities provided for practice and competitive events;

- (3) Availability of locker rooms;
- (4) Quality of locker rooms;
- (5) Maintenance of practice and competitive facilities; and
- (6) Preparation of facilities for practice and competitive events.

g. Provision of Medical and Training Facilities and Services (' 86.41(c)(8)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Availability of medical personnel and assistance;
- (2) Health, accident and injury insurance coverage;
- (3) Availability and quality of weight and training facilities;
- (4) Availability and quality of conditioning facilities; and
- (5) Availability and qualifications of athletic trainers.

h. Provision of Housing and Dining Facilities and Services (' 86.41(c)(9)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Housing provided;
- (2) Special services as part of housing arrangements (e.g., laundry facilities, parking space, maid service).

i. Publicity (' 86.41(c)(10)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Availability and quality of sports information personnel;
- (2) Access to other publicity resources for men's and women's programs; and
- (3) Quantity and quality of publications and other promotional devices featuring men's and women's programs.

4. Application of the Policy-Other Factors (' 86.41(c)). a. Recruitment of Student Athletes. The athletic recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes. Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.

Such examinations will review the following factors:

- (1) Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;
- (2) Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and
- (3) Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

b. Provision of Support Services. The administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions.

In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:

- (1) The amount of administrative assistance provided to men's and women's programs;
- (2) The amount of secretarial and clerical assistance provided to men's and women's programs.

5. Overall Determination of Compliance. The Department will base its compliance determination under ' 86.41(c) of the regulation upon an examination of the following:

- a. Whether the policies of an institution are discriminatory in language or effect; or
- b. Whether 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; or
- c. Whether 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.

C. Effective Accommodation of Student Interests and Abilities.

1. The Regulation. The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at ' 86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are available

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal

opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. The Policy. The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

- a. The determination of athletic interests and abilities of students;
- b. The selection of sports offered; and
- c. The levels of competition available including the opportunity for team competition.

3. Application of the Policy C Determination of Athletic Interests and Abilities.

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

- a. The processes take into account the nationally increasing levels of women's interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and
- d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. Application of the Policy - Selection of Sports.

In the selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

a. Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

- (1) The opportunities for members of the excluded sex have historically been limited; and
- (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

b. Non-Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

- (1) The opportunities for members of the excluded sex have historically been limited;
- (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and
- (3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. Application of the Policy - Levels of Competition.

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

- (1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or
- (2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. Overall Determination of Compliance.

The Department will base its compliance determination under ' 86.41(c) of the regulation upon a determination of the following:

- a. Whether the policies of an institution are discriminatory in language or effect; or
- b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or
- c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

VIII. The Enforcement Process

The process of Title IX enforcement is set forth in ' 88.71 of the Title IX regulation, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights

Act of 1964. The enforcement process prescribed by the regulation is supplemented by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.

According to the regulation, there are two ways in which enforcement is initiated:

- Compliance Reviews - Periodically the Department must select a number of recipients (in this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX (45 CFR 80.7(a))
- Complaints - The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. (45 CFR 80.7(b))

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.

The Department has 90 days to conduct an investigation and inform the recipient of its findings, and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between the Department and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance. Sometimes the violation is relatively minor and can be corrected immediately. At other times, however, the negotiations result in a plan that will correct the violations within a specified period of time. To be acceptable, a plan must describe the manner in which institutional resources will be used to correct the violation. It also must state acceptable time tables for reaching interim goals and full compliance. When agreement is reached, the Department notifies the institution that its plan is acceptable. The Department then is obligated to review periodically the implementation of the plan.

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate. If the plan is not adequate to correct the violations (or to correct them within a reasonable period of time) the recipient will be found in noncompliance and voluntary negotiations will begin. However, if the institutional plan is acceptable, the Department will inform the institution that although the institution has violations, it is found to be in compliance because it is implementing a corrective plan. The Department, in this instance also, would monitor the progress of the institutional plan. If the institution subsequently does not completely implement its plan, it will be found in noncompliance.

When a recipient is found in noncompliance and voluntary compliance attempts are unsuccessful, the formal process leading to termination of Federal assistance will be begun. These procedures, which include the opportunity for a hearing before an administrative law judge, are set forth at 45 CFR 80.8-80.11 and 45 CFR Part 81.

IX. Authority

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374, 20 U.S.C. 1681, 1682; sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612; and 45 CFR Part 86)

Dated December 3, 1979.

Roma Stewart,

Director, Office for Civil Rights, Department of Health, Education, and Welfare.

Dated December 4, 1979.

Patricia Roberts Harris,

Secretary, Department of Health, Education, and Welfare.

Appendix A-Historic Patterns of Intercollegiate Athletics Program Development

1. Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. During the 1977-78 academic year women students accounted for 48 percent of the national undergraduate enrollment (5,496,000 of 11,267,000 students). Yet, only 30 percent of the intercollegiate athletes are women.

The historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women. One source indicates that, on the average, colleges and universities are providing twice the number of sports for men as they are for women.

2. Participation by women in sports is growing rapidly. During the period from 1971-1978, for example, the number of female participants in organized high school sports increased from 294,000 to 2,083,000 C an increase of over 600 percent. In contrast, between Fall 1971 and Fall 1977, the enrollment of females in high school decreased from approximately 7,600,000 to approximately 7,150,000 a decrease of over 5 percent

The growth in athletic participation by high school women has been reflected on the campuses of the nation's colleges and universities.

During the period from 1971 to 1976 the enrollment of women in the nation's institutions of higher education rose 52 percent, from 3,400,000 to 5,201,000. During this same period, the number of women participating in intramural sports increased 108 percent from 276,167 to 576,167. In club sports, the number of women participants increased from 16,386 to 25,541 or 55 percent. In intercollegiate sports, women's participation increased 102 percent from 31,852 to 64,375. These developments reflect the growing interest of women in competitive athletics, as well as the efforts of colleges and universities to accommodate those interests.

3. The overall growth of women's intercollegiate programs has not been at the expense of men's programs. During the past decade of rapid growth in women's programs, the number of intercollegiate sports available for men has remained stable, and the number of male athletes has increased slightly. Funding for men's programs has increased from \$1.2 to \$2.2 million between 1970-1977 alone.

4. On most campuses, the primary problem confronting women athletes is the absence of a fair and adequate level of resources, services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that are members of both the National Collegiate Athletic Association (NCAA) and the Association for Intercollegiate Athletics for Women (AIAW), the average annual scholarship budget is \$39,000. Male athletes receive \$32,000 or 78 percent of this amount, and female athletes receive \$7,000 or 22 percent, although women are 30 percent of all the athletes eligible for scholarships.

Likewise, substantial amounts have been provided for the recruitment of male athletes, but little funding has been made available for recruitment of female athletes.

Congressional testimony on Title IX and subsequent surveys indicates that discrepancies also exist in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities.

5. At several institutions, intercollegiate football is unique among sports. The size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports, both men's and women's. Title IX requires that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity." However, the unique size and cost of football programs have been taken into account in developing this Policy Interpretation.

Appendix B-Comments and Responses

The Office for Civil Rights (OCR) received over 700 comments and recommendations in response to the December 11, 1978 publication of the proposed Policy Interpretation. After the formal comment period, representatives of the Department met for additional discussions with many individuals and groups including college and university officials, athletic associations, athletic directors, women's rights organizations and other interested parties. HEW representatives also visited eight universities in order to assess the potential of the proposed Policy Interpretation and of suggested alternative approaches for effective enforcement of Title IX.

The Department carefully considered all information before preparing the final policy. Some changes in the structure and substance of the Policy Interpretation have been made as a result of concerns that were identified in the comment and consultation process.

Persons who responded to the request for public comment were asked to comment generally and also to respond specifically to eight questions that focused on different aspects of the proposed Policy Interpretation.

Question No. 1: Is the description of the current status and development of intercollegiate athletics for men and women accurate? What other factors should be considered?

Comment A: Some commentators noted that the description implied the presence of intent on the part of all universities to discriminate against women. Many of these same commentators noted an absence of concern in the proposed Policy Interpretation for those universities that have in good faith attempted to meet what they felt to be a vague compliance standard in the regulation.

Response: The description of the current status and development of intercollegiate athletics for men and women was designed to be a factual, historical overview. There was no intent to imply the universal presence of discrimination. The Department recognizes that there are many colleges and universities that have been and are making good faith efforts, in the midst of increasing financial pressures, to provide equal athletic opportunities to their male and female athletes.

Comment B: Commentors stated that the statistics used were outdated in some areas, incomplete in some areas, and inaccurate in some areas.

Response: Comment accepted. The statistics have been updated and corrected where necessary.

Question No. 2: Is the proposed two-stage approach to compliance practical? Should it be modified? Are there other approaches to be considered?

Comment: Some commentators stated that Part II of the proposed Policy Interpretation "Equally Accommodating the Interests and Abilities of Women" represented an extension of the July 1978, compliance deadline established in '86.41(d) of the Title IX regulation.

Response: Part II of the proposed Policy Interpretation was not intended to extend the compliance deadline. The format of the two stage approach, however, seems to have encouraged that perception; therefore, the elements of both stages have been unified in this Policy Interpretation.

Question No. 3: Is the equal average per capita standard based on participation rates practical? Are there alternatives or modifications that should be considered?

Comment A: Some commentators stated it was unfair or illegal to find noncompliance solely on the basis of a financial test when more valid indicators of equality of opportunity exist.

Response: The equal average per capita standard was not a standard by which noncompliance could be found. It was offered as a standard of presumptive compliance. In order to prove noncompliance, HEW would have been required to show that the unexplained disparities in expenditures were discriminatory in effect. The standard, in part, was offered as a means of simplifying proof of compliance for universities. The widespread confusion concerning the significance of failure to satisfy the equal average per capita expenditure standard, however, is one of the reasons it was withdrawn.

Comment B: Many commentors stated that the equal average per capita standard penalizes those institutions that have increased participation opportunities for women and rewards institutions that have limited women's participation.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumptive compliance, the question of its effect is no longer relevant. However, the Department agrees that universities that had increased participation opportunities for women and wished to take advantage of the presumptive compliance standard, would have had a bigger financial burden than universities that had done little to increase participation opportunities for women.

Question No. 4: Is there a basis for treating part of the expenses of a particular revenue producing sport differently because the sport produces income used by the university for non-athletic operating expenses on a non-discriminatory basis? If, so, how should such funds be identified and treated?

Comment: Commentors stated that this question was largely irrelevant because there were so few universities at which revenue from the athletic program was used in the university operating budget.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumed compliance, a decision is no longer necessary on this issue.

Question No. 5: Is the grouping of financially measurable benefits into three categories practical? Are there alternatives that should be considered? Specifically, should recruiting expenses be considered together with all other financially measurable benefits?

Comment A: Most commentors stated that, if measured solely on a financial standard, recruiting should be grouped with the other financially measurable items. Some of these commentors held that at the current stage of development of women's intercollegiate athletics, the amount of money that would flow into the women's recruitment budget as a result of separate application of the equal average per capita standard to recruiting expenses, would make recruitment a disproportionately large percentage of the entire women's budget. Women's athletic directors, particularly, wanted the flexibility to have the money available for other uses, and they generally agreed on including recruitment expenses with the other financially measurable items.

Comment B: Some commentors stated that it was particularly inappropriate to base any measure of compliance in recruitment solely on financial expenditures. They stated that even if proportionate amounts of money were allocated to recruitment, major inequities could remain in the benefits to athletes. For instance, universities could maintain a policy of subsidizing visits to their campuses of prospective students of one sex but not the other. Commentors suggested that including an examination of differences in benefits to prospective athletes that result from recruiting methods would be appropriate.

Response: In the final Policy Interpretation, recruitment has been moved to the group of program areas to be examined under 86.41(c) to determine whether overall equal athletic opportunity exists. The Department accepts the comment that a financial measure is not sufficient to determine whether equal opportunity is being provided. Therefore, in examining athletic recruitment, the Department will primarily review the opportunity to recruit, the resources provided for recruiting, and methods of recruiting.

Question No. 6: Are the factors used to justify differences in equal average per capita expenditures for financially measurable benefits and opportunities fair? Are there other factors that should be considered?

Comment: Most commentors indicated that the factors named in the proposed Policy Interpretation (the "scope of competition" and the "nature of the sport") as justifications for differences in equal average per capita expenditures were so vague and ambiguous as to be meaningless. Some stated that it would be impossible to define the phrase "scope of competition", given the greatly differing competitive structure of men's and women's programs. Other commentors were concerned that the "scope of competition" factor that may currently be designated as "nondiscriminatory" was, in reality, the result of many years of inequitable treatment of women's athletic programs.

Response: The Department agrees that it would have been difficult to define clearly and then to quantify the "scope of competition" factor. Since equal average per capita expenditures has been dropped as a standard of presumed compliance, such financial justifications are no longer necessary. Under the equivalency standard, however, the "nature of the sport" remains an important concept. As explained within the Policy Interpretation, the unique nature of a sport may account for perceived inequities in some program areas.

Question No 7: Is the comparability standard for benefits and opportunities that are not financially measurably fair and realistic? Should other factors controlling comparability be included? Should the comparability standard be revised? Is there a different standard which should be considered?

Comment: Many commentors stated that the comparability standard was fair and realistic. Some commentors were concerned, however, that the standard was vague and subjective and could lead to uneven enforcement.

Response: The concept of comparing the non-financially measurable benefits and opportunities provided to male and female athletes has been preserved and expanded in the final Policy Interpretation to include all areas of examination except scholarships and accommodation of the interests and abilities of both sexes. The standard is that equivalent benefits and opportunities must be provided. To avoid vagueness and subjectivity, further guidance is given about what elements will be considered in each program area to determine the equivalency of benefits and opportunities.

Question No. 8: Is the proposal for increasing the opportunity for women to participate in competitive athletics appropriate and effective? Are there other procedures that should be considered? Is there a more effective way to ensure that the interest and abilities of both men and women are equally accommodated?

Comment: Several commentors indicated that the proposal to allow a university to gain the status of presumed compliance by having policies and procedures to encourage the growth of women's athletics was appropriate and effective for future students, but ignored students presently enrolled. They indicated that nowhere in the proposed Policy Interpretation was concern shown that the current selection of sports and levels of competition effectively accommodate the interests and abilities of women as well as men.

Response: Comment accepted. The requirement that universities equally accommodate the interests and abilities of their male and female athletes (Part II of the proposed Policy Interpretation) has been directly addressed and is now a part of the unified final Policy Interpretation.

The following comments were not responses to questions raised in the proposed Policy Interpretation. They represent additional concerns expressed by a large number of commentators.

(1) Comment: Football and other "revenue producing" sports should be totally exempted or should receive special treatment under Title IX.

Response: The April 18, 1978, opinion of the General Counsel, HEW, concludes that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulation in the administration of any revenue producing activity". Therefore, football or other "revenue producing" sports cannot be exempted from coverage of Title IX.

In developing the proposed Policy Interpretation the Department concluded that although the fact of revenue production could not justify disparity in average per capita expenditure between men and women, there were characteristics common to most revenue producing sports that could result in legitimate nondiscriminatory differences in per capita expenditures. For instance, some "revenue producing" sports require expensive protective equipment and most require high expenditures for the management of events attended by large numbers of people. These characteristics and others described in the proposed Policy Interpretation were considered acceptable, nondiscriminatory reasons for differences in per capita average expenditures.

In the final Policy Interpretation, under the equivalent benefits and opportunities standard of compliance, some of these non-discriminatory factors are still relevant and applicable.

(2) Comment: Commentors stated that since the equal average per capita standard of presumed compliance was based on participation rates, the word should be explicitly defined.

Response: Although the final Policy Interpretation does not use the equal average per capita standard of presumed compliance, a clear understanding of the word "participant" is still necessary, particularly in the determination of compliance where scholarships are involved. The word "participant" is defined in the final Policy Interpretation.

(3) Comment: Many commentators were concerned that the proposed Policy Interpretation neglected the rights of individuals.

Response: The proposed Policy Interpretation was intended to further clarify what colleges and universities must do within their intercollegiate athletic programs to avoid discrimination against individuals on the basis of sex. The Interpretation, therefore, spoke to institutions in terms of their male and female athletes. It spoke specifically in terms of equal, average per capita expenditures and in terms of comparability of other opportunities and benefits for male and female participating athletes.

The Department believes that under this approach the rights of individuals were protected. If women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby. Under the proposed Policy Interpretation, for example, if female athletes as a whole were receiving their proportional share of athletic financial assistance, a university would have been presumed in compliance with that section of the regulation. The Department does not want and does not have the authority to force universities to offer identical programs to men and women. Therefore, to allow flexibility within women's programs and within men's programs, the proposed Policy Interpretation stated that an institution would be presumed in compliance if the average per capita expenditures on athletic scholarships for men and women, were equal. This same flexibility (in scholarships and in other areas) remains in the final Policy Interpretation.

(4) Comment: Several commentators stated that the provision of a separate dormitory to athletes of only one sex, even where no other special benefits were involved, is inherently discriminatory. They felt such separation indicated the different degrees of importance attached to athletes on the basis of sex.

Response: Comment accepted. The provision of a separate dormitory to athletes of one sex but not the other will be considered a failure to provide equivalent benefits as required by the regulation.

(5) Comment: Commentors, particularly colleges and universities, expressed concern that the differences in the rules of intercollegiate athletic associations could result in unequal distribution of benefits and opportunities to men's and women's athletic programs, thus placing the institutions in a posture of noncompliance with Title IX.

Response: Commentors made this point with regard to ' 86.6(c) of the Title IX regulation, which reads in part:

"The obligation to comply with (Title IX) is not obviated or alleviated by any rule or regulation of any * * * athletic or other * * * association * * *"

Since the penalties for violation of intercollegiate athletic association rules can have a severe effect on the athletic opportunities within an affected program, the Department has reexamined this regulatory requirement to determine whether it should be modified. Our conclusion is that modification would not have a beneficial effect, and that the present requirement will stand.

Several factors enter into this decision. First, the differences between rules affecting men's and women's programs are numerous and change constantly. Despite this, the Department has been unable to discover a single case in which those differences require members to act in a discriminatory manner. Second, some rule differences may permit decisions resulting in discriminatory distribution of benefits and opportunities to men's and women's programs. The fact that institutions respond to differences in rules by choosing to deny equal opportunities, however, does not mean that the rules themselves are at fault; the rules do not prohibit choices that would result in compliance with Title IX. Finally, the rules in question are all established and subject to change by the membership of the association. Since all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve collectively any wide-spread Title IX compliance problems resulting from association rules. To the extent that this has not taken place, Federal intervention on behalf of statutory beneficiaries is both warranted and required by the law. Consequently, the Department can follow no course other than to continue to disallow any defenses against findings of noncompliance with Title IX that are based on intercollegiate athletic association rules.

(6) Comment: Some commentators suggested that the equal average per capita test was unfairly skewed by the high cost of some "major" men's sports, particularly football, that have no equivalently expensive counterpart among women's sports. They suggested that a certain percentage of those costs (e.g., 50% of football scholarships) should be excluded from the expenditures on male athletes prior to application of the equal average per capita test.

Response: Since equality of average per capita expenditures has been eliminated as a standard of presumed compliance, the suggestion is no longer relevant. However, it was possible under that standard to exclude expenditures that were due to the nature of

the sport, or the scope of competition and thus were not discriminatory in effect. Given the diversity of intercollegiate athletic programs, determinations as to whether disparities in expenditures were nondiscriminatory would have been made on a case-by-case basis. There was no legal support for the proposition that an arbitrary percentage of expenditures should be excluded from the calculations.

(7) Comment: Some commentors urged the Department to adopt various forms of team-based comparisons in assessing equality of opportunity between men's and women's athletic programs. They stated that well-developed men's programs are frequently characterized by a few "major" teams that have the greatest spectator appeal, earn the greatest income, cost the most to operate, and dominate the program in other ways. They suggested that women's programs should be similarly constructed and that comparability should then be required only between "men's major" and "women's major" teams, and between "men's minor" and "women's minor" teams. The men's teams most often cited as appropriate for "major" designation have been football and basketball, with women's basketball and volleyball being frequently selected as the counterparts.

Response: I here are two problems with this approach to assessing equal opportunity. First, neither the statute nor the regulation calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.

Second, no subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the "major/minor" classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women's volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to the members of one sex.

(8) Comment: Some commentors suggest that equality of opportunity should be measured by a "sport-specific" comparison. Under this approach, institutions offering the same sports to men and women would have an obligation to provide equal opportunity within each of those sports. For example, the men's basketball team and the women's basketball team would have to receive equal opportunities and benefits.

Response: As noted above, there is no provision for the requirement of identical programs for men and women, and no such requirement will be made by the Department. Moreover, a sport-specific comparison could actually create unequal opportunity. For example, the sports available for men at an institution might include most or all of those available for women; but the men's program might concentrate resources on sports not available to women (e.g., football, ice hockey). In addition, the sport-specific concept overlooks two key elements of the Title IX regulation.

First, the regulation states that the selection of sports is to be representative of student interests and abilities (86.41(c)(1)). A requirement that sports for the members of one sex be available or developed solely on the basis of their existence or development in the program for members of the other sex could conflict with the regulation where the interests and abilities of male and female students diverge.

Second, the regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities (86.41(c)). As implied above, Title IX protects the individual as a student-athlete, not all a basketball player, or swimmer.

(9) Comment: A coalition of many colleges and universities urged that there are no objective standards against which compliance with Title IX in intercollegiate athletics could be measured. They felt that diversity is so great among colleges and universities that no single standard or set of standards could practicably apply to all affected institutions. They concluded that it would be best for individual institutions to determine the policies and procedures by which to ensure nondiscrimination in intercollegiate athletic programs.

Specifically, this coalition suggested that each institution should create a group representative of all affected parties on campus.

This group would then assess existing athletic opportunities for men and women, and, on the basis of the assessment, develop a plan to ensure nondiscrimination. This plan would then be recommended to the Board of Trustees or other appropriate governing body.

The role foreseen for the Department under this concept is:

- (a) The Department would use the plan as a framework for evaluating complaints and assessing compliance;
- (b) The Department would determine whether the plan satisfies the interests of the involved parties; and
- (c) The Department would determine whether the institution is adhering to the plan.

These commentors felt that this approach to Title IX enforcement would ensure an environment of equal opportunity.

Response: Title IX is an antidiscrimination law. It prohibits discrimination based on sex in educational institutions that are recipients of Federal assistance. The legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions. The Department accepts that colleges and universities are sincere in their intention to ensure equal opportunity in intercollegiate athletics to their male and female students. It cannot, however, turn over its responsibility for interpreting and enforcing the law. In this case, its responsibility includes articulating the standards by which compliance with the Title IX statute will be evaluated.

The Department agrees with this group of commentors that the proposed self-assessment and institutional plan is an excellent idea. Any institution that engages in the assessment/planning process, particularly with the full participation of interested parties as envisioned in the proposal, would clearly reach or move well toward compliance. In addition, as explained in Section VIII of this Policy Interpretation, any college or university that has compliance problems but is implementing a plan that the Department determines will correct those problems within a reasonable period of time, will be found in compliance.

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Appendix

US Department of Education, Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test: The Part Three, Jan. 16, 1996



Print

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Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test

Jan 16, 1996

Dear Colleague:

It is my pleasure to send you the enclosed Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the Clarification).

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979--both of which followed publication for notice and the receipt, review and consideration of extensive comments--specifically address intercollegiate athletics. Since becoming Assistant Secretary, I have recognized the need to provide additional clarification regarding what is commonly referred to as the "three-part test," a test used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics. The three-part test is described in the Department's 1979 Policy Interpretation.

Accordingly, on September 20, 1995, OCR circulated to over 4500 interested parties a draft of the proposed Clarification, soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX. As indicated when circulating the draft of the Clarification, the objective of the Clarification is to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics. Further, the Clarification is limited to an elaboration of the "three-part test." This test, which has generated the majority of the questions that have been raised about Title IX compliance, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation.

OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

The draft has been revised to incorporate suggestions that OCR received regarding how to make the document more useful and clearer. For instance, the Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term "developing interests" under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities and why Title IX does not require an institution, under part three of the test, to accommodate the interests and abilities of potential students.

OCR also received requests for clarification that relate primarily to fact- or institution-specific situations that only apply to a small number of athletes or institutions. These comments are more appropriately handled on an individual basis and, accordingly, OCR will follow-up on these comments and questions in the context of OCR's ongoing technical assistance efforts.

It is important to outline several points about the final document.

The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes. The first part of the test--substantial proportionality--focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The second part--history and continuing practice--is an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part--fully and effectively accommodating interests and abilities of the underrepresented sex--centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways to comply. Opponents of the test assert, therefore, that the test improperly establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title IX because it measures gender discrimination by underrepresentation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

First, it is clear from the Clarification that there are three different avenues of compliance. Institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the

underrepresented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated. The fact that each part of the three-part test considers participation rates does not mean, as some opponents of the test have suggested, that the three parts do not provide different ways to comply with Title IX.

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting institutions--notwithstanding the long history of discrimination based on sex in athletics programs--to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.)

OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

What is clear then--because, for example, part three of the three-part test permits evidence that underrepresentation is caused not by discrimination but by lack of interest--is that underrepresentation alone is not the measure of discrimination. Substantial proportionality merely provides institutions with a safe harbor. Even if this were not the case and proportional opportunities were the only test, the "quota" criticism would be misplaced. Quotas are impermissible where opportunities are required to be created without regard to sex. However, schools are permitted to create athletic participation opportunities based on sex. Where they do so unequally, that is a legitimate measure of unequal opportunity under Title IX. OCR has chosen to make substantial proportionality only one of three alternative measures.

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.

OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex. Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.

Finally, several parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however, that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a significant challenge that many institutions face today, especially in the face of increasing budget constraints. It has been OCR's experience, however, that institutions committed to maintaining their men's program have been able to do so--and comply with Title IX--notwithstanding limited athletic budgets. In many cases, OCR and these institutions have worked together to find creative solutions that ensured equal opportunities in intercollegiate athletics. OCR is similarly prepared to join with other institutions in assisting them to address their own situations.

OCR is committed to continuing to work in partnership with colleges and universities to ensure that the promise of Title IX becomes a reality for all students. Thank you for your continuing interest in this subject.

Sincerely,

/signed/

Norma V. Cantú

Assistant Secretary
for Civil Rights

Enclosure

Jan 16, 1996

CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (Title IX), which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, at 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 *Fed. Reg.* 71413 *et seq.*

(1979)).¹

The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

The 1979 Policy Interpretation provides that as part of this determination OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described 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.

44 *Fed. Reg.* at 71418.

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

In addition, when an "overall determination of compliance" is made by OCR, 44 *Fed. Reg.* 71417, 71418, OCR examines the institution's program as a whole. Thus OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

This Clarification provides specific factors that guide an analysis of each part of the three-part test. In addition, it provides examples to demonstrate, in concrete terms, how these factors will be considered. These examples are intended to be illustrative, and the conclusions drawn in each example are based solely on the facts included in the example.

THREE-PART TEST -- Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program. The Policy Interpretation defines participants as those athletes:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport; or
- d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

44 *Fed. Reg.* at 71415.

OCR uses this definition of participant to determine the number of participation opportunities provided by an institution for purposes of the three-part test.

Under this definition, OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates.

In determining participation opportunities, OCR includes, among others, those athletes who do not receive scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete. OCR's investigations reveal that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team. Because these are significant benefits, and because receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

OCR's analysis next determines whether athletic opportunities are substantially proportionate. The Title IX regulation allows institutions to operate separate athletic programs for men and women. Accordingly, the regulation allows an institution to control the respective number of participation opportunities offered to men and women. Thus, it could be argued that to satisfy part one there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment.

However, because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality--for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality--the Policy Interpretation examines whether participation opportunities are "substantially" proportionate to enrollment rates. Because this determination depends on the institution's specific circumstances and the size of its athletic program, OCR makes this determination on a case-by-case basis, rather than through use of a statistical test.

As an example of a determination under part one: If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.

As another example, over the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal--i.e., 50 percent of the participants in its athletic program are female--its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy part one.

OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.

As another example, at Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

THREE-PART TEST -- Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under part two of the three-part test (part two), an institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.²

OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. Developing interests include interests that already exist at the institution.³ There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.

OCR will consider the following factors, among others, as evidence that may indicate a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

OCR will consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion. It is only necessary to examine part two if one sex is overrepresented in the athletic program. Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present

program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion for that sex.

In addition, OCR will not find that an institution satisfies part two where it established teams for the underrepresented sex only at the initiation of its program for the underrepresented sex or where it merely promises to expand its program for the underrepresented sex at some time in the future.

The following examples are intended to illustrate the principles discussed above.

At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.

By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and 1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

THREE-PART TEST -- Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex -- including students who are admitted to the institution though not yet enrolled. Title IX provides that a recipient must provide equal athletic opportunity to its students.

Accordingly, the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students.⁴

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

a) Is there sufficient unmet interest to support an intercollegiate team?

OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports, and
- participation in particular interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).⁵ For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. See 44 Fed. Reg. at 71417. These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

b) Is there sufficient ability to sustain an intercollegiate team?

Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:

- the athletic experience and accomplishments--in interscholastic, club or intramural competition--of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

c) Is there a reasonable expectation of competition for the team?

Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

- competitive opportunities offered by other schools against which the institution competes; and
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

Under the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.

CONCLUSION

This discussion clarifies that institutions have three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities. The three-part test gives institutions flexibility and control over their athletics programs. For instance, the test allows institutions to respond to different levels of interest by its male and female students. Moreover, nothing in the three-part test requires an institution to eliminate participation opportunities for men.

At the same time, this flexibility must be used by institutions consistent with Title IX's requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing nondiscriminatory participation opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.

1. The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation. See 44 Fed. Reg. 71413.
2. Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX..
3. However, under this part of the test an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex. Moreover, under part two an institution has flexibility in choosing which teams it adds for the underrepresented sex, as long as it can show overall a history and continuing practice of program expansion for members of that sex.
4. However, OCR does examine an institution's recruitment practices under another part of the Policy Interpretation. See 44 Fed. Reg. 71417 Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit potential student athletes.
5. While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.

Appendix

US Department of Education, Office for Civil Rights, Further Clarification of
Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance, July 11, 2003



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Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance

**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
400 MARYLAND AVE., S.W.
WASHINGTON, D.C. 20202-1100**

THE ASSISTANT SECRETARY

July 11, 2003

Dear Colleague:

It is my pleasure to provide you with this Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.

Since its enactment in 1972, Title IX has produced significant advancement in athletic opportunities for women and girls across the nation. Recognizing that more remains to be done, the Bush Administration is firmly committed to building on this legacy and continuing the progress that Title IX has brought toward true equality of opportunity for male and female student-athletes in America.

In response to numerous requests for additional guidance on the Department of Education's (Department) enforcement standards since its last written guidance on Title IX in 1996, the Department's Office for Civil Rights (OCR) began looking into whether additional guidance on Title IX requirements regarding intercollegiate athletics was needed. On June 27, 2002, Secretary of Education Rod Paige created the Secretary's Commission on Opportunities in Athletics to investigate this matter further, and to report back with recommendations on how to improve the application of the current standards for measuring equal opportunity to participate in athletics under Title IX. On February 26, 2003, the Commission presented Secretary Paige with its final report, "Open to All: Title IX at Thirty," and in addition, individual members expressed their views.

After eight months of discussion and an extensive and inclusive fact-finding process, the Commission found very broad support throughout the country for the goals and spirit of Title IX. With that in mind, OCR today issues this Further Clarification in order to strengthen Title IX's promise of non-discrimination in the athletic programs of our nation's schools.

Title IX establishes that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

In its 1979 Policy Interpretation, the Department established a three-prong test for compliance with Title IX, which it later amplified and clarified in its 1996 Clarification. The test provides that an institution is in compliance if 1) the intercollegiate-level participation opportunities for male and female students at the institution are "substantially proportionate" to their respective full-time undergraduate enrollments, 2) the institution has a "history and continuing practice of program expansion" for the underrepresented sex, or 3) the institution is "fully and effectively" accommodating the interests and abilities of the underrepresented sex.

First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. All three prongs have been used successfully by schools to comply with Title IX, and the test offers three separate ways of assessing whether schools are providing equal opportunities to their male and female students to participate in athletics. If a school does not satisfy the "substantial proportionality" prong, it would still satisfy the three-prong test if it maintains a history and continuing practice of program expansion for the underrepresented sex, or if "the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program." Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.

The transmittal letter accompanying the 1996 Clarification issued by the Department described only one of these three separate prongs - substantial proportionality - as a "safe harbor" for Title IX compliance. This led many schools to believe, erroneously, that they must take measures to ensure strict proportionality between the sexes. In fact, each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. The Department will continue to make clear, as it did in its 1996 Clarification, that "[i]nstitutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas."

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law, to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.

In the 1996 Clarification, the Department provided schools with a broad range of specific factors, as well as illustrative examples, to help schools understand the flexibility of the three-prong test. OCR reincorporates those factors, as well as those illustrative examples, into this Further Clarification, and OCR will continue to assist schools on a case-by-case basis and address any questions they have about Title IX compliance. Indeed, OCR encourages schools to request individualized assistance from OCR as they consider ways to meet the requirements of Title IX. As OCR works with schools on Title IX compliance, OCR will share information on successful approaches with the broader scholastic community.

Second, OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for

students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams.

Therefore, in negotiating compliance agreements, OCR's policy will be to seek remedies that do not involve the elimination of teams.

Third, OCR hereby advises schools that it will aggressively enforce Title IX standards, including implementing sanctions for Institutions that do not comply. At the same time, OCR will also work with schools to assist them in avoiding such sanctions by achieving Title IX compliance.

Fourth, private sponsorship of athletic teams will continue to be allowed. Of course, private sponsorship does not in any way change or diminish a school's obligations under Title IX.

Finally, OCR recognizes that schools will benefit from clear and consistent implementation of Title IX. Accordingly, OCR will ensure that its enforcement practices do not vary from region to region.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a challenge for many academic institutions. But OCR believes that the three-prong test has provided, and will continue to provide, schools with the flexibility to provide greater athletic opportunities for students of both sexes.

OCR is strongly reaffirming today its commitment to equal opportunity for girls and boys, women and men. To that end, OCR is committed to continuing to work in partnership with educational institutions to ensure that the promise of Title IX becomes a reality for all students.


Thank you for your continuing interest in this subject.

Sincerely,

Gerald Reynolds
Assistant Secretary for Civil Rights

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Last Modified: 12/20/2006

Appendix:

US Department of Education, Office for Civil Rights, Requirements Under Title IX of the



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Requirements Under Title IX of the Education Amendments of 1972

U.S. Department of Education
Office for Civil Rights
Washington, D.C. 20202-1328

INTRODUCTION

Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) prohibits discrimination on the basis of sex in education programs receiving Federal financial assistance. Athletics are considered an integral part of an institution's education program and are therefore covered by this law. It is the responsibility of the Department of Education (ED), Office for Civil Rights (OCR), to assure that athletic programs are operated in a manner that is free from discrimination on the basis of sex.

The regulation (34 C.F.R. Part 106) implementing Title IX contains specific provisions relating to athletic opportunities. It also permits individual institutions considerable flexibility in achieving compliance with the law.

To clarify the athletic requirements contained in the Title IX regulation, a Policy Interpretation was issued to provide colleges and universities with more guidance on how to comply with the law. The Policy Interpretation, which explains the standards of the regulation, clarifies the obligations of colleges and universities in three basic areas:

- student interests and abilities;
- athletic benefits and opportunities; and
- financial assistance.

While designed specifically for intercollegiate athletics, the general principles and compliance standards set forth in the Policy Interpretation will often apply to inter-scholastic athletic programs operated by elementary and secondary school systems, and to club and intramural athletic programs.

STUDENT INTERESTS AND ABILITIES

The athletic interests and abilities of male and female students must be equally and effectively accommodated. Compliance with this factor is assessed by examining a school's: (a) determination of the athletic interests and abilities of its students; (b) selection of the sports that are offered; and (c) levels of competition, including opportunity for team competition.

Measuring Athletic Interests

Colleges and universities have discretion in selecting the methods for determining the athletic interests and abilities of their students, as long as those methods are nondiscriminatory. The only requirements imposed are that institutions used methods that:

- take into account the nationally increasing level of women's interests and abilities;
- do not disadvantage the underrepresented sex (i.e., that sex whose participation rate in athletics is substantially below its enrollment rate);
- take into account team performance records of both male and female teams; and
- respond to the expressed interests of students capable of intercollegiate competition who belong to the underrepresented sex.

Selection of Sports

A college or university is not required to offer particular sports or the same sports for each sex. Also, an institution is not required to offer an equal number of sports for each sex. However, an institution must accommodate to the same degree the athletic interests and abilities of each sex in the selection of sports.

A college or university may sponsor separate teams for men and women where selection is based on competitive skill or when the activity is a contact sport. Contact sports under the Title IX regulation include boxing, wrestling, rugby, ice hockey, football, basketball and other sports in which the purpose or major activity involves bodily contact.

Equally effective accommodation also requires a college or university that sponsors a team for only one sex to do so for members of the other sex under certain circumstances. This applies to contact and non-contact sports. For example, a separate team may be required if there is sufficient interest and ability among members of the excluded sex to sustain a team and a reasonable expectation of competition for that team. Also, where an institution sponsors a team in a particular non-contact sport for members of one sex, it must allow athletes of the other sex to try-out for the team if, historically, there have been limited athletic opportunities for members of the other sex.

Levels of Competition

Colleges and universities must provide opportunity for intercollegiate competition as well as team schedules which equally reflect the competitive abilities of male and female athletes. An institution's compliance in this area may be assessed in any one of the following

ways:

- the numbers of men and women participating in intercollegiate athletics are substantially proportionate to their overall enrollment; or
- where members of one sex are underrepresented in the athletics program, whether the institution can show a continuing practice of program expansion responsive to the developing interests and abilities of that sex; or
- the present program accommodates the interests and abilities of the underrepresented sex.

In considering equivalent opportunities for levels of competition, compliance will be assessed by examining whether:

- male and female athletes, in proportion to their participation in athletic programs, are provided equivalently advanced competitive opportunities; or
- the institution has a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by the developing abilities among the athletes of that sex

Colleges and universities are not required to develop or upgrade an intercollegiate team if there is no reasonable expectation that competition will be available for that team within the institution's normal competitive region. However, an institution may be required to encourage development of such competition when overall athletic opportunities within that region have been historically limited for the members of one sex.

Discriminatory rules established by a governing athletic organization, or league do not relieve recipients of their Title IX responsibilities. For example, a college or university may not limit the eligibility or participation of women based on policies or requirements imposed by an intercollegiate athletic body.

ATHLETIC BENEFITS AND OPPORTUNITIES

In determining whether equal opportunities in athletics are available, the Title IX regulation specifies the following factors which must be considered

- accommodation of athletic interests and abilities (which is addressed separately in the section above);
- equipment and supplies;
- scheduling of games and practice time;
- travel and per diem allowances;
- opportunity for coaching and academic tutoring;
- assignment and compensation of coaches and tutors;
- locker rooms and other facilities;
- medical and training services;
- housing and dining services; and
- publicity.

The Title IX regulation also permits OCR to consider other factors in determining whether there is equal opportunity. Accordingly, the Policy Interpretation added recruitment of student athletes and provision of support services, since these factors can affect the overall provision of equal opportunity to male and female athletes.

The Policy Interpretation clarifies that institutions must provide equivalent treatment, services, and benefits regarding these factors. The overall equivalency standard allows institutions to achieve their own program goals within the framework of providing equal athletic opportunities. To determine equivalency for men's and women's athletic programs, each of the factors is assessed by comparing the following:

- availability;
- quality;
- kind of benefits;
- kind of opportunities; and
- kind of treatment.

Under this equivalency standard, identical benefits, opportunities, or treatment are not required. For example, locker facilities for a women's team do not have to be the same as for a men's team, as long as the effect of any differences in the overall athletic program are negligible.

If a comparison of program components indicates that benefits, opportunities, or treatment are not equivalent in quality, availability, or kind, the institution may still be in compliance with the law if the differences are shown to be the result of nondiscriminatory factors. Generally, these differences will be the result of unique aspects of particular sports or athletic activities, such as the nature/replacement of equipment and maintenance of facilities required for competition. Some disparities may be related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Difficulty in compliance will exist only if disparities are of a substantial and unjustified nature in a school's overall athletic program; or if disparities in individual program areas are substantial enough in and of themselves to deny equality of athletic opportunity. This equivalency approach allows institutions great flexibility in conducting their athletic programs and maintaining compliance without compromising the diversity of athletic programs among institutions.

FINANCIAL ASSISTANCE

To the extent that a college or university provided athletic scholarships, it is required to provide reasonable opportunities for such awards to members of each sex in proportion to the participation rate of each sex in intercollegiate athletics. This does not require the same number of scholarships for men and women or individual scholarships of equal value.

However, the total amount of assistance awarded to men and women must be substantially proportionate to their participation rates in athletic programs. In other words, if 60 percent of an institution's intercollegiate athletes are male, the total amount of aid going to male athletes should be approximately 60 percent of the financial aid dollars the institution awards.

Disparities in awarding financial assistance may be justified by legitimate, nondiscriminatory (sex-neutral) factors. For example, at some institutions the higher costs of tuition for out-of-state residents may cause an uneven distribution between scholarship aid to men's and women's programs. These differences are nondiscriminatory if they are not the result of limitations on the availability of out-of-state scholarships to either men or women. Differences also may be explained by professional decisions college and university officials make about program development. An institution beginning a new program, for example, may spread scholarships over a full generation (four years) of student athletes, thereby, awarding fewer scholarships during the first few years than would be necessary to create proportionality between male and female athletes.


ACHIEVING EQUAL OPPORTUNITY

Before the enactment of Title IX, most colleges and universities traditionally emphasized sports for male students, and the benefits and educational opportunities in athletic programs generally were limited for women. Title IX has helped focus attention on meeting the needs of women interested in athletics and helped education officials to recognize their responsibilities regarding the provision of equal athletic opportunity. The result has been increased involvement of girls and women in sports at all levels. OCR supports the efforts of education officials to comply with the requirements of Title IX by offering a program of technical assistance to institutions receiving Federal funds as well as to beneficiaries of those funds. OCR's technical assistance program is designed to provide education officials with the skills and knowledge necessary to apply the laws to their own circumstances and thereby facilitate voluntary compliance. OCR's principle enforcement activity is the investigation and resolution of discrimination complaints.

Anyone wishing additional information regarding the compliance and technical assistance program may contact the OCR regional office serving his or her state or territory. Copies of the Title IX law, regulation, and Policy Interpretation are available upon request.

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Last Modified: 03/14/2005