
AN ANALYSIS OF THE NEW CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY REGARDING PART THREE OF THE THREE- PART TEST FOR COMPLIANCE WITH THE EFFECTIVE ACCOMMODATION GUIDELINES OF TITLE IX

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INTRODUCTION

In 1972, when Congress enacted Title IX of the Education Amendments of 1972,¹ proponents of the law had various aims in mind with regard to achieving gender equity in educational institutions that receive federal financial assistance. While some had hoped that the law would “open[] the doors of our education system so that girls, young women, faculty members and administrators could fully utilize their God-given talents in the academic arena,”² others had the more pragmatic goal of filling a gap in coverage that existed between other civil-rights laws, such as Title VI and Title VII of the Education Amendments of 1964.³ Few could have predicted that the law—which has a fairly straightforward goal of ensuring that, in educational programs and activities that receive federal financial assistance, girls and women receive the same treatment as boys and men—would have spawned an entirely new field of legal specialization: gender equity in

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1. 20 U.S.C. §§ 1681–1688 (2000).

2. *Title IX and Science: Hearing on SR-253 Before the S. Subcomm. on Sci., Tech., and Space of the S. Comm. on Commerce, Sci., and Transp.*, 107th Cong. 2 (2002) (statement of Birch Bayh, Attorney and Partner, Venable, Baetjer, Howard, and Civiletti, LLP), available at <http://commerce.senate.gov/hearings/100302bayh.pdf>.

3. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-1 to -7 (2000), prohibits discrimination on the basis of race, ethnicity, and national origin both in employment and in educational programs and activities that receive federal financial assistance. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (2000), prohibits discrimination on the basis of gender in employment. Together, the two laws left a gap, and failed to prohibit discrimination on the basis of gender in educational programs and activities that receive federal financial assistance. See WELCH SUGGS, *A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX* 32–34 (2005).

intercollegiate athletic programs. Yet, more than three decades after Congress enacted the law, questions and controversies remain about what, exactly, an educational institution must do to provide an athletics program that, while accommodating men and women separately, complies with the dictates of equity.

In 1975, when the Department of Health, Education, and Welfare (HEW) issued its Title IX implementing regulations,⁴ it left the regulations intentionally vague, thus preserving institutional autonomy and allowing educational institutions “to decide for [themselves] the best means to comply with the law.”⁵ But because educational institutions really cannot determine for themselves whether their programs comply with the law,⁶ this vagueness immediately proved problematic, as educational institutions struggled to find ways to prove to the government that they operated their programs in a manner that satisfied the gender-equity aims of Title IX. Thus, almost immediately, a seemingly never-ending quest began for more definiteness in the application of the law.

In 1979, HEW issued the first clarification of Title IX as applied to intercollegiate athletics⁷—a clarification that actually has created more controversy than it has resolved. This 1979 Policy Interpretation established two separate lines of inquiry regarding gender equity in athletic programs:⁸ “effective accommodation” of student interests and abilities, which assesses whether an educational institution has provided a sufficient number of athletic opportunities for women;⁹ and “equal treatment” of female student-athletes in terms of both athletic-related financial assistance¹⁰ and the other incidents of athletic

4. See 34 C.F.R. pt. 106 (2005).

In 1979, the U.S. Congress transferred Department of Health, Education, and Welfare (HEW) responsibilities for Title IX to the Department of Education (DED) through the Department of Education Organization Act of 1979. 20 U.S.C. § 3441 (2000). DED adopted the original HEW policies as its own. *Id.*; 20 U.S.C. § 3505(a) (2000). See also Establishment of Title 34, 45 Fed. Reg. 30,802 (May 9, 1980) (establishing Title 34 of the C.F.R.). When referring to general enforcement authority under Title IX, this article refers to HEW and DED collectively as its successor agency, DED.

5. SUGGS, *supra* note 3, at 75.

6. See *id.*

7. Title IX of the Educational Amendments of 1972; A Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation].

8. Throughout this article, it is assumed that women constitute the under-represented gender in athletics participation. In 2003–04, women comprised 55% of all college and university students, but only 41% of the 494,000 college and university student-athletes. Welch Suggs, *Gender Quotas? Not in College Sports*, CHRON. HIGHER EDUC., July 1, 2005, at A24.

The National Center for Education Statistics has predicted that by 2013 women will comprise 57 to 58% of all college and university students. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, PROJECTIONS OF EDUCATION STATISTICS TO 2013, NCES 2004-013 57 (2003), available at <http://nces.ed.gov/pubs2004/2004013.pdf>. Thus, unless women's participation in intercollegiate athletics grows substantially—that is, by 25% or more—over the next decade, women will continue to be the under-represented gender in athletics participation.

9. See 1979 Policy Interpretation, *supra* note 7, at 71,417–18 (explaining the regulation at 34 C.F.R. § 106.41(c)(1) (2005)).

10. See *id.* at 71,415 (explaining the regulation at 34 C.F.R. § 106.37(c) (2005)).

participation, such as coaching, equipment, and facilities.¹¹ Most discussion of this policy interpretation has focused on the first of these two lines of inquiry—that is, how to determine “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes”¹²—because a student-athlete must have an opportunity to play a sport before she can challenge whether her educational institution has treated her properly in its athletic program. Key to this discussion is the meaning of the three-part test for evaluating effective accommodation as described in the 1979 Policy Interpretation:

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.¹³

These three criteria provide alternate means of complying with the effective accommodation requirement of the Title IX regulations. Educational institutions may select which of the three criteria to satisfy,¹⁴ and that choice may change over time as an athletic program evolves in response to changing student and institutional needs.¹⁵

11. *See id.* at 71,415–17 (explaining the regulations at 34 C.F.R. § 106.41(c)(2)–(10) (2005)).

12. 34 C.F.R. § 106.41(c)(1) (2005).

13. 1979 Policy Interpretation, *supra* note 7, at 71,418 (emphasis added).

14. According to the U.S. Department of Education’s Office of Civil Rights (DED-OCR), an educational institution “can choose which part of the [three-part] test it plans to meet.” Dep’t of Educ., *Clarification of Intercollegiate Athletics Policy Guidance* (1996), available at <http://www.ed.gov/ocr/docs/clarific.html> [hereinafter *1996 Clarification*].

Moreover, DED-OCR also “encourages schools to take advantage of [the] flexibility [of the three-part test], and to consider which of the three prongs best suits their individual situations.” Dep’t of Educ., *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidance/Final.html> [hereinafter *2003 Further Clarification*].

15. For example, an athletic program may satisfy Title IX under the second prong, the “history of continuing program expansion” test, for a number of years while the educational institution regularly adds women’s teams according to some plan. When the number of teams provides participation opportunities for women proportional to the undergraduate enrollment of women, the educational institution then would comply with Title IX under the first criterion, the

Over the years, the first of the three criteria, the “substantial proportionality” test, has received significant attention for a number of reasons. First, it provides an objective means of proving Title IX compliance. If an educational institution has a male-to-female undergraduate enrollment ratio that parallels its male-to-female student-athlete ratio, the educational institution satisfies the effective accommodation requirement of Title IX. Second, it provides a clear stopping point for actions aimed at Title IX compliance under either of the other two criteria—that is, an educational institution needs to expand its opportunities for female student-athletes only until it achieves proportionality, and the interests and abilities of its female student-athletes are presumptively satisfied when they have proportionate athletic participation opportunities. Third, it has become a controversial means of complying with Title IX. It allows (some say encourages) educational institutions to cut men’s programs, rather than to add women’s programs, to achieve numerical proportionality. Thus, even though the U.S. Department of Education’s Office of Civil Rights (DED-OCR) has stated that the three-part test “furnishes an [educational] 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,”¹⁶ many believe that the three-part test, in reality, collapses into only one test—that is, proportionality.¹⁷

In 1996, after the first round of Title IX litigation relevant to athletic programs had concluded,¹⁸ DED-OCR issued a *Clarification of Intercollegiate Athletics Policy Guidance* (1996 Clarification) to “provide[] specific factors that guide an analysis of each part of the three-part test.”¹⁹ With regard to the substantial proportionality test, the 1996 Clarification makes clear that, while exact proportionality satisfies the first criterion, “in some circumstances it may be unreasonable to expect an institution to achieve *exact* proportionality”²⁰ and, thus, the clarification discusses what the regulations mean by “substantial

“substantial proportionality” test. Or, if after a period of program expansion the educational institution has not achieved substantial proportionality but can demonstrate that it has satisfied the interests and abilities of its female students, it then would comply with Title IX under the third criterion, the “full and effective accommodations of interests and abilities” test.

16. *1996 Clarification*, *supra* note 14.

17. *See, e.g.*, SUGGS, *supra* note 3, at 130 (noting that “the [1996] clarification simply makes explicit what was implicit before”—that the “substantial proportionality” test “is the one prong that really counts”); and JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX* 38 (2002) (“In fact, say critics of the law, the three-part test of Title IX compliance is actually a one-part test: statistical proportionality.”).

18. Cases litigated in the early 1990s included a series of cases challenging cuts to women’s programs in the absence of proportionality: *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992), *aff’d*, 991 F.2d 888 (1st Cir. 1993) (preliminary injunction), and 879 F. Supp. 185 (D.R.I. 1995), *aff’d in part, rev’d in part*, 101 F.3d 155 (1st Cir. 1996) (trial on the merits), *cert. denied*, 520 U.S. 1186 (1997); *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); and *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993). Additionally, at least one case in that time-frame challenged Title IX compliance efforts that involved cuts to men’s programs: *Kelley v. Bd. of Trs. of the Univ. of Ill.*, 35 F.3d 265, 268 (7th Cir. 1994).

19. *1996 Clarification*, *supra* note 14.

20. *Id.* (emphasis added).

proportionality.” It explains that a determination of substantial proportionality “depends on the institution’s specific circumstances and the size of its athletic program,”²¹ and indicates that DED-OCR makes a determination of substantial proportionality “on a case-by-case basis, rather than through [the] use of a statistical test.”²² The 1996 Clarification also provides arithmetic examples of circumstances in which an educational institution might be required to add a women’s team to achieve proportionality, along with examples of when it might not.²³

The 1996 Clarification becomes less and less practically useful as it moves into the discussions of the second and third criteria of the effective accommodation test. In explaining the “history and continuing practice of program expansion” criterion, the 1996 Clarification lists factors that DED-OCR will consider when evaluating a program for compliance under this criterion, and provides examples of practices that would and would not comport with Title IX’s gender-equity mandate.²⁴ It does not, however, present any exacting formulae or objective standards against which to evaluate compliance. Consequently, the clarification leaves the determination of compliance on the basis of this criterion totally (and understandably uncomfortably) outside the realm of institutional control. The discussion of the “interests and abilities” criterion leaves even more to be desired because it merely presents the factors to examine in determining compliance, and does not provide either any objective means of complying with this criterion or any examples of practices that do and do not satisfy the effective accommodation requirements of the law.²⁵

In 2002, coincident with the thirtieth anniversary of the passage of Title IX, Secretary of Education Rod Paige convened the Secretary of Education’s Commission on Opportunity in Athletics to study the state of Title IX compliance and enforcement in athletic programs. In February of 2003, the commission issued its report, *Open to All: Title IX at Thirty*, which presented a number of recommendations to improve the application of Title IX to athletics programs.²⁶ Secretary Paige announced that DED-OCR would “‘move forward’ on only the 15 [of the twenty-four] recommendations that received unanimous approval from the commissioners.”²⁷ In response to the report, on July 11, 2003, DED-OCR issued yet another clarification, entitled *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (2003 Further Clarification).²⁸

21. *Id.*

22. *Id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. U.S. DEP’T OF EDUC., SECRETARY’S COMM’N ON OPPORTUNITY IN ATHLETICS, OPEN TO ALL: TITLE IX AT THIRTY (2003) [hereinafter 2003 COMMISSION REPORT]. For an analysis of the commission’s work, see Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75 (2003).

27. Welch Suggs, *Cheers and Condemnation Greet Report on Gender Equity*, CHRON. HIGHER EDUC., March 7, 2003, at A40.

28. 2003 Further Clarification, *supra* note 14.

Rather than presenting a broad policy statement that adopted all of the commission's unanimous recommendations, this short document focused on the concerns surrounding the quest for substantial proportionality and directly addressed only six of the fifteen recommendations approved unanimously by the commissioners.²⁹ Particularly, the 2003 Further Clarification reiterated that the three-part test remains the standard for determining whether an educational institution has effectively accommodated the interests and abilities of its under-represented student-athletes, and explained that an educational institution may choose which of the three criteria it intends to pursue to achieve compliance. It also explained that the transmittal letter that accompanied the 1996 Clarification had erroneously deemed only the "substantial proportionality" criterion a "safe harbor."³⁰ This represented a slight, almost imperceptible, and, in the absence of any other objective method of proving Title IX compliance, ultimately meaningless shift in the stated policy of President George W. Bush's administration from that of President Bill Clinton's.

One of the unanimously approved recommendations not addressed in the 2003 Further Clarification, Recommendation 19, stated the following:

[DED-OCR] should study the possibility of allowing institutions to demonstrate that they are in compliance with the third part of the three-part test by comparing the ratio of male/female athletic participation at the institution with the demonstrated interests and abilities shown by regional, state or national youth or high school participation rates or national governing bodies, or by the interest levels indicated in surveys of prospective or enrolled students at that institution.³¹

As explained in the 2003 Commission Report, "[t]his recommendation provides another way for schools to *quantify compliance* with the three-part test"³²—a statement that clearly expressed a common need for further guidance on how to satisfy the interests and abilities criterion of the three-part test for effective accommodation.

Additionally, Recommendation 18, which passed by a vote of only ten to five,³³ stated:

29. *Id.* The 2003 Further Clarification directly addressed: Recommendation 1, which calls for DED-OCR to reaffirm its strong commitment to equal opportunity; Recommendation 3, which calls for clearer guidelines and a national education effort on the subject of Title IX compliance; Recommendation 4, which asks DED-OCR not to change current compliance and enforcement policies in ways that would undermine the progress that has been made for women in athletics; Recommendation 5, which calls on DED-OCR to make clear that cutting teams is not a preferred method of complying with the law; Recommendation 6, which calls for DED-OCR to enforce the law aggressively but also pursue ways of encouraging compliance; and Recommendation 21, which calls for DED-OCR to abandon the "safe harbor" designation of the first prong of the benchmark test for effective accommodation. *2003 Commission Report, supra* note 26, at 33–34, 39. *See* Pieronek, *supra* note 26, at 168–72.

30. *2003 Further Clarification, supra* note 14.

31. 2003 COMMISSION REPORT, *supra* note 26, at 39.

32. *Id.* (emphasis added).

33. *Id.* at 65.

[DED-OCR] 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. [DED-OCR] should *specify the criteria* necessary for conducting such a survey in a way that is clear and understandable.³⁴

The report explains that those who voted in favor of this recommendation “wanted to preserve for [DED-OCR] the opportunity to determine whether the use of interest surveys might be feasible in allowing schools to demonstrate compliance with the three-part test,”³⁵ while those who voted against it “believed that since interest levels change, interest surveys could never adequately capture student interest in athletics.”³⁶

In these two recommendations, the commission identified one of the key problems with the 1975 regulations, as well as with the 1979 Policy Interpretation and the 1996 Clarification—specifically, that these sources do not provide sufficient guidance that gives educational institutions a clear, objective, and straightforward way of determining compliance with the effective accommodation requirements of the law under the “interests and abilities” criterion of the three-part test. The 2003 Commission Report explains this concern:

With regard to the third part of the test, some [educational] administrators express confusion about the possibility of using interest surveys to periodically determine levels of student interest in athletics, which then must be met with matching levels of athletic opportunity. In addition, schools expressed some concern about whether they must approve every request for recognition of a new women's team regardless of financial limitations to accommodate student interests. Thus, some witnesses have argued that if an educational institution is involved with litigation for dropping or failing to add a women's team, that fact alone would preclude a finding that they had accommodated student interest.³⁷

Educational administrators had good reason to express concern over how to comply with the “interests and abilities” criterion, particularly in light of some of the early Title IX lawsuits in which courts determined that, in the absence of substantial proportionality, when a college or university dropped a viable women's team (typically in those cases for financial reasons), it could not claim Title IX compliance under the “interests and abilities” criterion.³⁸ The commission's

34. *Id.* at 38 (emphasis added).

35. *Id.* at 65.

36. *Id.*

37. *Id.* at 26.

38. *See, e.g.,* Cohen v. Brown Univ., 991 F.2d 888, 904 (1st Cir. 1993) (“Although the full and effective accommodation of athletic interests is likely to be a complicated issue where allegedly underrepresented plaintiffs sue to force a university to create a neoteric team or upgrade the status of a club team, there is unlikely to be any comparably turbid question as to interest and

recommendations acknowledge these concerns. Consequently, the report asks DED-OCR for further guidance on complying with the “interests and abilities” criterion of the three-part test.

Finally, on March 17, 2005, DED-OCR answered the commission’s request with yet another clarification, the *Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test—Part Three*.³⁹ At a total of 177 pages, this 2005 *Additional Clarification* looks daunting and seems unreadable. Actually, however, it comprises four documents: a prefatory three-page transmittal letter (Transmittal Letter); a readable, thirteen-page statement of the clarification (2005 Additional Clarification); a *User’s Guide to Developing Student Interest Surveys Under Title IX* (User’s Guide), which also presents and explains a Model Survey to assess student athletic interest;⁴⁰ and a background document entitled *Title IX Data Collection: Technical Manual for Developing the User’s Guide* (Technical Manual).⁴¹ The Transmittal Letter and the thirteen-page clarification summarize the concepts relevant to conducting the survey detailed in the User’s Guide, while the Technical Manual provides a detailed explanation of the statistical methods behind the survey development.

This article examines the 2005 Further Clarification and what the Model Survey means for educational institutions attempting to comply with the effective accommodation requirements of Title IX by satisfying the athletic interests and abilities of students of the underrepresented gender. Part I summarizes the information contained in the Transmittal Letter and the 2005 Additional Clarification, and discusses what these documents say about using a survey—in particular, the Model Survey—to comply with the “interests and abilities” criterion. Part II looks at the User’s Guide, which explains the development and use of the Model Survey instrument. Both parts bring in information from the Technical Manual where necessary to explain how to administer the survey

ability where, as here, plaintiffs are seeking merely to forestall the interment of healthy varsity teams.”) (internal citation omitted). See also *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa. 1993), *aff’d*, 7 F.3d 332 (3d Cir. 1993) (discussing how the defendant university failed to satisfy the requirements of the third criterion when it dropped two viable women’s teams because of financial considerations); *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1517 (D. Colo. 1993), *aff’d in part, rev’d in part sub nom. Roberts v. Colo. State Bd. Of Agric.*, 998 F.2d 824 (10th Cir. 1993) (discussing how “the demonstrable interest in the varsity opportunities being eliminated” forecloses the defendant university’s ability to satisfy the “interests and abilities” criterion).

39. U.S. Dep’t of Educ., *Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test – Part Three* (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter *Transmittal Letter* and *2005 Additional Clarification*]. One wonders whether DED-OCR will someday soon run out of synonyms for “yet another.”

40. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *USER’S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX*, NCES 2005-173 (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter *USER’S GUIDE*].

41. ALAN F. KARR & ASHISH P. SANIL, NATIONAL INSTITUTE OF STATISTICAL SCIENCES, *TITLE IX DATA COLLECTION: TECHNICAL MANUAL FOR DEVELOPING THE USER’S GUIDE*, Technical Report No. 150 (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter *TECHNICAL MANUAL*].

properly and how to interpret the results.⁴² Part III explores the public criticisms of the clarification and raises some questions that educational institutions should ask themselves before deciding whether to use the Model Survey on their campuses. The discussion also attempts to discern whether the new policy clarifications will help or hurt colleges and universities in their quest for Title IX compliance.

I. TRANSMITTAL LETTER AND 2005 ADDITIONAL CLARIFICATION

The Transmittal Letter accompanying the 2005 Additional Clarification provides a top-level summary of the information presented in more detail in the clarification itself.⁴³ It sets out the general framework of the 2005 Additional Clarification and presents the highlights of this new policy statement.⁴⁴ As with the 1996 and 2003 clarifications, the Transmittal Letter carefully points out “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.”⁴⁵ But the letter also presents two new concepts, perhaps implicitly understood but never before explicitly stated elsewhere. First, it points out the “flexibility” of the “interests and abilities” test,⁴⁶ meaning both that the Model Survey (or, in fact, *any* survey) does not represent the only way of complying with the effective accommodation requirements of Title IX under this criterion, and that professional judgment will inform the survey results. Second, it states clearly that “*each part* of the three-part test is a safe harbor”⁴⁷—reiterating more directly the 2003 Further Clarification’s correction of the 1996 Clarification, which had given the “safe harbor” designation to only the “substantial proportionality” criterion.⁴⁸

The Transmittal Letter points out that the 2005 Additional Clarification “outlines specific factors that guide [DED-OCR’s] analysis of the third option for compliance with the ‘three-part test’”⁴⁹ and “provide[s] further guidance on

42. This article does not delve too deeply into the Technical Manual, because that lengthy document provides a great deal of background information that the User’s Guide summarizes in a more useful format. Additionally, in some cases, the Technical Manual makes recommendations not adopted in the User’s Guide. Exploring the Technical Manual in those instances would only confuse any discussion about the requirements for using the Model Survey. Should an educational institution decide to develop its own survey or to continue to use a survey that it has used in the past, however, the information in the Technical Manual should prove useful for identifying and correcting any common, identifiable flaws in these other types of surveys.

43. *Transmittal Letter*, supra note 39.

44. *Id.*

45. *Id.* at 3.

46. *Id.* at 1.

47. *Id.* at 3 (emphasis added).

48. See, e.g., *1996 Clarification*, supra note 14. The transmittal letter accompanying this clarification states: “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.” *Id.* Interestingly, however, the clarification itself does not contain this or similar language.

49. *Transmittal Letter*, supra note 39, at 1.

recipients' obligations under the three-part test, which was described only in very general terms in the [1979] Policy Interpretation, and . . . further help[s] institutions appreciate the flexibility of the test."⁵⁰ The 2005 Additional Clarification itself "explain[s] some of the factors that [DED-OCR] will consider when investigating a recipient's program in order to make a Title IX compliance determination under the third part of the three-part test."⁵¹ Specifically, in the absence of substantial proportionality, an educational 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.⁵²

Thus, the 2005 Additional Clarification clearly states a *presumption of compliance* with Title IX under the "interests and abilities" criterion, *unless* all three of the above conditions exist. It further characterizes these three conditions as "essential prerequisite[s] for determining a school's Title IX obligation to create a new intercollegiate varsity team or elevate an existing club team to varsity status."⁵³ It also explicitly states that, "[w]hen one or more of these conditions is *absent*, a school is in compliance with part three."⁵⁴

Much of the 2005 Additional Clarification and accompanying documents discuss the use of surveys—specifically, the Model Survey included in the User's Guide—to assess students' athletic interests and abilities.⁵⁵ It is important to note, however, that the Model Survey does not *prove* compliance with the "interests and abilities" criterion. Rather, the survey enables an educational institution to identify whether unmet interest in particular sports or teams exists on campus. And, in fact, in terms of *proving* anything relevant to the "interests and abilities" criterion, the clarification actually places the burden of rebutting the stated presumption of compliance "on [DED-OCR] (in the case of a [DED-OCR] investigation or compliance review), or on students (in the case of a complaint filed with the

50. *Id.*

51. *Id.* at 2.

52. *Id.* This language echoes similar language in the 1996 Clarification. *See 1996 Clarification, supra* note 14. *See also 2005 Additional Clarification, supra* note 39, at 4.

53. *2005 Additional Clarification, supra* note 39, at 4.

54. *Id.* (emphasis added).

55. The Technical Manual also discusses the rise in the use of surveys to prove compliance, and notes that the use of surveys has become increasingly common over time. For example, from 1990 to 1996, of the educational institutions in the DED-OCR group that complied with Title IX under the "interests and abilities" criterion, the percentage that used surveys ranged from a low of 38% in 1994 (three of eight) to a high of 75% in 1991 and 1995 (three of four in each of those years). From 1997 to 2001, however, that percentage ranged from a low of 80% in 2000 (four of five) to a high of 100% in 1997, 1998, and 2001 (three, seven, and three, respectively). TECHNICAL MANUAL, *supra* note 41, at 19–21.

institution under its Title IX grievance procedures).⁵⁶ By placing the burden of proving noncompliance on the challenger,⁵⁷ this new clarification may help to clear up a split in the federal courts, which have variously allocated the burden of proof for the “interests and abilities” test either to the defendant-institution⁵⁸ or to

56. *Transmittal Letter*, *supra* note 39, at 2. *See also 2005 Additional Clarification*, *supra* note 39, at 4 (“There must be *actual evidence* of unmet interests and abilities among the underrepresented sex.” (emphasis added)).

57. Note, however, that Arthur L. Coleman, deputy assistant secretary for civil rights at DED during the Clinton Administration, believes that the burden of proof has always rested with DED-OCR in investigations conducted by that office: “‘Broadly speaking, this tracks precisely with what [DED-OCR] put out in [the 1996 Clarification],’ said Mr. Coleman . . . ‘The material shift here is less one about substantive legal standards than issues of evidence, and how [DED-OCR] will address issues in the middle of an investigation.’” Welch Suggs, *New Policy Clarifies Title IX Rules for Colleges: Women’s Group Objects*, CHRON. HIGHER EDUC., Apr. 1, 2005, at A47. *See also 1996 Clarification*, *supra* note 14.

But this belief does not, in fact, reflect the standards that DED-OCR had set out in its own manual on Title IX investigations, which explains to DED-OCR investigators how to evaluate whether an educational institution complies with the effective accommodation requirements of Title IX under the “interests and abilities” test: “If the [educational] institution has not conducted a survey or used another method for determining interests and abilities[,] and cannot *demonstrate* that the current [athletic] program equally effectively accommodates interests and abilities, then [DED-OCR] must determine to what degree the current program accommodates interests and abilities.” DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 25 (Valerie M. Bonnette & Lamar Daniel eds., 1990) (emphasis added) [hereinafter 1990 INVESTIGATOR’S MANUAL]. This somewhat tautological procedure first places the burden on the educational institution to demonstrate compliance, and then explains that, if the educational institution cannot show compliance, a DED-OCR investigator must evaluate particular aspects of the educational institution’s athletic program to determine compliance. Thus, if the educational institution cannot prove compliance, DED-OCR must evaluate compliance.

Furthermore, as explained *infra* notes 58–59, courts that decided Title IX cases in the early 1990s variously allocated the burden of proof to the defendant educational institution or to the student-plaintiffs, depending on the circumstances of the case. Thus, it is not clear whether courts, in evaluating compliance in cases brought after DED-OCR issued the 2005 Additional Clarification, will allocate the burden of proof based on precedent within the relevant federal circuit, or will give *Chevron* deference to DED-OCR’s interpretation of its own policies. For example, in *Cohen*, the First Circuit decided to give “controlling weight” to the 1975 Implementing Regulations and “substantial deference” to the 1979 Policy Interpretation, stating that, “where . . . Congress has expressly delegated to an agency the power to ‘elucidate a specific provision of a statute by regulation,’ the resulting regulations should be accorded ‘controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.’” *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). Although the 1990 Investigator’s Manual, 1996 Clarification, 2003 Further Clarification, or 2005 Additional Clarification might not fit the definition of a “regulation” for the purposes of applying *Chevron*, “[i]t is [also] well established ‘that an agency’s construction of its own regulations is entitled to substantial deference.’” *Id.* (quoting *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150 (1984)). Thus, the question remains whether the courts will rely on their own relevant precedents or whether the courts will look at DED-OCR pronouncements on the subject and, if the latter, which of these pronouncements will control.

58. The Third, Fifth, and Seventh Circuits allocate this burden to the defendant institution. *See Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa. 1993), *aff’d*, 7 F.3d 332 (3d Cir. 1993) (“Defendants bear the burden of proof with respect to the second and third prongs.”);

the student-plaintiffs.⁵⁹ It also, however, appears to represent a departure from prior DED-OCR interpretations of the use of surveys, because surveys have been used to do more than merely assess interest and ability—they have been used to prove compliance with Title IX in DED-OCR investigations. As the Technical Manual explains, of the 130 Title IX investigations conducted by DED-OCR between 1992 and 2002 (ninety-five of which arose from complaints filed with DED-OCR and thirty-five of which arose from DED-OCR compliance-monitoring efforts), eighty-six (66.2%) complied with the effective accommodation requirements by satisfying the “full and effective accommodation of interests and abilities” criterion, and fifty-seven of those eighty-six (66.3%) used surveys to demonstrate compliance.⁶⁰

The 2005 Additional Clarification also sets out the standard that the challenger must meet to rebut the presumption of compliance. Specifically, the challenger must present “*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.”⁶¹

Pederson v. La. State Univ., 213 F.3d 858, 878–79 (5th Cir. 2000) (finding that “the district court correctly found that LSU . . . had not presented credible evidence regarding the interests and abilities of its student body”); Kelley v. Bd. of Trs. of the Univ. of Ill., 35 F.3d 265, 268 (7th Cir. 1994) (“If substantial proportionality has not been achieved, a school must demonstrate . . . that its existing programs effectively accommodate the interests of that sex . . .”).

59. The First, Sixth, Ninth, and Tenth Circuits allocate this burden to the party challenging the defendant-institution’s actions. See Cohen v. Brown Univ., 991 F.2d 888, 901–02 (1st Cir. 1993) (citing 1979 Policy Interpretation, *supra* note 7, at 71,418) (“[T]he plaintiff must prove that the underrepresented gender has not been fully and effectively accommodated by the present program.”); Horner v. Ky. High Sch. Athletic Ass’n, 206 F.3d 685, 696 (6th Cir. 2000) (indicating that the plaintiffs bear the burden of proof on the “interests and abilities” criterion); Neal v. Bd. of Trs. of the Cal. State Univ., No. CV-F-97-5009RECSMS, 1997 WL 1524813, at *13 (E.D. Cal. Dec. 26, 1997) (“The Policy Interpretation presents ways in which plaintiffs may show that a school has violated Title IX; it does not speak to ways by which an institution can show compliance with Title IX.”); Roberts v. Col. State Bd. of Agric., 998 F.2d 824, 831 (10th Cir. 1993) (“[W]e hold that the district court improperly placed the burden of proof on [the] defendant [institution].”).

60. TECHNICAL MANUAL, *supra* note 41, at 6.

Note that a data discrepancy exists between the User’s Guide, which indicates that nineteen educational institutions did not conduct a survey, USER’S GUIDE, *supra* note 40, at 3, and the Technical Manual, which indicates that twenty-nine did not conduct a survey, TECHNICAL MANUAL, *supra* note 41, at 5–6.

61. *Transmittal Letter*, *supra* note 39, at 2–3 (emphasis added). See also *2005 Additional Clarification*, *supra* note 39, at 6 (“[DED-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.”).

The terms “very persuasive evidence” and “broad-based petition” may seem somewhat vague—language perfect for clever lawyers to exploit. To interpret these terms, however, DED-OCR and the courts can turn to precedents in long-standing Title IX cases. In *Cohen*, for example, the district court found that Brown University had failed the “interests and abilities” test by downgrading two viable university-funded varsity women’s teams to unfunded varsity status as a budget-saving measure. Cohen v. Brown Univ., 809 F. Supp. 978, 992 (D.R.I. 1992), *aff’d*, 991 F.2d 888 (1st Cir. 1993) (preliminary injunction), and 879 F. Supp. 185 (D.R.I. 1995), *aff’d*

The 2005 Additional Clarification explains that “[d]irect evidence is actual evidence that is not circumstantial.”⁶² For example:

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.⁶³

Despite the fact that educational institutions enjoy a presumption of compliance with the Title IX effective accommodation requirements under the “interests and abilities” criterion and, consequently, need not engage in any action to prove compliance, educational institutions interested in assuring themselves that their athletic programs comply with Title IX may find such a survey useful. More importantly, such a survey may also point out that an educational institution has *not yet satisfied* the athletic interests and abilities of its female students, and could provide guidance regarding the types of teams or sports or other athletic opportunities to add.

To assist those educational institutions that, whatever their motivation, choose

in part, rev'd in part, 101 F.3d 155 (1st Cir. 1996) (trial on the merits), *cert. denied*, 520 U.S. 1186 (1997). In 1992, the *Cohen* district court found persuasive evidence of the existing interests and abilities of the female student-athletes on the two downgraded teams:

Both the women's gymnastics and volleyball teams have competed as varsity intercollegiate teams since 1974. More importantly, . . . these two teams were viable varsity squads when they were demoted in May 1991. The women's gymnastics team, for example, won the Ivy League championship in 1990. That same year, [one Brown student] was the individual “all-around” Ivy League gymnastics champion, and was named rookie of the year in the East Coast Athletic Conference. Many of the individual plaintiffs who testified described in detail their dedication to sports and their years of training prior to matriculating at Brown.

Id. See also *Cohen v. Brown Univ.*, 180 F.3d 155, 180 (1st Cir. 1996) (“[W]hile the question of full and effective accommodation of athletics interests and abilities is potentially a complicated issue where plaintiffs seek to create a new team or to elevate to varsity status a team that has never competed at the varsity level, no such difficulty is presented here, where plaintiffs seek to reinstate what were successful university-funded teams right up until the moment the teams were demoted.”).

The *Cohen* district court also explained when an educational institution might have to add a team in response to a petition from student-athletes:

[S]ome evidence was suggested that other women's teams besides gymnastics and volleyball have been, and continue to be, qualified to compete at the varsity level. At this preliminary stage [of the proceedings], I am not in a position to rule definitively on the varsity capabilities of other teams. Nor do I believe that Brown's violation of the three-part test requires it to simply create new women's varsity teams at the request of any students. Rather, Brown may consider the *expressed interests* of the students, whether there are *sufficient numbers of athletes* to form a team, and whether there is a *reasonable expectation of intercollegiate competition* for that team.

Cohen, 809 F. Supp. at 992 (emphasis added). Thus, while a broad-based petition from students might encourage an educational institution to consider adding a particular team, many other factors should also inform that decision.

62. 2005 Additional Clarification, *supra* note 39, at 6 n.10.

63. *Id.* (emphasis added).

to conduct a survey to assess interests and abilities, the 2005 Additional Clarification and accompanying documents also provide detailed guidelines on the use of “questionnaires or surveys to measure student athletic interest as part of their assessment” process.⁶⁴ Any well-constructed and properly administered survey might provide the necessary information. However, the Transmittal Letter also states that, if an educational institution uses the Model Survey provided in the User’s Guide, and if the educational institution administers the survey in a manner consistent with the recommendations in the User’s Guide, “institutions *can rely on* [this Model Survey] as an acceptable method to measure students’ interests in participating sports.”⁶⁵ More explicitly, “[when Model Survey] results . . . show *insufficient interest to support an additional varsity team* for the underrepresented sex[, this] 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.”⁶⁶

To address presumptively any complaints that educational institutions could use the survey results to justify curtailing athletic participation opportunities for women,⁶⁷ the 2005 Additional Clarification states that the survey has relevance only in determining whether to *add* a new team for students of the underrepresented gender. It specifically states that educational institutions

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 [already] expressed interest in 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.⁶⁸

The Model Survey provides a clear method for an educational institution to determine with reasonable certainty whether evidence exists to rebut the first of the three essential prerequisites for rebutting the presumption of compliance with the “interests and abilities” criterion—that is, whether sufficient student interest exists to warrant the consideration of adding a new team.⁶⁹ Students who express interest in a particular sport are counted among students with interest, while those who do not express interest or who do not respond to the survey at all evidence an “actual

64. *Transmittal Letter*, *supra* note 39, at 2.

65. *Id.* (emphasis added).

66. *Id.* (emphasis added).

67. See, e.g., National Women’s Law Center, *The Department of Education’s “Clarification” of Title IX Policy Undermines the Law and Threatens the Gains Women and Girls Have Made in Sports* (2005), available at http://www.nwlc.org/pdf/FactSheet_Prong_3_1.pdf [hereinafter *NWLC April 2005 Statement*]. Among other charges leveled against the 2005 Additional Clarification in this and similar press releases from other organizations, critics fear that it “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.” *Id.* at 3. This simply does not reflect an accurate interpretation of the clarification.

68. *2005 Additional Clarification*, *supra* note 39, at 8.

69. *Id.* at 5–9.

lack of interest”⁷⁰ as long as “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 school will take nonresponse as an indication of lack of interest.”⁷¹ The 2005 Additional Clarification also explains how to satisfy these three survey administration criteria. First, it recommends that any survey be administered to the entire undergraduate student body, rather than to a random sampling of students,⁷² although it does permit an educational institution to administer the survey only to students of the underrepresented gender.⁷³ Second, it suggests some ways to “generate high response rates,”⁷⁴ including by administering the survey during the registration process or by e-mailing a Web link to the survey to the entire survey target population.⁷⁵ It also states that “students must . . . 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.”⁷⁶

Thus, the Model Survey gives an educational institution a way to determine the *number* of students interested in varsity athletic opportunities. And with its list of “all varsity sports, including ‘emerging sports,’ currently recognized by the three national athletic associations to which most schools belong,”⁷⁷ the Model Survey gives students the opportunity to identify which sports interest them.

Interpreting the results of the Model Survey does require some professional judgment, though, in determining whether the number of students interested in a sport is sufficient to sustain a competitive team in that sport. For this, DED-OCR will “*defer[]* to the decisions of the athletic directors and coaches,”⁷⁸ who “generally have the experience with the mechanics and realities of operating a team to . . . decide the number of students needed to establish teams by sport.”⁷⁹ Factors to consider in this regard include “the average size of teams in a particular sport, . . . rate of substitutions, . . . variety of skill sets required for competition[,]

70. *Id.* at 7.

71. *Id.* at 6 (citing USER’S GUIDE, *supra* note 40, at 12). Interestingly, however, the User’s Guide points out:

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.

USER’S GUIDE, *supra* note 40, at 8.

72. 2005 *Additional Clarification*, *supra* note 39, at 5 (“[A] census is superior to a sample in almost every respect for purposes of assessing student interest under part three of the three-part test.”).

73. *Id.* at 6 (“[A]n 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.”).

74. *Id.* at 7.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 11 (emphasis added).

79. *Id.*

and effective practices for skill development.”⁸⁰ As an example, a basketball team may have only five players on the floor during a game, but “[t]o have effective practice to simulate regulation play, . . . [the team] may need twice the number of participants than are permitted on the court.”⁸¹ Competitive pressures in the region may add to this baseline number, while athletic-organization regulations may impose some limitations. Thus, if only five women with appropriate skills desire a varsity basketball team, an educational institution would not have to add that team if the norm in the competitive region required ten to fifteen players on a team.⁸²

If the number of students who indicate interest in a particular sport is not enough to sustain a new varsity team in that sport, the inquiry ends there. If, however, it appears that a sufficient number of students does have interest, the inquiry then moves on to whether the students have the ability to compete in that sport. At this point, the analysis becomes less straightforward, as professional judgments begin to play a bigger role.⁸³ The need to exercise professional judgment does render this test less precise than the numerically straightforward substantial proportionality test, but the 2005 Additional Clarification does give some reassurances in this regard. In assessing the existence of sufficient student ability, DED-OCR will presume valid the assessments of athletic directors and coaches, “provided the methods used to assess ability are adequate and evaluate whether the students have sufficient ability to sustain an intercollegiate varsity team.”⁸⁴ Moreover, DED-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.”⁸⁵ Thus, a student who self-assesses no ability to play lacrosse is presumed not to have the ability to play lacrosse, regardless of any expressed interest in playing on a lacrosse team.

With regard to whether there exists a reasonable expectation of intercollegiate competition for the team, DED-OCR “will look at available competitive opportunities in the geographic area in which the institution’s athletes primarily compete”⁸⁶—an analysis that an educational institution also can undertake for itself, based on the competitive region for its existing teams and certain other

80. *Id.*

81. *Id.* at 11–12.

82. See USER’S GUIDE, *supra* note 40, at 9.

83. 2005 Additional Clarification, *supra* note 39, at 9–11.

A further complicating factor in such an analysis occurs because, “confidentiality is essential to obtaining high quality data and to achieving acceptable response rates.” USER’S GUIDE, *supra* note 40, at 11. With a confidential survey, how can an educational institution identify the students who have expressed interest to determine whether they have the ability to compete on a particular team? The Model Survey does provide one solution, by asking students who have expressed an interest in a particular sport to provide name and contact information for further follow-up from the relevant coach or other athletic department administrator. *Id.* at 14. Or, after identifying a sport for which a sufficient number of students have expressed interest, an educational institution may simply put an advertisement in the school newspaper or send out an e-mail notifying students of a meeting they can attend to get more information.

84. 2005 Additional Clarification, *supra* note 39, at 9.

85. *Id.* at 10.

86. *Id.* at 12.

practicalities. An educational institution need not create a team “absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution’s normal competitive region,”⁸⁷ but might “be required . . . to encourage the development of such competition as part of a resolution agreement or remedy.”⁸⁸ A university in Miami, Florida, for example, need not offer a downhill snow-skiing team, even when survey respondents have expressed sufficient interest and demonstrate appropriate ability, because of the obvious difficulties in finding suitable competition and practice areas nearby. A college located in Lincoln, Nebraska, whose normal competitive region includes the Rocky Mountains and whose students have expressed sufficient interest in and ability to compete in snow skiing, also need not field that team if doing so would require that students travel an unreasonable distance to the Rocky Mountains simply to practice.⁸⁹ However, an educational institution in northern Michigan that does not have a snow-skiing team and has not satisfied the interests and abilities of its female students, who have expressed sufficient interest in and ability to compete in snow skiing, may have to try to create an appropriate competitive environment within its geographic region in order to develop a team to satisfy the expressed interests and abilities of these students. The 2005 Additional Clarification points out that such professional judgments must be reasonable.⁹⁰

The 2005 Additional Clarification states, in a clear and direct manner, several key points about the “interests and abilities” criterion:

- First, absent substantial proportionality, an educational institution will be found in compliance with the “interests and abilities” criterion *unless* all three essential prerequisite conditions exist.⁹¹ The party challenging the educational institution’s athletic programs—whether DED-OCR in response to a complaint or in a compliance audit, or student-plaintiffs in a complaint proceeding or lawsuit—must prove the existence of these conditions.⁹² It is important to note, however, that the recent elimination of a viable team or a broad-based petition for elevation of an existing club team to varsity status, may overcome this presumption of compliance.⁹³ Thus, an educational institution should weigh decisions on such actions very carefully.⁹⁴
- Second, again in the absence of substantial proportionality, DED-OCR will presume that an educational institution that properly administers the Model Survey provided with the 2005 Additional Clarification, and finds insufficient interest to sustain a varsity team

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 2.

92. *Id.* at 3–4.

93. *Id.* at 2–3.

94. *Id.* at 7.

for the underrepresented gender, complies with the effective accommodation requirements of Title IX, absent other clear and direct evidence of such unmet interest.⁹⁵

- Third, an educational institution need not take affirmative steps to generate interest in athletics among women,⁹⁶ presumably in order to find ways to add teams ultimately to achieve proportionality.⁹⁷ If, however, interest and ability in a sport exist, and if creating a team in that sport appears reasonable given all of the conditions of competition in the region, the educational institution may have an affirmative duty to try to create an appropriate competitive environment that fosters the successful development of that particular team.⁹⁸
- Finally, and most interestingly, the 2005 Additional Clarification revives the “safe harbor” language first presented explicitly in the 1996 Clarification⁹⁹ and later refuted explicitly in the 2003 Further Clarification.¹⁰⁰ Unable, apparently, to dissuade educational institutions and the public from the notion that a “safe harbor” for Title IX compliance must exist, the Transmittal Letter states that “each part of the three-part test is a safe harbor,”¹⁰¹ and explains 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,”¹⁰² while the clarification itself states that “each part of the three-part test is a safe harbor, and no part is favored by OCR.”¹⁰³ It remains to be seen, however, whether these assurances will change public thinking on what constitutes a true “safe harbor.”

Through the 2005 Additional Clarification, DED-OCR has established the “interests and abilities” criterion as yet another “safe harbor” in Title IX compliance, with a presumption of compliance that favors the educational institution. And although an educational institution need not conduct any survey to prove compliance with the “interests and abilities” criterion, DED-OCR evidently hopes that this approved survey instrument will inspire educational institutions

95. *Id.*

96. *Id.* at 5.

97. Interestingly, this runs counter to the unanimously approved Recommendation 7 of the Secretary of Education’s 2003 Commission Report, which calls on DED to “encourage educational and sports leaders to promote male and female student interest in athletics at the elementary and secondary levels to encourage participation in physical education and explore ways of encouraging women to walk on to teams.” 2003 COMMISSION REPORT, *supra* note 26, at 34–35.

98. 2005 Additional Clarification, *supra* note 40, at 12.

99. See *supra* note 48 and accompanying text.

100. See *supra* text accompanying note 30.

101. Transmittal Letter, *supra* note 39, at 3.

102. *Id.*

103. Additional Clarification, *supra* note 39, at 1.

both to engage in a self-assessment process to assure themselves that they have, in fact, complied with the law and the regulatory scheme, and to have confidence in the results of that survey process.

II. THE MODEL SURVEY, THE USER'S GUIDE AND THE TECHNICAL MANUAL

At the request of DED-OCR, the National Center for Education Statistics (NCES) produced the Model Survey and the User's Guide that accompany the 2005 Additional Clarification "to provide guidance on conducting a survey of student interest" relevant to the "interests and abilities criterion" of the three-part test for effective accommodation.¹⁰⁴ Using data gathered by the National Institute of Statistical Sciences (NISS) and presented in the Technical Manual, NCES developed a Web-based Model Survey that DED-OCR has determined meets the requirements of the law, as explained in the 2005 Additional Clarification.¹⁰⁵ The User's Guide presents the Model Survey in detail sufficient to facilitate proper administration of the survey instrument, while the Technical Manual provides more detailed background information on the concepts described in the User's Guide and on the statistical theories underlying the development of the Model Survey.

The User's Guide presents a Web-based Model Survey consisting of eight screens that gather information on student interests and abilities in varsity athletics, as follows:

- Screen 1 introduces the survey, informs students of its purpose, provides an explicit confidentiality statement and explains the structure of the survey.¹⁰⁶
- Screen 2 requests four demographic facts: student age, year in school, gender, and full- or part-time status.¹⁰⁷
- Screen 3 explains the questions on athletic experience, participation, and ability, and allows students with no athletic interest to complete the survey by exiting without having to answer any other questions.¹⁰⁸
- Screen 4 provides some definitions and an explanation of the survey to follow on the subsequent screens.¹⁰⁹
- Screen 5 asks the students to select those sports for which the student wishes to provide more information on subsequent screens, to allow the survey to "reduce the size and complexity of screen 6, on which the information is actually entered."¹¹⁰ In other words, rather than asking

104. USER'S GUIDE, *supra* note 40, at 2.

105. *Id.*

106. *Id.* at 13, 15. *See also* TECHNICAL MANUAL, *supra* note 41, at 54, 57.

107. USER'S GUIDE, *supra* note 40, at 13, 16. *See also* TECHNICAL MANUAL, *supra* note 41, at 55, 58.

108. USER'S GUIDE, *supra* note 40, at 13, 17. *See also* TECHNICAL MANUAL, *supra* note 41, at 55, 59.

109. USER'S GUIDE, *supra* note 40, at 13, 18. *See also* TECHNICAL MANUAL, *supra* note 41, at 55, 60.

110. USER'S GUIDE, *supra* note 40, at 13.

a student questions about all of the National Collegiate Athletic Association's (NCAA) twenty-three championship sports and seven emerging sports, the information entered on screen 5 will customize screen 6 to the student's particular interests, listing only those sports in which that student has expressed an interest.¹¹¹

- Screen 6 gathers "actual information regarding experience, current participation, interest in future participation, and self-assessed ability."¹¹²
- Screen 7 gives students an opportunity for comments or other feedback in narrative form.¹¹³
- 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."¹¹⁴ On this screen, the student receives a message asking whether the student would like further contact with the athletic department regarding participation opportunities in this particular sport.¹¹⁵

As the User's Guide explains, this Model Survey has the following benefits:

- it is simple;
- it explicitly explains the reasons behind the survey;
- it explicitly presents a confidentiality statement;
- it allows a student with no athletic interest or ability the opportunity to complete the study without answering pages of questions irrelevant to the student's interests;
- it allows the construction of a detailed survey only for those sports for which the respondent expresses interest;
- it is "nonprejudicial" in its wording of items;
- it includes all of a student's athletic experience, including current activities, interest in future participation, and ability; and
- it provides fixed-form responses in the way of drop-down boxes or radio buttons for response selection.¹¹⁶

These survey properties respond to the flaws that NISS identified in the surveys used by those fifty-seven educational institutions that demonstrated compliance with Title IX under the "interests and abilities" test.¹¹⁷ NISS's "historical analysis

111. *Id.* at 13, 19. *See also* TECHNICAL MANUAL, *supra* note 41, at 55, 61.

112. USER'S GUIDE, *supra* note 40, at 13, 20. *See also* TECHNICAL MANUAL, *supra* note 41, at 55, 62.

113. USER'S GUIDE, *supra* note 40, at 14, 21. *See also* TECHNICAL MANUAL, *supra* note 41, at 56, 63.

114. USER'S GUIDE, *supra* note 40, at 14.

115. *Id.* at 14, 22. *See also* TECHNICAL MANUAL, *supra* note 41, at 56, 64.

116. USER'S GUIDE, *supra* note 40, at 14. *See also* TECHNICAL MANUAL, *supra* note 41, at 57.

117. *See* TECHNICAL MANUAL, *supra* note 41, at 22–45.

Chapter 3 of the Technical Manual focuses on the survey instruments themselves, explaining in great detail the four aspects of the surveys analyzed, as summarized briefly in the

of the use of surveys . . . provide[d] a context for identifying good existing practices as well as desirable improvements[,]”¹¹⁸ and for “ascertain[ing] the unique needs of institutions attempting to demonstrate Title IX compliance using [the “interests and abilities” criterion].”¹¹⁹ As a foundation for this analysis, NISS reviewed over 130 files provided by DED-OCR involving Title IX investigations conducted between 1992 and 2002.¹²⁰ NISS focused its survey analysis on two broad areas: first, “the degree to which the institutions in the [DED-OCR] Title IX compliance case files, and the subset of those institutions that used [the “interests and abilities” criterion], were similar to the universe of postsecondary institutions that offer intercollegiate sports programs”;¹²¹ and second, “the specific survey practices that were used by those institutions that employed a survey.”¹²² Ultimately, NISS attempted to understand “the technical challenges to conducting a survey that will be both easy to implement and adequate [for] ascertaining whether the interests and abilities of the underrepresented sex have been effectively accommodated.”¹²³ The Model Survey thus derives from a statistical analysis of prior survey instruments, giving DED-OCR—as well as educational institutions that choose to use the survey instrument—the confidence that the survey instrument will provide accurate information on whether and how an educational institution has satisfied Title IX by fully and effectively meeting the athletic interests and abilities of its female students.

The User’s Guide explains in some detail—but not nearly as much detail as the Technical Manual—some of the considerations that informed the development of the Model Survey. With regard to the first area of inquiry, NISS evaluated the

User’s Guide. For a social scientist or statistician who wants more information on the survey instrument, perhaps to understand it better for academic purposes or to understand the concerns identified by NISS in developing a survey other than the Model Survey, this chapter contains some interesting information. For educational institutions that choose simply to use the Model Survey, however, the information contained in this chapter is more detailed than necessary to properly administer that survey instrument. *Id.* at 22–38.

Chapter 4 looks at five data-collection instruments identified other than those provided in the DED-OCR files, including four Web-based surveys, and presents an analysis parallel to that performed in Chapter 3 for the surveys in the DED-OCR files. This chapter also points out some of the problems with these Web-based surveys, including the fact that the surveys did not exploit the interactive nature of the Web by, for example, creating a survey that allowed students to identify specific sports of interest and to answer questions only about those sports, along with the fact that the surveys did not provide access to “metadata” by use of a mouse-over to provide definitions of terms. These surveys also had some problems with confidentiality due to the fact that respondents were e-mailed the survey links and were asked for identifying information on the survey response to ensure that the respondent would not be e-mailed again about completing the survey. *Id.* at 40–45.

118. USER’S GUIDE, *supra* note 40, at 2.

119. *Id.*

120. *Id.*

121. *Id.* See also TECHNICAL MANUAL, *supra* note 41, at 5–19. As the User’s Guide explains, “[t]o the extent that the institutions in the . . . case files are similar to the larger universe of institutions, it is easier to generalize from their history.” USER’S GUIDE, *supra* note 40, at 2–3.

122. USER’S GUIDE, *supra* note 40, at 3. See also TECHNICAL MANUAL, *supra* note 41, at 22–38.

123. USER’S GUIDE, *supra* note 40, at 3.

similarities and differences between the 130 DED-OCR institutions and the “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).”¹²⁴ Although NISS found some statistically significant differences between the 130 DED-OCR educational institutions and the base population,¹²⁵ NCES concluded that no reason exists, “from a statistical and measurement perspective, for student interest surveys to be more appropriate for one type of institution than another.”¹²⁶

With regard to the second area of inquiry, NISS sought to understand specific survey practices. The User’s Guide summarizes the information gathered by NISS from the DED-OCR files and presented in more detail in the Technical Manual. NISS divided its analysis into four broad categories, and discussed how the surveys it analyzed compared with each other and with good survey practices:

- First, NISS examined the general properties of the surveys.¹²⁷ In looking at whether the educational institution conducted the survey for its own reasons, because of a complaint filed against the educational institution or because of a compliance audit initiated by DED-OCR, NISS determined that two-thirds of all of the surveys analyzed occurred in response to a complaint filed against the educational institution.¹²⁸ NISS also looked at the survey target population (whether the entire student body or some subset, such as female

124. *Id.* at 3–4. *See also* TECHNICAL MANUAL, *supra* note 41, at 5–19 (discussing the differences in more detail and providing the statistical measures used to identify these differences).

125. In Chapter 2, the Technical Manual presents this information in great detail. TECHNICAL MANUAL, *supra* note 41, at 5–19. NISS looked at fourteen characteristics and found statistically significant differences between the two populations in nine of these characteristics: sector (type of institution), region, Carnegie class (classification based on degree-granting activities), in-state cost, enrollment (size), percent female, athletic association membership, the presence of football, and the number of sports offered. *See id.* at 7–9. No significant differences existed in urbanicity, selectivity, out-of-state cost, percent Black, or percent out-of-state. *See id.*

In summary, the educational institutions involved in the DED-OCR cases tended to be “large state colleges and universities (including doctoral universities) that are highly involved in intercollegiate sports.” USER’S GUIDE, *supra* note 40, at 4. *See also* TECHNICAL MANUAL, *supra* note 41, at 10, 12–13. These colleges and universities more likely participate in “all four major conference sports (i.e., baseball, football, basketball, and track),” and more likely belong to the NCAA than to the NAIA or NJCAA. USER’S GUIDE, *supra* note 41, at 4. *See also* TECHNICAL MANUAL, *supra* note 41, at 12–13. Although a higher proportion of the 130 DED-OCR institutions are in the Southeast and Far West regions of the country, the Technical Manual points out that the region category was “strongly influenced by the ‘cluster’ of 10 . . . cases involving community colleges in North Carolina.” TECHNICAL MANUAL, *supra* note 41, at 13.

126. USER’S GUIDE, *supra* note 40, at 5.

127. *Id.* *See also* TECHNICAL MANUAL, *supra* note 41, at 22.

128. USER’S GUIDE, *supra* note 40, at 6. This fact does raise an interesting question about the aim of the analyzed surveys themselves. Since NCES developed the Model Survey based on the findings of the NISS analysis, and since NISS analyzed surveys that educational institutions had developed to gather evidence to respond to a charge of Title IX noncompliance, could the Model Survey be biased toward proving compliance rather than simply assessing interest?

students only) and the sampling mechanism (whether random sampling, non-random sampling, or complete census), and found that a majority of the surveys targeted the entire undergraduate student body rather than some subgroup, such as only women.¹²⁹ However, NISS also found that most educational institutions did not proactively attempt to solicit a reasonable response from the target population. Rather, most educational institutions typically distributed the questionnaires in a central place and did not engage in any follow-up, although a few did offer incentives for completing the survey.¹³⁰ The User's Guide reports that response rates varied from 8 to 70%,¹³¹ leading to extensive discussions in the Technical Manual about the problem of non-respondents and nonresponse bias.¹³²

- Second, NISS examined the characteristics of the survey instruments themselves.¹³³ NISS looked for the presence or absence of specific kinds of questions, mainly demographic information, and found that most surveys did ask questions about student age, class year, and gender, but did not ask for any information that could identify the student.¹³⁴ Although not asking for identifying information does protect student confidentiality, which NCES deems essential for

129. *Id.*

130. *Id.*

131. *Id.* at 8. Note, though, that the Technical Manual reports response rates that “range from less than 1 percent to 70 percent,” well below the rates required to satisfy NCES statistical standards. TECHNICAL MANUAL, *supra* note 41, at 37. It appears, however, that the User's Guide contains an error and, perhaps, the response rates should have been given as 0.8 to 70% instead of 8 to 70%. Nevertheless, the rates were low enough—regardless of how low they actually were—to cause some concerns.

132. USER'S GUIDE, *supra* note 40, at 8. See also TECHNICAL MANUAL, *supra* note 41, at 37, 47, 48, 52–54, 68–73. As the Technical Manual explains, “[t]he problem posed by low response rates is that non-respondents may systematically differ from respondents, producing biased results.” *Id.* at 37. In the case of a survey to determine student interests, a low response rate may “work[] to the detriment of the institutions conducting surveys because those who are dissatisfied with the athletic programs at an institution are probably more likely to respond than those that are satisfied,” leading to a lower reported level of satisfaction than the “true” level of satisfaction. *Id.* Both the 2005 Additional Clarification and the User's Guide, however, deal with this problem in a straightforward manner by declaring that nonresponse equals noninterest and, thus, the educational institution may presume that those students who do not respond to the survey are satisfied with existing athletic opportunities. 2005 Additional Clarification, *supra* note 39, at 6 (“[N]onresponse 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”); USER'S GUIDE, *supra* note 40, at 12 (using essentially the same language to indicate that nonresponse to the survey equates to lack of interest).

The decision by DED-OCR to equate no response to lack of interest has, however, generated a significant amount of controversy. See *infra* text accompanying notes 202–40 for a discussion of this and other controversial aspects of the 2005 Additional Clarification.

133. USER'S GUIDE, *supra* note 40, at 5–6. See also TECHNICAL MANUAL, *supra* note 41, at 22.

134. USER'S GUIDE, *supra* note 40, at 5–6.

conducting a proper survey,¹³⁵ in the event that a student did express interest in a particular team, the educational institution would have no way of contacting her to pursue follow-up questions about ability. NISS also looked at whether the surveys explicitly solicited student opinions on the educational institution's athletic programs and on the respondent's interest in and ability to participate in athletics, and found that most did not ask about student attitudes toward intercollegiate athletics or their interest as spectators, and less than half asked a general question about satisfaction with the institution's athletic program.¹³⁶ NISS also examined whether the surveys explicitly solicited information from respondents on their athletic abilities, and found that less than one-third included such questions, although many did ask questions about previous athletic experience and whether the student had been recruited—questions that likely served as proxies for directly gathered information on student athletic abilities.¹³⁷

- Third, NISS examined some global characteristics of the survey instruments.¹³⁸ Around one-quarter of the surveys contained a statement of the drawbacks and benefits associated with participation in intercollegiate athletics,¹³⁹ less than one-third of the surveys told the students the purpose of the survey,¹⁴⁰ and less than 20% promised confidentiality.¹⁴¹
- Finally, NISS looked at how the survey measured athletic interest, experience, and ability.¹⁴² It examined the sports included in the surveys and the ways in which respondents could express interest and ability,¹⁴³ and found that less than one-third of the surveys explicitly asked about a respondent's athletic abilities but instead asked questions about previous high school or college experiences.¹⁴⁴ The surveys also differed significantly in how students identified the sports in which they were interested: some provided a fixed list of entries from which

135. *Id.* at 11.

136. *Id.* at 5–6.

137. *Id.* at 5–7.

138. *Id.* at 6. *See also* TECHNICAL MANUAL, *supra* note 41, at 23.

139. USER'S GUIDE, *supra* note 40, at 7–8. NISS noted that one statement in particular appeared in several of the survey instruments analyzed:

“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 services, including tutoring, counseling and study tables.”

Id. at 33–34.

140. *Id.* at 7.

141. *Id.*

142. *Id.* at 6. *See also* TECHNICAL MANUAL, *supra* note 41, at 23–24.

143. USER'S GUIDE, *supra* note 40, at 6.

144. *Id.* at 7.

respondents could select particular sports, while others provided blank lines on which a student could write the name of a sport or code a numerical entry that corresponded to a particular sport of interest from a list provided with the survey.¹⁴⁵ The surveys also differed in the way that they ascertained interest and ability, ranging from a question with a simple “yes/no” response to providing a scale that allowed a student to select from up to ten levels of increasing interest or ability.¹⁴⁶

The User’s Guide concludes that the surveys examined by NISS “exhibit a mixture of strengths and weaknesses.”¹⁴⁷ Strengths include “[I]ack of explicit bias” in the wording of survey questions and an increasing use of the Web to collect data.¹⁴⁸ Weaknesses include unnecessary complexity and the inclusion of irrelevant information, with the most serious weakness being “the inattention to low response rates.”¹⁴⁹

The User’s Guide then explains how to conduct a survey of student interest to capitalize on the identified strengths and remedy the identified weaknesses. It cautions that “certain choices will make it easier to conform to legal requirements as well as the technical requirements of surveys”¹⁵⁰ and directs the user to the Technical Manual for specific criteria.¹⁵¹ It then summarizes information relevant to seven aspects of the survey process: problem formulation, target population, census versus sample, periodicity, excluding students, confidentiality, and nonresponse.¹⁵² In this section, the User’s Guide makes some choices regarding the recommendations presented in the Technical Manual. Reading the Technical Manual before understanding the recommendations chosen for the survey in the User’s Guide proves unnecessarily complicating, however, because the Technical Manual really provides detailed background information on the development of the survey. But the Technical Manual can provide insights into how to conduct an institution-specific survey different from the Model Survey.¹⁵³

For “problem formulation,” the User’s Guide explains that an educational institution should be able to identify the minimum number of women required to field a team in a particular sport—a number that “depends on the sport and possibly contextual factors.”¹⁵⁴ A basketball team cannot play with fewer than

145. *Id.*

146. *Id.*

147. *Id.* at 9.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* In Section 5, the Technical Manual describes: the proper process for conducting a survey, TECHNICAL MANUAL, *supra* note 41, at 48–52; the proper process for collecting data, *id.* at 52–54; the proper process for Web-based data collection, including a discussion of the Model Survey itself, *id.* at 54–66; and the proper data analysis process, *id.* at 66–74.

152. USER’S GUIDE, *supra* note 40, at 9–12.

153. For example, as described *supra* note 132, the Technical Manual presents a long discussion of how to deal with non-respondents, while in the 2005 Additional Clarification and the User’s Guide, on the other hand, DED-OCR simply chooses to equate nonresponse with noninterest.

154. USER’S GUIDE, *supra* note 40, at 9.

five members, for example, but a competitive team probably requires ten to fifteen members.¹⁵⁵ Then, if the number of women with interest and ability equals or exceeds this minimum number, the educational institution must take further steps toward determining whether to add a varsity team in the identified sport, including assessing the athletic ability and interested students and evaluating competitive opportunities within the educational institution's normal competition area.¹⁵⁶ Otherwise, it need not proceed any further.¹⁵⁷ Determining this minimum number with some certainty does present a challenge in this aspect of the survey,¹⁵⁸ but the Technical Manual reinforces the idea that the goal of the survey is to estimate "the number of students in the data analysis population interested [in] and able to participate at the intercollegiate level in [a] given sport."¹⁵⁹ It points out that the survey data should separate respondents into two categories on a sport-by-sport basis: "interested *and* able" or "either not interested or not able," and clarifies that a student must be both interested in and able to participate in a sport in order to qualify as a student with interests and abilities under this criterion.¹⁶⁰

For the "target population," the User's Guide recommends surveying the "entire undergraduate student body."¹⁶¹ Even though educational institutions would use such surveys to ascertain the interests and abilities of full-time undergraduate students of the underrepresented gender, "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."¹⁶² Moreover, "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."¹⁶³ The User's Guide also gives an alternative survey target population consisting of the current undergraduate population and potential applicants, but recommends against this approach, explaining how such a "catchment" population creates problems in, for example identifying an appropriate population to survey. Moreover, since this population is "almost surely unreachable in any meaningful way,"¹⁶⁴ the User's Guide recommends against extending the survey beyond the existing undergraduate student population.¹⁶⁵

With regard to a census or sample survey, the User's Guide clearly favors a census approach, as "it is superior in almost every respect" for establishing interest

155. *Id.* See also *supra* text accompanying notes 78–82.

156. USER'S GUIDE, *supra* note 40, at 9.

157. *Id.* at 10.

158. *Id.*

159. TECHNICAL MANUAL, *supra* note 41, at 66.

160. *Id.* at 67–68.

161. USER'S GUIDE, *supra* note 40, at 10. See also TECHNICAL MANUAL, *supra* note 41, at 48–49.

162. USER'S GUIDE, *supra* note 40, at 10.

163. *Id.*

164. *Id.*

165. *Id.* This aspect of the survey has also generated some controversy, as explored *infra* text accompanying notes 210–11.

and ability and avoids several difficulties with sample surveys, such as the selection of the sampling mechanism (for example random versus non-random) and sample size (which must be large enough to enable a precise estimate of students interested in particular teams), and the calculation of sampling error (which can complicate understanding whether a sufficient number of students with appropriate interest and ability exists).¹⁶⁶ With regard to sampling error, in particular, the User's Guide points out that a sample survey raises the question of how an educational institution should "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 at least 18 people to form a team."¹⁶⁷ Should the educational institution assume it must create the team (because fifteen plus three equals eighteen), or that it need not create the team (because fifteen minus three equals twelve)? A census survey eliminates this uncertainty, because fifteen interested respondents probably would not be sufficient to form a team.¹⁶⁸

For "periodicity," the User's Guide states that a census survey of the undergraduate population with a high response rate that indicates that the educational institution has satisfied the athletic interests and abilities of its female students may "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."¹⁶⁹ Otherwise, the educational institution should survey students more frequently.¹⁷⁰

With regard to "excluding students," the User's Guide indicates that, for determining interest in varsity sports, part-time students may be excluded from calculations.¹⁷¹ It does, however, recommend including graduating seniors in the calculations, even if it is too late in their academic careers for them to participate in intercollegiate sports, as this "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."¹⁷²

With regard to "confidentiality," the User's Guide states that "confidentiality is

166. USER'S GUIDE, *supra* note 40, at 10. *See also* TECHNICAL MANUAL, *supra* note 41, at 50–52.

167. USER'S GUIDE, *supra* note 40, at 11.

168. *Id.* Note, however, that, when confronted with this level of interest, an educational institution should nevertheless consider whether it should plan to add the particular team in the coming years.

169. *Id.*

170. *Id.*

171. *Id.* *See also* TECHNICAL MANUAL, *supra* note 41, at 49, 52.

172. USER'S GUIDE, *supra* note 40, at 10. The Technical Manual recommends against including graduating seniors, instead recommending a survey that includes "the entire student population eligible for intercollegiate athletic participation." TECHNICAL MANUAL, *supra* note 41, at 49. The 2005 Additional Clarification and the User's Guide, however, set the target as the entire undergraduate student population, noting that students ineligible for varsity competition due to age or class year may be eliminated from subsequent analysis on the basis of the demographic questions in the survey. *See 2005 Additional Clarification, supra* note 39, at 6; USER'S GUIDE, *supra* note 40, at 10.

essential to obtaining high quality data and to achieving acceptable response rates.”¹⁷³ Although e-mailed surveys may lose some of the confidentiality of paper-and-pencil surveys with no identifying information, the User’s Guide also points out that today’s newer Web-based technologies can help to protect respondent confidentiality.¹⁷⁴ Note, too, that the Model Survey does provide a student who has expressed an interest in and ability to play a particular sport the option to have identifying information forwarded to the appropriate college or university office for follow-up.¹⁷⁵

Finally, with regard to “nonresponse,” the User’s Guide points out that none of the surveys studied by NISS “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.”¹⁷⁶ Instead, those educational institutions “treated nonresponse as indicating no interest in future sports participation.”¹⁷⁷ The User’s Guide characterizes this as a defensible assumption “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.”¹⁷⁸ Thus, although the Technical Manual discusses in great detail how to handle non-respondents and the resulting nonresponse bias,¹⁷⁹ both the User’s Guide and the 2005 Additional Clarification deal with nonresponse bias in a very simple manner,¹⁸⁰ by assuming that nonresponse equates to lack of interest, as long as the survey instrument clearly explains this assumption.¹⁸¹ The User’s Guide also recommends a Web-based survey as the best method for giving students an easy way to respond.¹⁸²

The User’s Guide concludes with two pages of technical details for implementing the survey in a Web-based format at an individual educational

173. USER’S GUIDE, *supra* note 40, at 11.

174. *Id.* at 11–12.

175. *Id.* at 21.

176. *Id.* at 12.

177. *Id.*

178. *Id.* The User’s Guide does, however, state a preference for a survey approach that “generate[s] high enough response rates that nonresponse can safely be ignored for the purposes of Title IX compliance.” *Id.* Note, though, that at least one criticism of this view points out that, “in these days of excessive e-mail spam,” this assumption may not be defensible. See *NWLC April 2005 Statement*, *supra* note 67, at 1, 3 (“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.”).

179. TECHNICAL MANUAL, *supra* note 41, at 37, 47, 48, 52–54, 68–73.

180. USER’S GUIDE, *supra* note 40, at 12. The User’s Guide justifies this simplification by stating that “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.” *Id.*

181. *Id.* For example, if the educational institution chooses to send an e-mail to students with a Web link to the survey, the e-mail can “include[] 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.” *Id.*

182. *Id.*

institution,¹⁸³ and with a summary of the additional steps an educational institution should take after conducting the survey and analyzing the data.¹⁸⁴ The concluding paragraph notes that the “purpose of this guide is limited to providing guidance on conducting and interpreting an interest survey.”¹⁸⁵ It then discusses “what an institution might do next with survey results,” particularly if those results indicate that unmet interests exist among a sufficient number of students with the ability to participate in a new sport.¹⁸⁶ It then directs the user back to the 2005 Additional Clarification for more guidance on how to proceed.¹⁸⁷

The information contained in the User’s Guide expands on the summary information provided in the 2005 Additional Clarification and explains the reasoning behind some of the survey requirements. The Technical Manual adds further details, but those details will interest primarily social scientists and statisticians, and will have little practical application for administering the survey and interpreting the resulting data—although the details might prove relevant to an educational institution that already has a survey and needs to understand how its survey compares to the Model Survey. Moreover, the 2005 Additional Clarification and the User’s Guide may have, in some cases, adopted a statistically less sound, but ultimately more practical, approach than recommended in the Technical Manual. Overall, the requirements for a proper survey as described in the 2005 Additional Clarification eliminate some of the problems found in the surveys studied by NISS and ensure that any survey used will produce accurate and useable results in response to the limited survey goal of determining whether unsatisfied athletic interest exists among female undergraduates at a level sufficient to justify considering whether to add another team. The Model Survey itself satisfies all of these criteria and has the added benefit of a DED-OCR imprimatur. Nevertheless, an educational institution remains free to develop its own survey, consistent with these requirements.

III. CRITICISMS AND QUESTIONS

The 2005 Additional Clarification and accompanying documents provide a much-needed clarification on how an educational institution can ascertain the athletic interests of female students. The documents present valuable data to help educational institutions to structure a sound plan to grow an athletic program for women, and also give an educational institution some level of assurance that its athletic programs comply with the Title IX effective accommodation requirements under the “interests and abilities” criterion as spelled out in the 1979 Policy Interpretation.¹⁸⁸ It provides yet another “safe harbor” for educational institutions attempting to comply with Title IX¹⁸⁹ by explicitly stating that, regardless of

183. *Id.* at 23–24. *See also* TECHNICAL MANUAL, *supra* note 41, at 65–66.

184. USER’S GUIDE, *supra* note 40, at 24.

185. *Id.*

186. *Id.*

187. *Id.*

188. 1979 Policy Interpretation, *supra* note 7, at 71,418.

189. 2005 Additional Clarification, *supra* note 39, at 1 (“[E]ach part of the three-part test is a

whether an educational institution conducts a survey, it enjoys a rebuttable presumption of compliance with the “interests and abilities” criterion.¹⁹⁰ The clarification also squarely places the burden of proving noncompliance on the party challenging the educational institution’s existing programs, and sets out clear guidelines as to the evidence required to rebut this presumption of compliance: a sufficient number of interested and able students, and a reasonable expectation of competition within the educational institution’s normal competitive region.¹⁹¹ It also points out that a recently disbanded and competitive varsity team, or a broad-based petition from an existing club sport for elevation to varsity status, will satisfy this evidentiary requirement, and makes clear that survey results cannot form the basis for eliminating a current and viable intercollegiate team.¹⁹² In these aspects alone the 2005 Additional Clarification has provided new and clear guidance on compliance with Title IX under the “interests and abilities” test and fills in some of the gaps in understanding the 1996 Clarification¹⁹³ and the 2003 Further Clarification.¹⁹⁴

The clarification does, however, go a step further. Although an educational institution need not conduct any survey of student interests and abilities—because the burden of proof of noncompliance with the “interests and abilities” criterion rests with the challenger—an educational institution that would like to assure itself of compliance *may* conduct a survey and can have faith in the results of a properly administered survey that satisfies certain survey construction criteria. The 2005 Additional Clarification and the User’s Guide then present a recommended Model Survey¹⁹⁵ that addresses the problems identified in an analysis of several dozen interest-and-ability surveys conducted during the 1990’s.¹⁹⁶ If an educational institution administers the Model Survey in accordance with the requirements presented in the User’s Guide and finds insufficient interest and ability among existing students to field an additional team for students of the underrepresented gender, the 2005 Additional Clarification provides the assurance that the educational institution’s athletic programs satisfy the effective accommodation requirements of Title IX.¹⁹⁷ The clarification also clearly absolves the educational institution from any obligation to generate interest in athletics among students of the underrepresented gender.¹⁹⁸ If, on the other hand, an educational institution administers the survey and finds sufficient interest and, upon further investigation, also ability in a particular sport, it may have to field a team or may have to help to

safe harbor, and no part is favored by [DED-OCR].”).

190. *Transmittal Letter*, *supra* note 39, at 2–3; *2005 Additional Clarification*, *supra* note 39, at 3–4.

191. *2005 Additional Clarification*, *supra* note 39, at 4.

192. *Id.* at 7.

193. *See 1996 Clarification*, *supra* note 14.

194. *See 2003 Further Clarification*, *supra* note 14.

195. *Id.* at 5–9.

196. *See generally* TECHNICAL MANUAL, *supra* note 41.

197. *2005 Additional Clarification*, *supra* note 39, at 7.

198. *Id.* at 5. This is yet another point of controversy, as explained *infra* text accompanying note 209.

develop interest in that particular sport in its normal competitive region “within a reasonable period of time.”¹⁹⁹ DED-OCR has indicated that, for those portions of the data analysis that require professional judgment, it will defer to the judgment of athletic administrators, coaches, and educators.²⁰⁰ DED-OCR will employ a reasonableness standard in those areas beyond the strict purview of experts in a particular field.²⁰¹

This all seems relatively straightforward and should give educational institutions a good way to survey their student populations to ascertain athletic interests and then follow up to determine the existence of the necessary athletic abilities. Yet, the 2005 Additional Clarification has already fomented some predictable controversy, and also raises some questions both about the process by which DED-OCR issued the clarification and about whether educational institutions should adopt the Model Survey as part of their Title IX compliance and monitoring efforts. The rest of this section considers some of these issues.

- A. Does the 2005 Additional Clarification represent a rollback of three decades’ worth of reforms to intercollegiate athletic programs for women?

Groups that have a political stake in the enforcement of Title IX reacted strongly to the 2005 Additional Clarification upon its release in March 2005. Most of these criticisms charge the Bush Administration with enabling a rollback of reforms to intercollegiate athletic programs and a change in DED policy from that of the Clinton Administration. A careful reading of the clarification, coupled with a decent understanding of prior policies, however, leads to the inescapable conclusion that these initial criticisms do not have any basis in fact.

For example, a document prepared by the National Women’s Law Center (NWLC) in April 2005 contains the most common criticisms about the 2005 Additional Clarification.²⁰² The NWLC position paper claims that the clarification “is inconsistent with long-standing [DED-OCR] policies and with fundamental principles of equity under Title IX.”²⁰³ In reality, however, the clarification merely addresses one technical aspect of the “interests and abilities” criterion of the three-part test for effective accommodation (which dates back to 1979 and the first Title IX policy interpretation)—that is, how to measure student athletic interest. The substance of the “interests and abilities” criterion remains unchanged. The 1979 Policy Interpretation explains that DED-OCR “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;

199. *2005 Additional Clarification*, *supra* note 39, at 12. Factors to consider when evaluating the reasonableness of the time to establish a new team 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.” *Id.* at 13.

200. *Id.* at 9–12.

201. *Id.* at 11–12.

202. *See NWLC April 2005 Statement*, *supra* note 67.

203. *Id.* at 1.

- b. The selection of sports offered; and
- c. The levels of competition available including the opportunity for team competition.”²⁰⁴

This policy interpretation then explains the factors to consider when evaluating each of these three factors.

For determining athletic interests and abilities, the 1979 Policy Interpretation states that educational 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.²⁰⁵

In selecting sports and in determining the level of competition for men’s and women’s teams, educational institutions enjoy a similar level of flexibility.²⁰⁶

Furthermore, in the 1996 Clarification issued during the Clinton Administration, DED-OCR indicated that, when determining compliance under the “interests and abilities” criterion of the three-part test for effective accommodation, the department

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.²⁰⁷

The 2005 Additional Clarification, as discussed above, uses almost exactly this language in explaining the type of evidence necessary to rebut the presumption of compliance with the “interests and abilities” criterion:

[An educational 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

204. 1979 Policy Interpretation, *supra* note 7, at 71,417.

205. *Id.* (emphasis added).

206. *See id.* at 71,417–18.

207. *See 1996 Clarification, supra* note 14, at 1.

normal competitive region.²⁰⁸

The 1996 Clarification also spells out the sort of evidence required to determine the existence of these three conditions. For example, “if an institution has recently eliminated a viable team from the intercollegiate program, [DED-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.”²⁰⁹ Similarly, in the 2005 Additional Clarification, evidence of a recently disbanded varsity team rebuts the presumption of compliance with the “interests and abilities” criterion.²¹⁰

Furthermore, the 1996 Clarification and the 2005 Additional Clarification present similar lists of factors to consider when determining interest, ability, and available competition. In the 1996 Clarification, DED-OCR states that it “will look for interest by the underrepresented sex as expressed through the following indicators, among others: . . . results of questionnaires of students and admitted students regarding interests in particular sports.”²¹¹ Thus, dating at least as far back as 1996, DED-OCR indicated that surveys could provide a valid way to determine interest. In 2005, DED-OCR has merely provided educational institutions with a way to conduct a survey and have confidence in the results.

It is difficult to understand how the 2005 Additional Clarification, in these respects, represents any departure from prior DED-OCR policy. Yet, the NWLC has offered several specific examples of the ways in which the organization believes that the clarification does not support the aims of Title IX. All of the complaints raised by NWLC can, however, be resolved by a clear-headed reading of the entire document.

- NWLC complains that the clarification “allows schools to use surveys alone to demonstrate compliance with the law.”²¹² In fact, all that the clarification does is give educational institutions a straightforward and unbiased way to determine whether there is unmet interest that athletic program administrators should consider accommodating.²¹³ Given that the 2005 Additional Clarification states a clear presumption of compliance with the “interests and abilities” criterion in the absence of evidence to the contrary,²¹⁴ educational institutions need never “demonstrate compliance.” Moreover, since administering a survey may actually provide evidence to counter the presumption of

208. *Transmittal Letter*, *supra* note 39, at 2. *See also 2005 Additional Clarification*, *supra* note 39, at 4.

209. *1996 Clarification*, *supra* note 14, at 6.

210. *Transmittal Letter*, *supra* note 39, at 2–3. *See also 2005 Additional Clarification*, *supra* note 39, at 7.

211. *1996 Clarification*, *supra* note 14.

212. *NWLC April 2005 Statement*, *supra* note 67, at 2.

213. Although, as discussed briefly *supra* note 128, the fact that NCES derived the survey from instruments studied by NISS, which educational institutions had developed in response to a DED-OCR investigation, raises the question of whether the Model Survey only gathers information on interests and abilities or whether it can actually prove compliance.

214. *See Transmittal Letter*, *supra* note 39, at 2–3.

compliance by bringing some unmet interest to the attention of the educational institution, it is not clear that administering a survey actually provides an educational institution with any particular assurances in advance, or with any way actually to avoid adding athletic opportunities for women.

- NWLC complains that “[s]urveys are likely only to provide a measure of the discrimination that has limited, and continues to limit, sports opportunities for women and girls,”²¹⁵ and explains that “basing women’s future opportunities on their responses to surveys that measure their prior lack of exposure will only perpetuate the cycle of discrimination.”²¹⁶ Nevertheless, the 1979 Policy Interpretation and the 1996 Clarification only require full and effective accommodation of the *expressed* athletic interests and abilities of female students—that is, their actual interests and abilities, not some undefined and indescribable utopian ideal of women’s participation in athletics.²¹⁷
- NWLC claims that the clarification “conflicts with a key purpose of Title IX—to encourage women’s interest in sports and eliminate stereotypes that discourage them from participating.”²¹⁸ But neither the statute itself, nor the 1975 Implementing Regulations, requires anything other than simply not discriminating against women. Nowhere does the law require the active encouragement of athletic interest and ability among girls and women, no matter how much certain advocacy groups wish that it would.
- NWLC criticizes DED-OCR’s decision to restrict the survey to enrolled and admitted students, because it “permit[s] schools to evade their legal obligation to measure interest broadly.”²¹⁹ Nowhere, however, does the law impose a “legal obligation to measure interest broadly”—this is again another element of the perfect society such advocacy groups aim to create through social legislation. In this criticism, though, the NWLC does make an interesting point when it states that “students interested in a sport not offered by a school are unlikely to attend that school.”²²⁰ But the flaw in this reasoning is that it presumes that students interested in a particular sport will select their academic institutions on that basis alone and not on other bases such as location, academic programs, cost, or perhaps some intangible factor. An educational institution will not and cannot know what untapped

215. *NWLC April 2005 Statement*, *supra* note 67, at 2.

216. *Id.*

217. 1979 Policy Interpretation, *supra* note 7, at 71,417 (stating that any method of determining student interest must be “responsive to the *expressed* interests of students capable of intercollegiate competition who are members of an underrepresented sex”) (emphasis added); *see also* 1996 Clarification, *supra* note 14 (“OCR will look for interest by the underrepresented sex as *expressed* through the following indicators”) (emphasis added).

218. *NWLC April 2005 Statement*, *supra* note 67, at 2.

219. *Id.*

220. *Id.*

interest exists on its campus unless and until it asks. Again, the survey only asks what interest exists on campus, which is all that every prior policy statements has required.²²¹

- The NWLC claims that the survey methodology, particularly in its treatment of nonresponse bias and student self-assessment of ability, “is flawed and inconsistent with the requirements of prior [DED-OCR] policy.”²²² Given that no prior DED-OCR policy statement ever addressed the use of surveys to measure interest and ability in any thorough, meaningful way, this criticism has no basis in fact. Moreover, NCES does not make the choice of how to treat nonresponse bias without considering all of the ramifications of one approach or another, as discussed in the Technical Manual.²²³ Rather, the approach presented in the User’s Guide merely attempts to effect a practical and workable solution to a difficult and intractable statistical problem.
- The NWLC objects to the way in which the clarification “*shifts* the burden to female students to show that they are *entitled to equal opportunity*.”²²⁴ In fact, the burden of proof on the “interests and abilities” criterion has never been clear, although DED-OCR officials from in the Clinton Administration indicate that the challenger has always had the burden of proving that the educational institution did not satisfy the athletic interests and abilities of female students.²²⁵ Moreover, the clarification does not weaken the requirement to provide women with equal athletic opportunity; it merely sets out another way to determine whether the athletic participation opportunities provided are equal, in a system set up to be “separate but equal” by gender.
- Finally, the NWLC does correctly point out that the 2005 Additional Clarification “makes no provision for [DED-OCR] to monitor [the] implementation of the model survey or its results.”²²⁶ Consistent with its other obligations under the law, however, DED-OCR must broadly monitor Title IX compliance at educational institutions,²²⁷ and the clarification does nothing to diminish this legal requirement.

Other groups and organizations have raised concerns similar to those expressed by the NWLC. The NCAA, in particular, has issued a number of press releases and articles cataloging the perceived flaws in the 2005 Additional Clarification. The NCAA Division I, II, and III governance structures also unanimously endorsed a resolution that “urged the Department of Education to honor its 2003 commitment to strongly enforce the standards of long-standing Title IX athletics

221. See *supra* text accompanying notes 163–65. See also *supra* note 217.

222. NWLC April 2005 Statement, *supra* note 67, at 3.

223. See TECHNICAL MANUAL, *supra* note 41, at 68–72.

224. NWLC April 2005 Statement, *supra* note 67, at 3 (emphasis added).

225. See *supra* notes 57–59.

226. NWLC April 2005 Statement, *supra* note 67, at 3.

227. 20 U.S.C. § 1682 (2000).

policies, including the 1996 Clarification,”²²⁸ and “urged NCAA members to decline use of the procedures set forth in the [2005] Additional Clarification.”²²⁹ The six criticisms spelled out in the NCAA press release parrot the NWLC’s position paper directly:

[T]he 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 results²³⁰

The similarity of language between the NWLC position paper and the NCAA statements raises the question of whether parroting talking points often enough, and from a high enough perch, turns those points into unassailable facts. Nevertheless, NCAA statements on the issue do add one other telling—but ultimately just as irrelevant—criticism of the 2005 Additional Clarification, by claiming that it “will elevate the third prong of the [effective accommodation] test by providing a standardized measure of interest.”²³¹ In the NCAA’s view, such a change “could *reduce pressure* on institutions that traditionally have relied on creating participation levels proportionate to undergraduate enrollment.”²³² Throughout the documents that comprise the clarification, however, DED-OCR frequently “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.”²³³ Those who criticize the clarification in this way have thus revealed themselves for the quota-mongers they actually are. Far from merely seeking to ensure that women continue to have equal opportunity by whatever measure an educational institution deems appropriate to its circumstances, those who have criticized the 2005 Additional Clarification really object to the document because it provides a

228. Press Release, NCAA, In Honor of Title IX Anniversary, NCAA Urges Department of Education to Rescind Additional Clarification of Federal Law (June 22, 2005), available at http://www2.ncaa.org/media_and_events/press_room/2005/june/20050622_titleixanniv.html.

229. *Id.*

230. *Id.*

231. Michelle Brutlag Hosick, *Title IX Advocates Rally Communication Effort to Rethink Clarification*, NCAA NEWS ONLINE, Apr. 25, 2005, http://www2.ncaa.org/media_and_events/association_news/ncaa_news_online/2005/04_25_05/index.html.

232. *Id.* (emphasis added).

233. *Transmittal Letter*, *supra* note 39, at 3.

workable alternative to their desired goal of proportional representation of women among student-athletes.

In June 2005, “more than 140 Democrats in the U.S. House of Representatives sent a letter to President [George W.] Bush, urging him to withdraw the guideline,”²³⁴ claiming that the 2005 Additional Clarification “creates a major loophole and lowers the standard for Title IX compliance, jeopardizing the number of athletic opportunities available to women and girls in schools across the country.”²³⁵ The letter claims that the clarification now makes it unnecessary for educational institutions “to look at other factors, such as input from coaches and administrators and interest in the surrounding schools and community sports leagues, which together provide a more comprehensive and accurate reflection of student interest.”²³⁶ This letter then, actually criticizes the 2005 Additional Clarification for discounting the value of circumstantial evidence of *possible* interest in favor of focusing on direct evidence of *actual* interest.²³⁷

A similar criticism by the U.S. Senate Appropriations Committee, issued in a report accompanying the 2006 DED funding bill, also asks DED “to require colleges to make reasonable good-faith efforts to gather other evidence of women’s interest in sports.”²³⁸ The report states that the Senate Appropriations 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.”²³⁹ This criticism, too, misreads the 2005 Additional Clarification, which actually states that other evidence such as “[a] recent broad-based petition from an existing club team for elevation to varsity status” does help to defeat the presumption of compliance.²⁴⁰ And, as the clarification indicates, requests for athletic teams, if “direct and very persuasive,” also overcome this presumption of compliance.²⁴¹

These specific, identifiable errors in understanding aside, it bears repeating that these criticisms also entirely miss the point of the 2005 Additional Clarification. The documents together merely “provid[e] guidance on conducting and interpreting an interest survey,”²⁴² and offer the survey as a way to establish the athletic interests and abilities of female undergraduate students.²⁴³

234. Jamie Schuman, *Senate Panel Says More Proof Needed for Colleges’ Compliance with Title IX*, CHRON. HIGHER EDUC., July 29, 2005, at A38.

235. Letter from Nancy Pelosi, U.S. House of Representatives Minority Leader, to President George W. Bush, (June 22, 2005), available at <http://democraticleader.house.gov/press/releases.cfm?pressReleaseID=1052>.

236. *Id.*

237. See 2005 Additional Clarification, *supra* note 39, at 6. See also *supra* text accompanying notes 61–63.

238. Schuman, *supra* note 234, at A38 (internal quotation marks omitted).

239. *Id.*

240. See 2005 Additional Clarification, *supra* note 39, at 6 n.10. See also *supra* text accompanying notes 61–63.

241. *Transmittal Letter*, *supra* note 39, at 2–3.

242. USER’S GUIDE, *supra* note 40, at 24.

243. *Transmittal Letter*, *supra* note 39, at 2–3.

It should be apparent that these and other public criticisms of the 2005 Additional Clarification and Model Survey stem more from an ideological problem than from any problem with the survey itself. The survey's creators had no agenda to pursue, other than to craft an unbiased survey that would allow educational institutions to gauge student interest in athletic participation opportunities on campus.²⁴⁴ A careful review of criticisms of the survey reveals that the core of the criticism is that the survey might yield a result that some find unpalatable—perhaps proof that, at an individual educational institution, women simply do not have the same level of interest in athletics as men, for whatever reason any such disparity might exist. Widespread use of such a survey could, therefore, impair the ability of social engineers to progress toward some utopian goal apart from simply ensuring equal athletic opportunity, whether it is an increase in the number of women participating in athletics, a decrease in the number of men participating in athletics, cuts to men's football teams, or the elimination of intercollegiate athletics in their present form altogether. The key to understanding the criticisms of the clarification, then, lies more in understanding the political motivations of the critics rather than understanding the drawbacks, from a statistical and social-sciences perspective, of using surveys to prove or disprove any hypothesis.

B. Should DED-OCR have issued the 2005 Additional Clarification through the normal federal rulemaking process?

Recently, members of the President's Commission on Opportunity in Athletics drafted a letter to send to athletic directors across the country, urging a widespread effort among athletic department officials to request that DED-OCR withdraw the 2005 Additional Clarification.²⁴⁵ This letter offers additional criticisms of the clarification, most particularly that DED-OCR did not develop the clarification "through the normal federal rulemaking process."²⁴⁶ If it had, the clarification would have been "subject to public notice and comment,"²⁴⁷ as unanimously recommended by commission members in Recommendation 2 of the 2003 Commission Report. That recommendation requests

[a]ny clarification or policy interpretation should consider the recommendations that are approved by this Commission, and substantive adjustments to current enforcement of Title IX should be developed through the normal federal rulemaking process.²⁴⁸

In explaining this recommendation, the commission members stated the following:

The Commission heard criticism that the [pre-2003] interpretation of Title IX was implemented through non-regulatory processes. The

244. User's Guide, *supra* note 40, at 2 ("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.").

245. Letter from members of the President's Commission on Opportunity in Athletics to athletics directors (Sept. 19, 2005) (copy on file with author). See also Erik Brady, *Ex-members of Title IX Panel Urge Against Use of Surveys*, USA TODAY, Oct. 17, 2005.

246. *Id.*

247. *Id.*

248. 2003 Commission Report, *supra* note 26, at 33.

Commission strongly recommends that any new Title IX policies or procedures be subject to public notice and comment, and that the Administrative Procedures Act be strictly adhered to. When the public is given an opportunity to comment on proposed rules, the new rules can be improved by those comments. Moreover, the new rules are given legitimacy when this process is followed.²⁴⁹

The commissioners' letter does make a good point: the new clarification might have received more widespread acceptance if DED-OCR had given the public an opportunity to weigh in on the clarification prior to its issuing the documents. However, as one federal court pointed out in another recent Title IX case, *National Wrestling Coaches Association v. U.S. Department of Education*,²⁵⁰ the Administrative Procedure Act does not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice."²⁵¹ That court also characterized the 1979 Policy Interpretation and 1996 Clarification as "interpretive rules"²⁵²—a designation almost assuredly applicable to the 2005 Additional Clarification as well. Thus, although providing an opportunity for public comment might have been good from a public-relations standpoint and would have shown some respect for the commission's work, DED-OCR did not violate any law in issuing the clarification as it did.²⁵³

C. What concerns do the 2005 Additional Clarification and Model Survey present for educational institutions themselves?

The 2005 Additional Clarification and the Model Survey raise some unanswered questions regarding the use of surveys. Importantly, the documents fail to address some broader public policy issues, particularly with regard to whether educational institutions have, in asking for more guidance on the "interests and abilities" criterion, traded off institutional autonomy and flexibility for security and (unfortunately) rigidity. In a number of places, the Transmittal Letter and the 2005 Additional Clarification explain how the "interests and abilities" test is a "flexible" test,²⁵⁴ and also explain that educational institutions need not conduct any survey or, if they choose to conduct a survey, need not use the Model Survey.²⁵⁵ But, with the detailed developmental information provided in the

249. *Id.*

250. 263 F. Supp. 2d 82 (D.D.C. 2003).

251. *Id.* at 128.

252. *Id.*

253. Regardless of any legal requirements imposed on these clarifications, though, given that Secretary Paige had pledged to act on recommendations unanimously passed by commission members, however, *see Suggs, supra* note 27, it might have made more sense to offer the public some sort of opportunity to comment on the 2005 Additional Clarification before issuing the document.

254. *Transmittal Letter, supra* note 39, at 1, 3; *2005 Additional Clarification, supra* note 39, at 1, 2, 3, 5, 8, 13.

255. The 2005 Additional Clarification notes that if an educational institution chooses to use a survey different from the Model Survey, DED-OCR will evaluate the survey for "reliability and compliance" by examining the contents of the survey, the target population of the survey, the

User's Guide and Technical Manual, could an educational institution still rely on the appropriateness of its own survey unless that survey addressed every concern identified in these documents? It would, of course, simply make more sense to use the Model Survey, with the assurances that DED-OCR has provided regarding its acceptance of the survey, given proper survey administration and results analysis. On the other hand, prior to the existence of the Model Survey, as the User's Guide points, out, "about three-fourths of the [eighty-six] institutions that achieved compliance using [the "interests and abilities" criterion] did so by means of a student interest survey."²⁵⁶ These surveys did contain some identifiable flaws,²⁵⁷ but they also proved sufficient for their purposes at that time. How will the existence of the Model Survey, with its emphasis on addressing the flaws in these existing surveys, change expectations regarding surveys developed by educational institutions themselves?

Will this new clarification lead to an expectation of surveys? The 2005 Additional Clarification states that an educational institution has "discretion and flexibility in choosing the nondiscriminatory methods [it uses] to determine the athletic interests and abilities of the underrepresented sex."²⁵⁸ But if a student-plaintiff brings an educational institution into court to challenge whether its athletic programs satisfy Title IX under the "interests and abilities" criterion, will the lack of a survey now, given the availability of the Model Survey, somehow hurt the educational institution's defense? Although the 2005 Additional Clarification gives educational institutions a presumption of compliance with the "interests and abilities" criterion in the absence of other direct and very persuasive evidence to the contrary, it is not inconceivable that some court, employing a burden-shifting scheme common to civil-rights protection laws such as Title VII of the Equal Rights Act of 1964,²⁵⁹ would initially impose the burden of proof on the student-plaintiff to prove unmet interest and ability, and then shift the burden to the educational institution to prove compliance with the law, and further, require disclosure of any survey results as part of that proof. Might a court then interpret the absence of a survey as evidence that the educational institution was noncompliant with the law?

On the positive side, a widespread use of the Model Survey within an athletic conference or within a particular geographic region may provide sufficient information to allow a group of educational institutions to target the development of their sports programs toward the teams that have the best chances of attracting

response rates of the target population, and the frequency with which the educational institution conducts the survey. *2005 Additional Clarification*, *supra* note 39, at 8.

256. USER'S GUIDE, *supra* note 40, at 3. Thus, prior to the existence of the Model Survey, at least sixty-seven educational institutions complied with Title IX using their own surveys, even though those surveys contained some identifiable flaws. *Id.*

257. See generally TECHNICAL MANUAL, *supra* note 41, at 22-45.

258. *2005 Additional Clarification*, *supra* note 39, at 5.

259. 42 U.S.C. §§ 2000e-1 to -17 (2000). For a discussion of burden shifting in Title VII cases, see *McDonnell Douglas v. Green*, 411 U.S. 792 (1972). For an example of the use of the Title VII burden-shifting scheme in Title IX cases, see *Arceneaux v. Vanderbilt Univ.*, 25 F. App'x 345 (6th Cir. 2001).

female student-athletes. The data may also allow an educational institution, in the absence of proportionality, to add a men's team without fear of litigation, once it has proven that female undergraduates are satisfied with the existing athletic program.²⁶⁰

On the negative side, particularly for public institutions subject to various state open-records laws, would the publication of survey data merely serve as evidence in a lawsuit or as fodder for some other campaign against a particular educational institution? Would the lack of survey data make the taxpayers believe that the institution has something to hide?

CONCLUSION

The 2005 Additional Clarification provides clear guidance on how an educational institution can, through the use of a survey, gauge the athletic interest of female undergraduate students on its campus. Although it has generated widespread public criticism, the clarification fundamentally represents a benign effort by statisticians to examine the best and worst features of existing survey instruments and to craft a sound instrument from a statistical and social-sciences perspective that gives educational institutions the assurance that they have conducted a proper survey and that they can rely on the results of that survey in making informed decisions about their athletic programs.

Public criticisms of the 2005 Additional Clarification by the NWLC, the NCAA, both houses of Congress, the presidential Title IX commission, and others merely evidence a gross, and perhaps purposeful, misunderstanding of the clarification's aims. Far from providing a survey that will allow educational institutions to avoid their legal obligations to provide equal athletic opportunities to women, when used as intended, the survey actually can help educational institutions to make prudent decisions about which teams to add and when. This goal, however, has been lost in the hyper-political rhetoric publicly accepted as enlightened commentary on an emotionally charged issue.

These knee-jerk reactions from predictable players have also taken attention away from more serious concerns over the use of such surveys. In 2002, while testifying before a federal commission reviewing Title IX, Brown University's general counsel "argue[d] that the government ought to revise the 1979 policy interpretation . . . to preserve institutional autonomy."²⁶¹ Presumably, this would have returned the originally intended flexibility to the interpretation of the law and the 1975 Implementing Regulations.²⁶² Instead of taking that action, however, in subsequent years, DED-OCR has issued one policy clarification after another, each of which, as it defines compliance with the law more and more clearly, also incrementally narrows the possible interpretations of the statute and the 1975 Implementing Regulations. The deeper and deeper DED-OCR goes into defining

260. See Suggs, *supra* note 57, at A47 ("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.")

261. SUGGS, *supra* note 3, at 123.

262. *Id.* at 75. See also *supra* text accompanying note 5.

the specific requirements for complying with the various parts of the effective accommodation and equal treatment aspects of Title IX, the more and more its actions erode institutional autonomy. So while the 2005 Additional Clarification provides some security, does it also erode institutional autonomy? Educational institutions that choose to tread down the path toward the Model Survey and all of its assurances should weigh carefully the trade-offs.

