

THE 2010 “DEAR COLLEAGUE” LETTER ON TITLE IX COMPLIANCE FOR COLLEGE ATHLETIC PROGRAMS: POINTING THE WAY TO PROPORTIONALITY...AGAIN

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INTRODUCTION

Since the enactment of Title IX of the Education Amendments of 1972,¹ one aspect of the law as applied to intercollegiate athletics has proven particularly difficult for athletic programs—that is, how to determine whether an athletic program that maintains separate and not necessarily identical teams and other participation opportunities for men and women nevertheless provides appropriate athletic participation opportunities for its female students. The law itself merely mandates that educational institutions that receive federal funding not discriminate on the basis of sex, but offers no further clarity. Implementing regulations issued in 1975 simply state that the federal government, in determining compliance with the law, will evaluate “[w]hether [an educational institution’s] selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes,” without explaining the metrics for that evaluation.² A 1979 Policy Interpretation³ finally set out *what* the government would evaluate, but left open *how* the government would evaluate an educational institution against what has come to be known as the Three-Part Test for Effective Accommodation. According to the 1979 Policy Interpretation, an educational institution has effectively accommodated the athletic interests and abilities of its students if it satisfies one of three criteria:

- (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*

1. See Patsy Takemoto Mink Equal Opportunity in Education Act, Title XI, Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681–88 (2006)).

2. 34 C.F.R. § 106.41 (2011).

3. Title IX of the Educational Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

effectively accommodated by the present program.⁴

Over the last three decades, various pronouncements from the United States Department of Education's Office for Civil Rights (OCR) and the federal courts have added substance to this test, and have established some guidelines for compliance with each part of the test.⁵ However, not all parts of this test have evolved into equally desirable measures of compliance. The "substantial proportionality" test is the only test with objective measures—it compares the percentage of women among student-athletes with the percentage of women in the student body—and as such has become known as a "safe harbor" for Title IX compliance.⁶ The "history and continuing practice of program expansion" test involves a subjective assessment of an educational institution's commitment, over time, to add programs.⁷ This second test has become somewhat less relevant, however, as educational institutions continue to approach substantial proportionality and, at any rate, a "historical" commitment to equity matters somewhat less today because educational institutions have had nearly forty years to add participation opportunities for women. The "full and effective accommodation" test,⁸ on the other hand, does remain relevant, as it allows an educational institution to demonstrate Title IX compliance in the absence of substantial proportionality. However, this test has proven difficult to employ, as each educational institution must meet the needs of its own students in its own way.

The changing political atmosphere of the executive branch over time has further complicated any widespread implementation of the "full and effective accommodation" test. Over the last 20 years, the Clinton, Bush, and Obama administrations have each put a unique stamp on the test by issuing guidance through the OCR on the utility of surveys or other methods of establishing full and effective accommodation in the absence of substantial proportionality.

In 1996, after a number of federal court cases discussed the requirements of the three-part test,⁹ the Clinton Administration issued a policy clarification that provided educational institutions with only limited guidance on how to prove that athletic programs satisfied the interests and

4. *Id.* at 71,418 (emphasis added).

5. *See infra* text accompanying notes 48–53.

6. *See* 44 Fed. Reg. at 239, 71,418. In fact, a Clinton Administration policy explicitly called the "substantial proportionality" test a "safe harbor," but a subsequent Bush Administration policy removed that designation. *See* text accompanying notes 10–14, *infra*.

7. *See* 44 Fed. Reg. at 239, 71,418.

8. *Id.*

9. *See infra* notes 58–62.

abilities of female students.¹⁰ But this clarification had a more important impact on Title IX compliance by declaring, for the first time, that when an educational institution has achieved a proportion of female student-athletes that mirrors the proportion of female undergraduates, the institution will have found a “safe harbor” in the tumultuous waters of Title IX compliance.¹¹

A 2003 Bush administration policy incorporated all of the Clinton administration’s *1996 Clarification* except the substantial proportionality test’s controversial “safe harbor” designation.¹² Furthermore, the *2003 Further Clarification* also declared that each of the three tests for compliance—substantial proportionality, a history of continuing program expansion, and full and effective satisfaction of women’s athletic interests and abilities—as first set out in by the original 1979 policy implementation,¹³ were “an equally sufficient means of complying with Title IX.”¹⁴ Two years later, the Bush Administration issued another policy in an attempt to establish some standards for proving compliance with the “full and effective accommodation test.”¹⁵ This *2005 Additional Clarification*, along with a Model Survey, Technical Manual, and User’s Guide, aimed to provide guidance beyond that in the *1996 Clarification* both of the interests and abilities test, and of the use of surveys to measure

10. “Dear Colleague” Letter from Norma V. Cantú, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test* (Jan. 16, 1996), available at <http://www.ed.gov/ocr/docs/clarific.html> [hereinafter *1996 Clarification*].

11. *Id.*

12. “Dear Colleague” Letter from Gerald Reynolds, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> [hereinafter *2003 Further Clarification*].

13. See Title IX of the Educational Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239, 71,413 (Dec. 11, 1979).

14. *2003 Further Clarification*, *supra* note 12, at 2.

15. See “Dear Colleague” Letter from James F. Manning, Delegate of the Auth. of the Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., *Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test—Part Three* (March 17, 2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter *2005 Additional Clarification*]. For a more complete discussion of the *2005 Additional Clarification* and the accompanying Model Survey and related Technical Manual, see Catherine Pieronek, *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*, 32 J.C. & U.L. 105 (2005).

student interest in intercollegiate athletics.¹⁶

But the Model Survey fomented controversy from its inception. Groups such as the National Women's Law Center (NWLC) published lists of objections to the survey instrument and methodology.¹⁷ The National Collegiate Athletic Association (NCAA) issued a press release parroting the NWLC's objections and urging its member institutions not to use the survey.¹⁸ Both organizations also pushed to characterize Title IX as a law that promotes women's participation in athletics, rather than as a law that simply prohibits educational institutions from discriminating against women who wish to participate in sports.¹⁹ Politicians joined the chorus of negativity as well. More than 140 Democrats in the U.S. House of Representatives urged President George W. Bush to withdraw the *2005 Additional Clarification*, claiming that it "lower[ed] standards for Title IX

16. *Id.*

17. 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_Prong3_1.pdf [hereinafter 2005 NWLC STATEMENT]. For a thorough discussion of NWLC's objections to the *2005 Additional Clarification* and Model Survey, see Pieronek, *supra* note 15, at 134–40. *See also* U.S. COMM'N ON CIVIL RIGHTS, TITLE IX AND ATHLETICS: ACCOMMODATING INTERESTS AND ABILITIES 11–13, 18–23, 49–56 (2010), *available at* <http://www.usccr.gov/pubs/TitleIX-2010-rev100610.pdf>. [hereinafter 2010 USCCR REPORT] (presenting testimony from, and follow-up discussion with, Jocelyn Samuels, who, at the time of her testimony in May of 2007, served as NWLC's Vice President for Education and Employment. *Id.* at 104.

18. Press Release, Nat'l Collegiate Athletic Assoc., In Honor of Title IX Anniversary NCAA Urges Department of Education to Rescind Additional Clarification of Federal Law (June 22, 2005), *available at* <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/index.html> [hereinafter 2005 NCAA Press Release]. *See also* Pieronek, *supra* note 15, at 140–41; 2010 USCCR REPORT, *supra* note 17, at 14–16, 57–61 (testimony of Judith Sweet, who had served in a number of administrative capacities at the NCAA). In fact, the NCAA Divisions I, II, and III governance structures 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 policies, including the 1996 Clarification," and "urged NCAA members to decline use of the procedures set forth in the March 17, 2005, Additional Clarification." 2005 NCAA Press Release, *supra*.

19. For example, the NWLC claimed that the *2005 Additional Clarification* "conflicts with a key purpose of Title IX—to encourage women's interest in sports and eliminate stereotypes that discourage them from participating." 2005 NWLC STATEMENT, *supra* note 17, at 2. The NCAA press release contained identical language. 2005 NCAA Press Release, *supra* note 18.

compliance.”²⁰ The U.S. Senate Appropriations Committee, clearly having misread (or not read at all) the survey instrument and accompanying documents, criticized the OCR for creating a survey that allowed an educational institution to demonstrate compliance based on survey results alone.²¹ Even members of the Commission on Opportunity in Athletics, convened in 2003 by the Secretary of Education to discuss Title IX reforms and whose work led to the *2005 Additional Clarification*, urged the OCR to rescind the *2005 Additional Clarification*—not for substantive reasons, but for procedural reasons, because the members believed that the document should not have been issued outside the normal federal rule-making process.²²

In response to these objections, the Obama Administration made yet another change to executive branch policy with the April 20, 2010, issuance of a “Dear Colleague” letter that sets out the OCR’s current position on how an educational institution might prove compliance with Title IX by demonstrating that its athletic program offerings satisfy the interests and abilities of its female students.²³ The letter explicitly withdraws the Bush administration’s *2005 Additional Clarification* and explicitly reaffirms the Clinton administration’s *1996 Clarification*. Nevertheless, by its silence, it appears to leave in place the Bush administration’s *2003 Further Clarification* that removes the Clinton administration’s “safe harbor” designation from the “substantial proportionality” test.

The Obama administration drew high praise from the NWLC and others

20. Letter from Nancy Pelosi, Minority Leader, U.S. House of Representatives, to President George W. Bush (June 22, 2005), *available at* <http://pelosi.house.gov/news/press-releases/2005/06/releases-June05-TitleIX.shtml>. *See also* Pieronek, *supra* note 15, at 141–42.

21. *See* Jamie Schuman, *Senate Panel Says More Proof Needed for Colleges’ Compliance with Title IX*, CHRON. HIGHER EDUC. (D.C.), July 29, 2005, at A38. *See also* Pieronek, *supra* note 16, at 142.

22. *See* Erik Brady, *Ex-members of Title IX Panel Urge Schools Not to Use Surveys*, USA TODAY, Oct. 18, 2005, at C9. Several members of the 2003 commission believed that the *1996 Clarification* did not receive widespread acceptance because the OCR issued it through non-regulatory processes. The commissioners felt strongly that their work, which led to the creation of the *2005 Additional Clarification* and Model Survey, would be strengthened through the public-comment process, and would be accepted as legitimate policy once the public had a right to offer input. *Id.* *See also* Pieronek, *supra* note 16, at 143.

23. “Dear Colleague” Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., *Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three* (Apr. 20, 2010), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html> [hereinafter *2010 Clarification*].

with its announcement of a change to an apparently already ineffective Bush administration policy.²⁴ But not everyone agreed with the wisdom of that decision. The OCR's action came less than three weeks after the United States Commission on Civil Rights (USCCR)²⁵ issued a report on "Title IX and Athletics: Accommodating Interests and Abilities," in which it explicitly advocated for the use of the 2005 Model Survey.²⁶ The Commission described that survey as the "best method available" for assessing athletic interests and abilities, and explained that "it offers institutions a flexible and practical, yet rigorous means of attaining a high student response rate."²⁷ The Commission had also recommended that the OCR "continue to encourage institutions to use the Model Survey as a method of complying with Title IX, rather than relying on mechanical compliance with proportional representation, which may result in unnecessary reduction of men's athletic opportunities,"²⁸ and had asked the NCAA to reconsider its position on using the survey.²⁹

Despite this strong endorsement of the Model Survey by a bipartisan body authorized by Congress to investigate and comment upon national civil-rights matters, the OCR found the *2005 Additional Clarification*,

24. See Erik Brady, *Rescinding of Title IX Model Survey Draws Praise from Critics*, USA TODAY (April 20, 2010), http://www.usatoday.com/sports/college/2010-04-19-title-ix-reaction_N.htm. Prior to the issuance of the Model Survey, fifty-seven educational institutions had successfully used their own, albeit identifiably flawed, surveys to demonstrate compliance with the interests and abilities test. See ALAN F. KARR AND ASHISH P. SANIL, NAT'L INST. OF STATISTICAL SCIENCES, TITLE IX DATA COLLECTION: TECHNICAL MANUAL FOR DEVELOPING THE USER'S GUIDE 6 (2005) (hereinafter 2005 TECHNICAL MANUAL). But even with the assurances that the OCR would treat the Model Survey as an unassailable survey instrument and the resulting data as good if the instrument were used according to directions, see *2005 Additional Clarification*, *supra* note 15, not a single NCAA-member institution has yet used this survey to assess student interest in athletics. 2010 USCCR REPORT, *supra* note 17, at 7.

25. The U.S. Commission on Civil Rights is an independent, bipartisan agency established by the United States Congress through the Civil Rights Act of 1957. It is entrusted with responsibility for investigating, reporting on and making recommendations relevant to national civil rights issues. Civil Rights Act of 1957, 42 U.S.C. §§ 1981-2000H-6 (2006).

26. See 2010 USCCR REPORT, *supra* note 17. Although the report is dated February 2010, it was not released by the Commission until April 1st of 2010 and testimony on relevant issues was heard in May 2007. See Erik Brady, *Commission: Title IX Interpretation Unnecessarily Hurts Men's Sports*, USA TODAY (Apr. 1, 2010), http://www.usatoday.com/sports/college/2010-04-01-title-ix_N.htm.

27. 2010 USCCR REPORT, *supra* note 17, at 2.

28. *Id.*

29. *Id.*

Model Survey, and related documents “inconsistent with the nondiscriminatory methods of assessment” set forth in prior OCR pronouncements on the subject.³⁰ The OCR also declared, without citing any evidence, that the 2005 documents “do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys,” relevant to assessing athletic interests and abilities.³¹

In issuing the *2010 Clarification*, what has the OCR actually accomplished? Is the policy a “no-brainer” that will “better ensure equal opportunity in athletics, and allow women to realize their potential,” as Vice President Joseph Biden stated the day he announced the release of the letter?³² Is it a meaningless political move, given that no educational institution has even used the Model Survey since its release in 2005? Or does it change the way that the OCR will view educational institutions’ efforts to prove compliance with Title IX by demonstrating the full and effective satisfaction of the athletic interests and abilities of their female students?

This Article evaluates the new OCR policy in the context of the complete suite of Title IX regulations and policy interpretations issued over the last four decades. It begins with a brief history of Title IX in athletics, including a discussion of the relevant documents that have modified the statute and implementing regulations. It highlights concerns expressed about the *2005 Additional Clarification* and Model Survey, and evaluates the concerns raised in the *2010 USCCR Report*. The Article then discusses what the *2010 Clarification* adds to or takes away from existing Title IX policy, and concludes with a discussion of how this policy appears designed to force schools toward a social-engineering-inspired goal of proportionality, once again, by making it more difficult to comply with the law any other way.

I. THE PROGRESS OF WOMEN IN HIGHER EDUCATION

When enacted in 1972, Title IX provided, quite simply, that

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .³³

The law contained a number of exclusions for certain types of schools

30. *2010 Clarification*, *supra* note 23, at 2.

31. *Id.*

32. Press Release, Dep’t of Educ., Vice President Biden Announces Strengthening of Title IX (Apr. 20, 2010), *available at* <http://www2.ed.gov/news/pressreleases/2010/04/04202010a.html>.

33. Patsy Takemoto Mink Equal Opportunity in Education Act, Title XI, Education Amendments of 1972, 20 U.S.C. §§ 1681(a) (2006).

and programs, such as traditionally single-sex schools,³⁴ and traditionally single-sex programs like Girl Scouts and Boy Scouts.³⁵ Its mandate seemed simple: educational institutions that receive federal funding may not discriminate on the basis of sex. Figuring out exactly what that mandate meant in practice and application, however, has not proved as simple as the wording seems.

Women today enjoy considerable academic success. They comprise approximately half of the U.S. population,³⁶ but graduate from high school at a higher rate than men,³⁷ and earn more than half of all bachelor's and master's degrees awarded across all fields.³⁸ In fact, women crossed the 50% mark at these degree levels a mere ten years after the enactment of Title IX.³⁹ Women have also earned nearly half of all Ph.D.⁴⁰ and first professional degrees⁴¹ granted in recent years. There do remain significant challenges in individual degree programs—for example, women remain seriously under-represented in engineering and the physical sciences⁴²—but

34. *Id.* §1681(a)(5).

35. *Id.* §1681(a)(6)(B).

36. Women actually comprise 50.7% of the U.S. population, but only 48.5% of the traditional college-aged population (ages 18 to 24). NAT'L SCIENCE FOUND., NSF 09-305, WOMEN, MINORITIES AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING 21 tbl.A-1 (2009) [hereinafter NSF 2009 DATA TABLES]. Updated data tables are available at <http://www.nsf.gov/statistics/wmpd/>.

37. See JUDY TOUCHTON WITH CARYN MCTIGHE MUSIL & KATHRYN PELTIER CAMPBELL, ASSOC. OF AM. COLLS. & UNIVS., A MEASURE OF EQUITY: WOMEN'S PROGRESS IN HIGHER EDUCATION 3 (2008). In 2005, 87% of women, but only 79% of men, in the 18–24 year-old group had earned a high school diploma or its equivalent. *Id.*

38. NSF 2009 DATA TABLES, *supra* note 36, at 39 tbl.C-4, tbl.E-2 (In 2007, women earned 57.5% of all bachelor's degrees granted and 60.7% of all master's degrees granted).

39. NAT'L SCIENCE FOUND., NSF 08-321, SCIENCE AND ENGINEERING DEGREES: 1966–2006, at 5 tbl.2 (2008) available at <http://www.nsf.gov/statistics/nsf08321/pdf/nsf08321.pdf> [hereinafter NSF 2008 REPORT] (Women crossed the 50% mark for bachelor's degrees awarded in 1982, and for master's degrees awarded in 1981).

40. *Id.* at 28 tbl.25 (Women earned 45% of all Ph.D. degrees granted across all fields in 2006). 2007 data are not available for all Ph.D. degree earners.

41. The National Science Foundation defines a “first professional degree” as a degree that requires at least six years of college work for completion and two years of pre-professional training. *Id.* at 61. First professional degrees include chiropractic, dentistry, medicine, optometry, osteopathic medicine, pharmacy, podiatry, veterinary medicine, law, divinity/ministry and rabbinical/Talmudic studies. *Id.* Women earned 49.6% of all first professional degrees granted in 2006. *Id.* 2007 data is not available for all first professional degree earners.

42. For example, in 2007, women earned only 18.5% of all engineering

overall, women have made significant educational progress in the wake of the enactment of Title IX.

Nevertheless, at all levels of education, women still do not comprise a proportional share of student-athletes. In high schools across the country, girls comprise half of all students but only 41.3% of student-athletes.⁴³ At NCAA member institutions,⁴⁴ women comprise nearly 60% of all students, but only 42.6% of student-athletes.⁴⁵

This lack of proportionality raises a legitimate concern within the scope of Title IX because institutional decisions can create this participation-rate disparity by funding equipment, facilities, coaches, etc., in an unequal manner. In this way, athletics differs from academics. On the academic side of the collegiate enterprise, women and men have a wide array of opportunities across a range of institutions and programs. Whether a male or female student occupies a seat in a classroom or a bed in a residence hall, the cost is the same to the educational institution. Thus, in a broad sense, it matters little to an institution whether the tuition-paying, expense-costing human is a man or a woman—most institutions merely want to enroll the best students they can to achieve their enrollment and graduation goals. But athletes, on the other hand, do cost the institution differently depending on the sports they play and, surprisingly, depending on their gender.

The financial aspects of athletics differ significantly from the financial aspects of academics. Athletic participation opportunities are not as fungible as seats in a classroom. An educational institution cannot increase

bachelor's degrees granted, NSF 2009 DATA TABLES, *supra* note 36, at 39 tbl.C-4, 22.6% of all engineering master's degrees granted, *id.* at 144 tbl.E-2, and only 20.9% of all engineering Ph.D. degrees granted, *id.* at 172 tbl.F-2.

43. Press Release, Nat'l Fed'n of State High Sch. Assocs., High School Sports Participation Increases for 20th Consecutive Year (Sept. 15, 2009), *available at* <http://www.nfhs.org/content.aspx?id=3505>.

44. Other national athletic associations—including the National Association for Intercollegiate Athletics (NAIA), the National Christian Collegiate Athletic Association (NCCAA), the National Junior College Athletic Association (NJCAA) and the United States Collegiate Athletic Association (USCAA)—also sponsor competitions, but only the NCAA collects and presents participation data by gender in a consistent format that aggregates data across all member institutions. Even the Government Accountability Office uses only NCAA data in its analyses of trends in athletics participation by women and men. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-535, INTERCOLLEGIATE ATHLETICS: RECENT TRENDS IN TEAMS AND PARTICIPANTS IN NATIONAL COLLEGIATE ATHLETIC ASSOCIATION SPORTS 28 (2007).

45. NAT'L COLLEGIATE ATHLETICS ASSOC., 1981-82 - 2006-07, NCAA SPORTS SPONSORSHIP AND PARTICIPATION REPORT 63-64 (2009).

the number of female student-athletes simply by substituting a woman for a man on a team. Rather, adding opportunities for women usually requires adding entire teams, with all of their attendant costs. And although men's programs actually cost more to operate than women's programs, men's programs also have a higher total revenue (or lose less money overall) than women's sports—with or without profitable football teams—as Table 1 below shows.

Table 1: Median Expenditures and Revenue of Men's and Women's Athletic Programs
NCAA Division I (2006) (in millions of dollars)

	Median Expenditures	Median Total Revenue	Median Net Revenue
Football Bowl Subdivision (n=119) ⁴⁶			
Men's Programs	\$15.196	\$18.824	\$1.209
Women's Programs	\$6.143	\$1.702	(\$4.033)
	Median Expenditures	Median Total Revenue	Median Net Revenue
Football Championship Subdivision (n=118) ⁴⁷			
Men's Programs	\$4.204	\$3.028	(\$0.443)
Women's Programs	\$2.701	\$1.441	(\$0.585)
Division I without Football (n=93) ⁴⁸			
Men's Programs	\$3.003	\$2.791	(\$0.033)
Women's Programs	\$2.949	\$2.235	(\$0.273)

Football clearly has a significant positive impact on the financial status of men's programs in the NCAA's Football Bowl Subdivision (FBS). But even at educational institutions where football is less profitable overall (the Football Championship Subdivision, or FCS), or totally nonexistent, men's

46. NAT'L COLLEGIATE ATHLETICS ASSOC., NCAA REVENUES AND EXPENSES: DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 2004–2006, at 21 tbl.3.1 (2008).

47. *Id.* at 50 tbl.4.1.

48. *Id.* at 78 tbl.5.1.

sports cost their institutions less money because their programs generate more revenue. In fact, in 2006, not one single women's program across all 330 institutions in the NCAA's Division I reported revenues exceeding expenses, while sixty-six men's programs actually earned money for their institutions: sixty-one in the FBS, one in the FCS, and four among schools with no football program.⁴⁹

Simply put, women's athletic participation opportunities, collectively, cost educational institutions more money than men's athletic participation opportunities. And when achieving equity in athletics requires an allocation of financial assets, funding opportunities for women may well require taking opportunities away from men. The same mathematical considerations simply do not apply in academics.

A serious debate has raged for decades over whether an educational institution striving for Title IX compliance should make available to women a percentage of athletic participation opportunities that closely resembles their percentage in the student body (proportionality), or whether the institution merely needs to meet the athletic interests and abilities of the students it enrolls, much the same way it strives to meet the academic interests of all of its students.⁵⁰ The proportionality solution could cause an educational institution, working with fixed financial resources, to choose to cut men's programs, and those cuts might or might not result in additional opportunities for women. Satisfying women's interests and abilities, on the other hand, might preserve more opportunities for both men and women, but presents an additional problem for the institution, because even though Title IX actually allows an educational institution to decide which way it chooses to comply with the law, the OCR has not made it equivalently easy to *prove* compliance or, alternatively, avoid a finding of noncompliance.

49. *Id.* at 23 tbl.3.5; 52 tbl.4.5; 80 tbl.5.6.

50. There has been very little discussion in recent years about the "history of continuing program expansion" test for Title IX compliance. Although it remains possible to comply with the law by demonstrating a history of continuing program expansion, the lack of attention to this criterion leads to the question of whether it is a viable way to comply with the law thirty years after the *1979 Policy Interpretation* included it in its three-part test for compliance, or whether it is merely a road that ultimately leads to proportionality.

II. A BRIEF HISTORY OF TITLE IX: THE STATUTE, REGULATIONS, AND CLARIFYING DOCUMENTS⁵¹

Over the years, as educational institutions and all three branches of the federal government have wrestled with the meaning of Title IX as applied to intercollegiate athletics, a seemingly simple law has become complex. A brief chronology of significant developments since 1972 includes:

- Promulgation of the 1975 Implementing Regulations:⁵² These regulations mention athletics only twice. The regulations require that an educational institution distribute any athletic scholarships/financial assistance to male and female student-athletes in proportion to their participation in athletics.⁵³ The regulations also provide general guidelines on gender equity in athletics, indicating that an institution may sponsor separate men's and women's teams, but must nevertheless provide "equal athletic opportunity" for men and women.⁵⁴ In assessing whether the educational institution has met this responsibility, the regulations listed ten factors to consider:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.⁵⁵

- Issuance of the 1979 Policy Interpretation:⁵⁶ This policy interpretation treated the first of the ten items listed above as a separate line of inquiry because it involves a separate issue for

51. For a more detailed discussion of the history of Title IX in athletics, see Pieronek, *supra* note 15, at 105–12.

52. 34 C.F.R. § 106.41 (2011).

53. *Id.* § 106.37(c).

54. *Id.* § 106.41.

55. *Id.* § 106.41(c).

56. *See* Title IX of the Educational Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

educational institutions. Items (2) through (10) concern the *quality* of a female student-athlete's participation experience—that is, whether women receive “equivalent treatment” by the institution.⁵⁷ But item (1) concerns whether or not she even *has* that participation experience in the first place—that is, whether the educational institution has effectively accommodated her athletic interests and abilities. The 1979 Policy Interpretation thus established a three-part test for “effective accommodation” comprising:

- (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.⁵⁸

• *Grove City College v. Bell*:⁵⁹ In 1984, the United States Supreme Court determined that Title IX applied only to those specific educational programs and activities within an institution that received federal funding, effectively removing athletics from Title IX's reach, unless the athletic program itself received federal funding.

• Civil Rights Restoration Act of 1987:⁶⁰ In 1988, Congress enacted the Civil Rights Restoration Act of 1987 “to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs.”⁶¹ The law had the effect of subjecting to

57. *Id.*

58. *Id.* at 71,418 (emphasis added).

59. 465 U.S. 555 (1984).

60. 20 U.S.C. § 1687–88 (2006).

61. S. REP. NO. 100-64, at 2 (1988) (citation omitted).

Title IX's mandates *all* operations of an educational institution, including athletics, if *any* program at the institution accepted any federal funding whatsoever.⁶²

• Over the next fifteen years, the federal courts further defined the meaning of the three-part test for effective accommodation. With regard to proportionality (Part One of the three-part test), the courts noted that proportionality did not necessarily mean exact proportionality, but did mean something closer than a 10% disparity between the enrollment of women and the participation of women in athletics.⁶³ With regard to a history of continuing program expansion (Part Two of the three-part test), courts made clear that an educational institution could not demonstrate continuing program expansion if it had cut women's programs⁶⁴ or if it had added only one women's team over a fifteen-year period.⁶⁵ And with regard to the satisfying the interests and abilities test (Part Three of the three-part test), courts ruled that the existence of a viable women's team demonstrated interest and ability, and thus, cutting that team could not possibly allow the institution to comply with the law by demonstrating that it had satisfied the interests and abilities of its female students.⁶⁶ Moreover, courts found that educational institutions could, in the absence of proportionality, cut only men's teams—regardless of the fact that this could be considered a gender-based decision—and still remain in compliance with the law.⁶⁷

62. See 20 U.S.C. §1687(2), (4) (2006).

63. See *Roberts v. Colo. State Bd. of Agric.*, 814 F. Supp. 1507, 1511–13 (D. Colo. 1993), *aff'd in relevant part*, 998 F.2d 824 (10th Cir. 1993) (12.7% difference too high); *Cohen v. Brown Univ.*, 809 F. Supp. 978, 980–81, 991 (D.R.I. 1992) (preliminary injunction), *aff'd*, 991 F.2d 888 (1st Cir. 1993), 879 F. Supp. 185 (D.R.I. 1995) (trial on the merits) (10% difference between women's enrollment and women's participation in athletics determined too high), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

64. See *Roberts*, 814 F. Supp. at 1514; *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

65. See *Pederson vs. La. State Univ.*, 912 F. Supp. 892, 916–17 (M.D. La. 1996) (University only added two women's teams because it was following decisions of the Southeastern Conference, not in an effort to expand women's athletics), *aff'd in part, rev'd in part, vacated in part and remanded*, 201 F.3d 388 (5th Cir.), *on rehearing*, 213 F.3d 858 (5th Cir. 2000) (prior decision modified); *Cohen*, 809 F. Supp. at 981, 991.

66. See *Roberts*, 814 F. Supp. at 1517; *Favia*, 812 F. Supp. at 585; *Cohen*, 809 F. Supp. at 991–93.

67. See *Boulahanis v. Bd. of Regents, Ill. State Univ.*, 198 F.3d 633, 637–38 (7th Cir. 1999); *Miami Univ. Wrestling Club v. Miami Univ.*, 195 F. Supp. 2d

- The Clinton administration's *1996 Clarification*.⁶⁸ This document provided specific factors to guide an analysis of each part of the three-part test. It contained a lengthy discussion of the concept of substantial proportionality (Part One), including arithmetic examples of situations in which an educational institution probably would and probably would not have to add a women's team. The document only briefly discussed the other two effective accommodation tests. It listed factors to consider when attempting to satisfy either test, but provided no objective measures for evaluating compliance with either the history of continuing program expansion test (Part Two) or the interests and abilities test (Part Three). Importantly, the transmittal letter accompanying the *1996 Clarification* also clearly set out the controversial premise that the substantial proportionality test provided educational institutions with a "safe harbor."⁶⁹

- The Bush administration's *2003 Further Clarification*.⁷⁰ This document responded to widespread concerns that the *1996 Clarification* drove institutions to strive for substantial proportionality, because the *1996 Clarification* characterized only substantial proportionality as a "safe harbor." The *2003 Further Clarification* specifically incorporated the guidelines for compliance with each part of the three-part test as presented in the *1996 Clarification*, but also made clear that "each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored,"⁷¹ thus removing the "safe harbor" designation from the substantial proportionality test.

1010 (S.D. Ohio 2001), *aff'd*, 302 F.3d 608, 615–16 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154, 1157 (D.N.D. 2000), *aff'd*, 291 F.3d 1042 (8th Cir. 2002); *Neal v. Bd. of Trustees of the Cal. State Univ.*, 1997 WL 1524813, 14–15 (E.D. Cal. Dec. 26, 1997), *on rehearing*, 1999 WL 1569047 (E.D. Cal. Feb. 22, 1999), *rev'd and vacated*, 198 F.3d 763 (1999); *Kelley v. Bd. of Trustees of the Univ. of Ill.*, 832 F. Supp. 237, 244 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994).

68. *1996 Clarification*, *supra* note 10.

69. *Id.*

70. *2003 Further Clarification*, *supra* note 12.

71. *Id.* at 2.

III. THE 2005 ADDITIONAL CLARIFICATION AND MODEL SURVEY

In response to a report issued by the Secretary of Education's Commission on Opportunity in Athletics in 2003,⁷² the OCR issued yet another Title IX clarification,⁷³ to give educational institutions a clear, objective, and straightforward way of determining compliance with the interests and abilities test for effective accommodation (Part Three). This clarification included the Model Survey developed by the National Center for Education Statistics, based on studies of other surveys conducted by the National Institute of Statistical Sciences.⁷⁴ In offering the survey, the OCR assured that, if an institution used the Model Survey to assess student interest in athletics participation and administered the survey in accordance with the accompanying User's Guide, neither the survey instrument nor the raw results of the survey would be open to question. Of course, the institution's interpretation of the survey results and its actions in response to the survey data would remain open to review.⁷⁵

The *2005 Additional Clarification* also indicated that the survey results would present a rebuttable presumption of compliance with Part Three.⁷⁶ Thus, the results would allow an educational institution to demonstrate compliance *unless* there existed at the educational institution: (1) unmet interest sufficient to sustain a varsity team in a sport, which the survey would identify;⁷⁷ (2) sufficient ability to sustain a varsity team in a sport, which the survey could identify; and (3) a reasonable expectation of competition for the team within the institution's normal competitive region.⁷⁸ Critics, however, charged that the survey "lower[ed] the standard for Title IX compliance" because it allowed educational institutions to justify fewer participation opportunities—that is, non-proportional

72. SEC'Y COMM'N ON OPPORTUNITY IN ATHLETICS, U.S. DEP'T OF EDUC., OPEN TO ALL: TITLE IX AT THIRTY (2003) [hereinafter *2003 Commission Report*] available at <http://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf>. See also Pieronek, *supra* note 15, at 109–13; Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75 (2003).

73. *2005 Additional Clarification*, *supra* note 15.

74. 2010 USCCR REPORT, *supra* note 17, at 7. These organizations have been described as "independent, expert statisticians." *Id.*

75. *2005 Additional Clarification*, *supra* note 15, at 7–8.

76. *Id.*

77. *Id.* at 11. The survey allowed students to assess their own ability, but also allowed for actual evaluation of those abilities by coaches and other professionals.

78. *Id.* at 4. The *2005 Additional Clarification* thus included language similar to that in the *1996 Clarification*, *supra* note 10, at 1, and incorporated by reference into the *2003 Further Clarification*, *supra* note 12, at 2.

participation opportunities—for women, if women expressed less interest in athletics generally than men.⁷⁹ Rather than interpreting the direct expression of interest, or lack thereof, as women having the “ability to express and act on their own interests,”⁸⁰ critics contended that any lack of interest by women in athletics must be the result of a “lingering lack of exposure [to] and the second-class status of opportunities for women” in athletics.⁸¹

Critics also charged that the survey allowed educational institutions to support decisions not to offer *particular* sports for women. The 2005 Model Survey allowed an educational institution to restrict survey administration to current students, but recommended administering it to the “entire student population.”⁸² The NWLC argued that this would “allow[] schools to evade their legal obligation to look broadly for interest in certain sports by women,”⁸³ albeit without identifying whence this legal obligation arises. More to the point, though, the NWLC did note that “students interested in a sport not offered by a school are unlikely to attend that school.”⁸⁴ Consequently, surveying only the population of enrolled, or even admitted and enrolled, students “narrows the universe of interest and has the impact of perpetuating limited sports opportunities,”⁸⁵ because a student presumably would not apply to, much less attend, an educational institution that did not sponsor a team in a sport in which the student had a serious interest in participating. Unfortunately, this characterization of an educational institution’s obligations to understand student interests could invalidate a survey that does not reach the entire population of students who *might* be interested in the institution. Solving this problem likely would require the intervention of Department of Education, the NCAA or other athletic organizations, or national testing organizations that reach millions of high school students annually—it is not something an individual educational institution likely could solve for itself.

Overall, critics expressed concern that 2005 Model Survey results could justify fewer opportunities for women in response to lower expressed levels of interest. This would, in turn, have the effect of “fr[eezing] past bias against women’s participation in sports.”⁸⁶

79. See Pieronek, *supra* note 15 at 141–42.

80. 2010 USCCR REPORT, *supra* note 17, at 9 (summarizing the testimony of Jessica Gavora, a Washington, D.C.-based writer who has commented extensively on Title IX and athletics).

81. *Id.* at 28 (capturing discussion comments from Jocelyn Samuels).

82. See 2005 *Additional Clarification*, *supra* note 15, at 10, 49.

83. 2005 NWLC STATEMENT, *supra* note 17, at 2.

84. *Id.*

85. 2010 USCCR REPORT, *supra* note 17, at 98 (quoting from the rebuttal statement of Commissioners Michael Yaki and Arlan Melendez).

86. *Id.* at 30 (capturing discussion comments from Judith Sweet).

But a properly executed survey could have had the exact opposite effect, by providing firm evidence of sufficient unmet interest to force an institution to add participation opportunities for women. In fact, during the May 2007 discussions that informed the 2010 U.S. Commission on Civil Rights (USCCR) Report, the chair of the USCCR, Gerald A. Reynolds, “observed that if [the Model Survey] was a method for avoiding a school’s obligation to add women’s teams, it was a poor idea,” because a survey “would augment the burden on schools over time if women’s interest and ability continued to increase.”⁸⁷ And David Black, commenting in his role as Deputy Assistant Secretary for Enforcement at the OCR, pointed out that the Model Survey actually presented a “tool to identify unmet interest,” and noted that some educational institutions might not want to use it because survey results might identify unmet interest that the institution would then have to meet.⁸⁸

Critics also objected to the way in which the survey treated non-respondents—that is, by equating lack of response to lack of interest as long as the survey was open to the entire student population.⁸⁹ But the developers of the Model Survey had included significant safeguards to ensure that interested students would have a way of expressing their interest. The *2005 Additional Clarification* set out a clear preference for a census approach over a survey approach,⁹⁰ because a survey approach could miss interested students and also presents difficulties in dealing with sampling error. It recommended tying the survey to something that students had to do, such as registering for classes, further evidencing a desire to give every student a chance to respond.⁹¹ And it also allowed non-response to equate to lack of interest only if the educational institution clearly told the students that fact.⁹² But critics complained that students might not take such surveys seriously and, for any number of reasons, might not complete them.⁹³ Further, NCAA guidelines declared “suspect” any survey with a response rate below 60%, and indicated that a non-response rate of more than 40% would not meet the organization’s validity criteria.⁹⁴ Others have pointed out, however, that a survey response rate as

87. *Id.* at 27.

88. *Id.*

89. *2005 Additional Clarification*, *supra* note 15, at 6.

90. *Id.* at 7.

91. *Id.*

92. *Id.*

93. 2010 USCCR REPORT, *supra* note 17, at 12 (capturing comments by Jocelyn Samuels).

94. *Id.* at 13, 53. Interestingly, however, the NCAA appears to have based its objections on a sample survey rather than a census survey, because the guidelines “warn that response rates below 60% ‘would almost always be cause for concern because almost half of *those selected to represent your school* did not participate in

low as 2% might provide valuable information, “if [those] responses are from the 25 students interested in softball, [because] the institution is now eligible to add the sport, and assess the ability of [those] interested students.”⁹⁵

However unreasonable, the criticisms of the Model Survey have persisted. Only one educational institution has ever used the survey to prove compliance with Part Three.⁹⁶ And now, no further educational institutions will.

IV. THE 2010 CIVIL RIGHTS COMMISSION REPORT

In May 2007, the USCCR heard testimony from a number of Title IX experts and the general public on the *2005 Additional Clarification* and Model Survey, and compiled the testimony and the Commission’s recommendations into a report, which it issued in April 2010.⁹⁷ As the Executive Summary explains, “The guidance was issued at a time when critics of Title IX claimed that rigid compliance forced the cancellation of many educational programs or teams for men, as many schools demonstrated Title IX compliance through ‘substantial proportionality.’”⁹⁸ The report also acknowledged that the Model Survey had “prompted a strong and often negative reaction from the [NCAA] and many women’s groups.”⁹⁹

The report contains testimony from and discussions involving people who favored a broader range of ways to prove Title IX compliance, along with those who focused on proportionality as an ultimate goal. The panelists addressed a “wide range of issues,” along with a defined list of questions:

- The methods that schools used to administer the Model Survey, with special attention to electronic means and the impact on response rate.
- The appropriateness of using any survey in gauging interest.

the study’ . . .” *Id.* at 53 (emphasis added). The NCAA does not address what would happen if half of those who *do* respond represent the opinions of the half of the population that did not participate.

95. *Id.* at 20 (capturing comments by David Black).

96. See ALISON SOMIN, THE FEDERALIST SOCIETY, NEW FEDERAL INITIATIVE PROJECT, TITLE IX 7 n.24 (2010), available at http://www.fed-soc.org/doclib/20100805_NFIPTitleIX.pdf. See also Eric McErlain, *WIU Completes Model Survey*, SAVING SPORTS, BLOG OF THE AMERICAN SPORTS COUNSEL (May 27, 2009, 12:05 AM), <http://savingsports.blogspot.com/2009/05/wiu-completes-model-survey.html>.

97. 2010 USCCR REPORT, *supra* note 17, at 1–2.

98. *Id.* at 1.

99. *Id.*

- Are men and women equally interested in sports?
- To what extent has Title IX affected women's participation in sports?
- Has Title IX resulted in the elimination of any men's sports?
- How is ability in sports determined?¹⁰⁰

After hearing testimony from representatives of the NCAA, the NWLC, and critics of the law, the Commission declared the Model Survey "the best method available for attaining [Part] Three compliance, because it offers institutions a flexible and practical, yet rigorous means of attaining a high student response rate."¹⁰¹ The report also presented four recommendations directed at the OCR and the NCAA:

1. The U.S. Commission on Civil Rights commends the U.S. Department of Education for developing the student interest survey and for providing a rigorous yet practical means of complying with Title IX. It recommends that the Department's Office for Civil Rights continue to encourage institutions to use the Model Survey as a method of complying with Title IX, rather than relying on mechanical compliance with proportional representation, which may result in unnecessary reduction of men's athletic opportunities.
2. Since female students are fully capable of expressing interest in athletics, or lack thereof, advocates for particular views on Title IX compliance should not devalue or dismiss their perspectives.
3. [Part] Three regulations should be revised to explicitly take into account the interest of both sexes rather than just the interest of the underrepresented sex. This would help to restore Title IX to its original goal of providing equal opportunity for individuals of both sexes.
4. The NCAA should reconsider its objection to the Model Survey and not discourage educational institutions from using student interest surveys or urge them to avoid their use, since college students are adults capable of assessing their own interest in sports.¹⁰²

100. *Id.* at 2.

101. *Id.*

102. *Id.* at 4. Of the eight commissioners, five voted in favor of the recommendations, one abstained and two were not present for the vote.

But the report apparently had no effect on the OCR. A mere three weeks after the USCCR released the report, the OCR took an action directly opposite to that recommended by the independent, bipartisan USCCR and revoked the Model Survey.¹⁰³

V. THE 2010 CLARIFICATION

The *2010 Clarification*, by rescinding the *2005 Additional Clarification*, closed the door on the use of the Model Survey as a way of demonstrating compliance with the interests and abilities criterion (Part Three) of the three-part test for effective accommodation.¹⁰⁴ That much is clear from the language of the clarification itself: “[T]he Department is withdrawing the *2005 Additional Clarification* and User’s Guide, including the model survey.”¹⁰⁵

But what else has the *2010 Clarification* changed? In stating that “[a]ll other Department policies on Part Three remain in effect and provide the applicable standards for evaluating Part Three compliance,”¹⁰⁶ has the *2010 Clarification* done anything other than simply eliminate the 2005 Model Survey from the methods an educational institution might use to assess interest and ability? On its face, this statement indicates that the OCR has reverted to the standards for proving compliance with Part Three as set out in the *2003 Further Clarification*¹⁰⁷ and, by its incorporation into the *2003 Further Clarification*, the *1996 Clarification*.¹⁰⁸ But the *2010 Clarification* actually goes further, and adds to those documents by “provid[ing] additional clarification on[] the multiple indicators discussed in the *1996 Clarification* that guide the OCR’s analysis of whether institutions are in compliance with Part Three, as well as the nondiscriminatory implementation of a survey as one assessment technique.”¹⁰⁹ In fact, the *2010 Clarification* actually adds to existing policy and, consequently, requires careful analysis in the context of those prior policies.

A. The 1979 Policy Interpretation

Soon after the adoption of the 1975 Implementing Regulations, it became necessary to clarify the provision dealing with the goal of equal athletic opportunity for men and women within the context of separate

103. *2010 Clarification*, *supra* note 23, at 2.

104. *Id.*

105. *Id.*

106. *Id.*

107. *2003 Further Clarification*, *supra* note 12, at 1–3.

108. *Id.*; *1996 Clarification*, *supra* note 10.

109. *2010 Clarification*, *supra* note 25, at 2–3.

athletic programs. As stated in the “Purpose” section of the 1979 Policy Interpretation, between 1975 and 1978, the Department of Health, Education and Welfare (HEW)¹¹⁰ had received over one hundred complaints about sex discrimination in collegiate athletic programs, and numerous questions about compliance issues.¹¹¹ HEW thus determined a need for “further guidance on what constitutes compliance with the law,”¹¹² and issued the 1979 Policy Interpretation “to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.”¹¹³

This new guidance focused separately on equal-treatment factors—scholarships, equipment, and other program accouterments—and on the effective accommodation of the interests and abilities of student-athletes through sufficient participation opportunities. The effective accommodation section presented for the first time the now-familiar three-part test for compliance: substantial proportionality; a history of continuing program expansion; or the full and effective accommodation of the interests and abilities of students of the underrepresented sex.¹¹⁴ Unfortunately, the 1979 Policy Interpretation offered no other guidance on what constituted compliance with any of these criteria, leaving the interpretation of the text to the courts for the next seventeen years.

The courts, however, never explicitly defined standards for complying with Part Three (or any other part). Instead, when evaluating decisions that colleges and universities made about their athletic programs, courts identified actions that did not meet the requirements of the test, or circumstances that rendered an application of the test unnecessary. In so doing, they identified certain actions that did not constitute compliance or that did not implicate compliance under that criterion, but never stated what actually did constitute compliance.

In *Cohen v. Brown University*; *Roberts v. Colorado State University*; and *Favia v. Indiana University of Pennsylvania*, each defendant institution cut both men’s and women’s programs in response to budget concerns. These cuts impacted men’s and women’s opportunities fairly equally, but in each case, the representation of women among student-athletes was at least 10% lower than their representation in the undergraduate student body before and after the cuts—a condition that the

110. 1979 Policy Interpretation, *supra* note 3, at 71,413 (At the time, the Department of Health, Education and Welfare had responsibility for Title IX.).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 71,418.

courts construed as an absence of substantial proportionality.¹¹⁵ And in each case, the federal courts indicated that, absent proportionality, cutting a viable women's team could not satisfy the interests and abilities test because eliminating those opportunities for women worked directly against satisfying their interests and abilities as expressed through their participation on those teams.¹¹⁶

When men used similar logic to challenge cuts to their programs, however, the courts reacted differently. In *Kelley v. Board of Trustees of the University of Illinois*, the court determined that, where a disproportionately high percentage of participation opportunities existed for members of one sex, the interests and abilities of that group are presumptively met—that is, the institution may choose to satisfy Part One, substantial proportionality, and need not satisfy Part Three.¹¹⁷ Building on the reasoning in *Kelley*, the courts in *Neal v. Board of Trustees of the California State University*; *Boulahanis v. Board of Regents, Illinois State University*; *Chalenor v. University of North Dakota*; and *Miami University Wrestling Club v. Miami University*, further ruled that cuts to men's programs made expressly for the purpose of complying with Title IX—in other words, decisions made on the basis of the sex of the student-athletes involved—did not violate Title IX as long as the resulting athletic program either complied with the substantial proportionality test or continued to provide more opportunities to male student-athletes.¹¹⁸

B. 1996 Clarification

In issuing the *1996 Clarification*,¹¹⁹ the Clinton administration recognized “the need to provide additional clarification regarding what is

¹¹⁵ *Roberts v. Colo. State Bd. of Agric.*, 814 F. Supp. 1507, 1511–13 (D. Colo. 1993), *aff'd in relevant part*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993); *Cohen v. Brown Univ.*, 809 F. Supp. 978, 980–81, 991 (D.R.I. 1992) (preliminary injunction), *aff'd*, 991 F.2d 888 (1st Cir. 1993), 879 F. Supp. 185 (D.R.I. 1995) (trial on the merits), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

¹¹⁶ *Roberts*, 814 F. Supp. at 1517; *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993); *Cohen*, 809 F. Supp. at 991–93.

¹¹⁷ *Kelley v. Bd. of Trustees of the Univ. of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994).

¹¹⁸ *See Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046 (8th Cir. 2002); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615–16 (6th Cir. 2002); *Neal v. Bd. of Trustees of the Cal. State Univ.*, 198 F.3d 763, 766–69, 772–73 (9th Cir. 1999); *Boulahanis v. Bd. of Regents, Ill. State Univ.*, 198 F.3d 633, 638 (7th Cir. 1999).

¹¹⁹ *1996 Clarification*, *supra* note 10.

commonly referred to as the ‘three-part test’ . . . ”¹²⁰ after almost a decade of allowing the courts alone to clarify the law. The transmittal letter accompanying the clarification characterized the interests and abilities criterion as “center[ing] on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.”¹²¹ And, despite declaring the substantial proportionality criterion a “safe harbor,” the letter confirmed that each part of the test provided a viable way of complying with Title IX. Discussing Part Three specifically, the letter stated:

In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women’s interests and abilities are fully and effectively accommodated.¹²²

Following in the path established by the courts in *Kelley* and the other men’s athletics cases, the letter also indicated that the interests and abilities test may focus only on the underrepresented sex, because Title IX addresses discrimination and, significantly, because the law allows educational institutions to establish separate programs for men and women, “thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex.”¹²³ The transmittal letter also noted that “several parties suggested that the [OCR] provide more information regarding the specific elements of an appropriate assessment of student interest and ability.”¹²⁴ In choosing not to give such specific guidance, the OCR indicated a countervailing desire “to give institutions flexibility to determine interests and abilities consistent with [their] unique circumstances and needs.”¹²⁵ And recognizing the usefulness of sharing good assessment strategies, the OCR indicated that it would “work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.”¹²⁶

The clarification itself looks at each part of the three-part test separately. In exploring Part Three, the clarification recognizes that under-

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

representation of (typically) women in an institution's athletic program might result from factors other than discrimination on the part of the institution. But consistent with the decisions in *Cohen*, *Favia*, and *Roberts*,¹²⁷ the clarification states:

If an institution has recently eliminated a viable team from the intercollegiate program, the [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.¹²⁸

The clarification then discusses three areas of inquiry when evaluating whether an institution has complied with Title IX by satisfying the interests and abilities of its female students:

The [OCR] will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If *all three conditions are present* the OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.¹²⁹

In evaluating whether there exists unmet interest in a particular sport among an institution's current students and admitted students not yet enrolled, the OCR will seek to identify the existence of any of the following indicators:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular interscholastic sports by admitted students.¹³⁰

Thus, the clarification requires that the institution pay attention to things going on both at the institution and in the areas from which the institution recruits its students, to ensure that the institution notices trends to which it might react in improving opportunities for women. It explicitly allows the

127. See *supra* text accompanying note 116.

128. 1996 Clarification, *supra* note 10.

129. *Id.* (emphasis added).

130. *Id.*

use of questionnaires or surveys to gauge student interest.¹³¹ In conducting an assessment of interest on campus, the clarification does not require any particular method, and instead allows an institution to use “nondiscriminatory methods of its choosing,” which could include surveys, a student forum, or any other method that would “reach a wide audience of students.”¹³² The OCR did indicate that any information-gathering mechanism should provide an “open-ended” way for students to indicate the sports in which they have interest. However, such assessments need not undergo “elaborate scientific validation.”¹³³ Thus, an institution could use a survey, but need not. The OCR also cautioned that, however an institution evaluated interest, such evaluations must occur periodically “so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex.”¹³⁴

In evaluating whether sufficient ability exists to sustain a team in a sport in which the institution has identified an emerging interest, the OCR will look at the following:

- the athletic experience and accomplishments—in interscholastic, club or intramural competition—of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.¹³⁵

It matters not whether the students interested and able to sustain a team can compete at the same level as the institution’s other, existing teams; it matters that they can sustain any sort of a team, however successful or unsuccessful that team might be.¹³⁶

Finally, in determining whether reasonable competitive opportunities exist within the institution’s geographic area, the OCR will consider:

- competitive opportunities offered by other schools against which the institution competes; and

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.¹³⁷

If such opportunities do not exist, an institution might still have an obligation to try to generate interest in the particular sport, but need not create the team until a reasonable competitive opportunity exists.¹³⁸

Thus, the *1996 Clarification* spelled out the indicators that the OCR will examine to determine whether sufficient interest and ability exist to sustain a competitive team in the institution's geographic region. An institution may assess interest in a way that works for the institution, as long as that method is nondiscriminatory and is designed to reach broadly across the student population.¹³⁹ The professional judgment of coaches, administrators, and students is important in determining whether a sufficient number of students have the ability to sustain a team. However, the institution cannot refuse to create a team that could be competitive, even if it would not be as competitive as the institution's other, established team.¹⁴⁰ Additionally, an institution does not need to do something outrageous, such as creating a downhill snow-skiing team in Miami, Florida, but might have to encourage other teams in its conference or its state to develop programs in emerging sports to establish a geographically reasonable competitive group in a sport.¹⁴¹

Some have characterized the *1996 Clarification's* guidance on Part Three as a thorough list of indicators to consider, but have complained that the guidance on evaluating those indicators was "so vague that schools had no way of knowing when they had attained compliance."¹⁴² Others believed the factors to be "very specific,"¹⁴³ "appropriate and lawful,"¹⁴⁴ and have characterized as "misguided" any suggestions that "the 1996 Clarification did not provide adequate guidance," because it actually provided "a very detailed road map."¹⁴⁵ This level of disagreement alone should have demonstrated the need for further efforts to reconcile these diametrically opposed viewpoints. The real issue, of course, is that the *1996 Clarification* provided guidance on Part One, substantial

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. 2010 USCCR REPORT, *supra* note 17, at 6 (summarizing the testimony of Daniel A. Cohen, an attorney specializing in Title IX cases).

143. *Id.* at 12 (comments by Jocelyn Samuels).

144. *Id.* at 22 (comments by Jocelyn Samuels).

145. *Id.*

proportionality, that was “measurable,” so “school officials knew when compliance with Title IX had been attained.”¹⁴⁶ The clarification’s guidance on Part Three, on the other hand, “was so ambiguous that [school officials] could not determine [for themselves] when compliance was achieved,” so “schools resorted to using proportionality.”¹⁴⁷ Those obsessed with proportionality as the standard for Title IX compliance, then, would find the guidance in the *1996 Clarification* adequate, while those looking for other means of compliance likely would find the guidance insufficient.

C. 2003 Further Clarification

In the *2003 Further Clarification*,¹⁴⁸ the Bush administration explicitly incorporated the *1996 Clarification* in its entirety, but with one significant change. In response to criticisms of the “safe harbor” designation bestowed upon the substantial proportionality criterion in the *1996 Clarification*, the *2003 Further Clarification* declared that “each of the three prongs of the test is an equally sufficient means of complying with Title IX,” and stated clearly that “no one prong is favored,”¹⁴⁹ thereby lifting the “safe harbor” designation from the substantial proportionality criterion. It added nothing new to public understanding of Part Three.

D. 2010 Clarification

By withdrawing the *2005 Additional Clarification* and the accompanying Model Survey and related documents, the *2010 Clarification*, on its face, returns Title IX compliance to the criteria defined by the *1996 Clarification* and explicitly adopted by the *2003 Further Clarification*.¹⁵⁰ However, the *2010 Clarification* actually goes beyond simply eliminating one policy statement and returning to the prior statement. Instead, it also addresses some of the objections raised in response to the *2005 Additional Clarification* and offers some additional guidance on using a survey to gather data to support an evaluation of the interests and abilities criteria.¹⁵¹ In so doing, it incorporates much of what informed the Model Survey and also adds some new recommendations. What it does not do, however, is provide an assured way of using a survey to determine student interest in athletics.

The *2010 Clarification* focuses on the three areas of inquiry first

146. *Id.* at 7 (summarizing the testimony of Daniel Cohen).

147. *Id.*

148. *2003 Further Clarification*, *supra* note 12.

149. *Id.*

150. *2010 Clarification*, *supra* note 23, at 2.

151. *Id.* at 8–12.

presented in the *1996 Clarification* used by the OCR to determine compliance with the interests and abilities criteria:

1. Is there unmet interest in a particular sport?
2. Is there sufficient ability to sustain a team in the sport?
3. Is there a reasonable expectation of competition for the team?¹⁵²

The *Clarification* continues, “If the answer to all three questions is ‘Yes,’ the [OCR] will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance” with the interests and abilities criterion.¹⁵³ A “No” answer to any question, then, means that, even in the absence of substantial proportionality, the institution’s athletic program has fully and effectively accommodated the interests and abilities of those female students on campus at the time the institution conducted the assessment.

This formulation sets out the same standards as the *1996 Clarification*¹⁵⁴ and the *2005 Additional Clarification*,¹⁵⁵ but uses more negative language than the *2005 Additional Clarification*, signifying perhaps that the OCR takes a harsher view toward attempting to comply with Title IX using this test, despite the persisting language in the *2003 Further Clarification* that “no one prong is favored.”¹⁵⁶ While the *1996 Clarification* and the *2010 Clarification* state that an institution fails Part Three if the answers to all three of the questions are “Yes,” the *2005 Additional Clarification* states that an institution satisfies Part Three unless the answers to all three of the questions are “Yes.”¹⁵⁷ Thus, the OCR shifts the rhetoric from finding a way to help educational institutions prove compliance with this criterion, to explaining what will result in noncompliance.

The *1996 Clarification* did provide some guidance on what each of these three questions means.¹⁵⁸ The *2010 Clarification* leaves the analysis of the third question unchanged, but provides substantially more guidance on the first two questions. It groups those questions into one inquiry, discusses in some detail how survey instruments might inform the answers to the two questions together, and actually adds some items for consideration beyond those stated in the *1996 Clarification*.¹⁵⁹

i. Unmet Interest and Ability: How to Answer the First Two

152. *Id.* at 4.

153. *Id.*

154. *1996 Clarification*, *supra* note 10.

155. *2005 Additional Clarification*, *supra* note 15, at 1.

156. *2003 Further Clarification*, *supra* note 12.

157. *Id.*

158. *1996 Clarification*, *supra* note 10.

159. *2010 Clarification*, *supra* note 23, at 5–13.

Questions

In the *1996 Clarification*, the OCR simply set out several indicators of interest¹⁶⁰ and several indicators of ability.¹⁶¹ In the *2010 Clarification*, the OCR incorporates these indicators into a much more detailed discussion of how to evaluate those indicators of interest and ability. It sets out eight areas that the OCR will evaluate:

1. Whether the educational institution uses nondiscriminatory methods of assessment;¹⁶²
2. Whether the educational institution has used an assessment to eliminate a viable team;¹⁶³
3. Multiple indicators that evidence student interest in athletics;¹⁶⁴
4. Multiple indicators that evidence student athletic ability;¹⁶⁵
5. Frequency of assessments by the institution;¹⁶⁶
6. Whether the educational institution has effective procedures for evaluating requests to add teams and assessing participation;¹⁶⁷
7. Whether, if the educational institution has used a survey to assess interests and abilities, it has properly designed and implemented that survey tool;¹⁶⁸ and
8. Multiple indicators that assess whether a sufficient number of interested and able students exist in order to sustain a team.¹⁶⁹

Items one, three, and four add nothing new to Title IX athletics guidance. Items two, five, seven, and eight actually bring in parts of the *2005 Additional Clarification* and Model Survey, but in a much weaker way. Item six, however, may create some new requirements for educational institutions to consider.

a. Reiterating Old Policy: Items One, Three, and Four

Item one merely reiterates language first contained in the *1979 Policy Interpretation* and reiterated in the *1996 Clarification*. It affirms that the OCR allows an educational institution to use methods of its choosing to determine the athletic interests and abilities of women, but requires that any

160. *See supra* text accompanying note 112.

161. *See supra* text accompanying note 138.

162. *2010 Clarification, supra* note 23, at 5.

163. *Id.*

164. *Id.* at 5–6.

165. *Id.* at 6.

166. *Id.* at 7.

167. *Id.* at 8.

168. *Id.* at 8–12.

169. *Id.* at 12–13.

assessment process account for “nationally increasing levels of women’s [athletic] interests and abilities,”¹⁷⁰ and further requires that the methods used to determine interest and ability do not disadvantage women, that the methods used to determine ability account for team performance records, and that the methods “are responsive to the expressed interests of [female] students capable of intercollegiate competition.”¹⁷¹

Items three and four come directly from the guidelines established in the *1996 Clarification*.¹⁷² The *2010 Clarification* changes nothing substantive about those items.

b. Incorporating the 2005 Model Survey: Items Two, Five, Seven, and Eight

Items two, five, seven, and eight, each in its own way, incorporate much of the discussion contained in the *2005 Additional Clarification* and, in particular, in the User’s Guide that described how to administer the Model Survey. In some cases, the *2010 Clarification* language borrows directly from the 2005 documents. In other cases, the *2010 Clarification* weakens some strong protections that the 2005 documents offered.

Item two brings in a concept first stated in the *2005 Additional Clarification* regarding whether the results of a survey could justify eliminating a viable team. As the *2005 Additional Clarification* states, educational institutions:

cannot use the failure [of students] 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 . . . may not be used to contradict that expressed interest.¹⁷³

The *2010 Clarification* uses similar language to prohibit the termination of a viable team on the basis of survey or assessment data:

The [OCR] does not consider the failure by students to express interest during a survey . . . as evidence sufficient to justify the elimination of a current and viable intercollegiate team for the underrepresented sex. In other words, students participating on a viable intercollegiate team have expressed interest by active participation, and the [OCR] does not use survey results to

170. *Id.* at 5, quoting 44 Fed. Reg. at 71,417. See also *1996 Clarification*, *supra* note 10.

171. *2010 Clarification*, *supra* note 23, at 5, quoting 44 Fed. Reg. at 71,417.

172. *Id.* at 5–7; see also *1996 Clarification*, *supra* note 10.

173. *2005 Additional Clarification*, *supra* note 15, at 8.

nullify that expressed interest.¹⁷⁴

Item five covers “Frequency of Assessments.” The *1996 Clarification* indicated that an educational institution should evaluate interest “periodically[,] so that the institution can identify in a timely and responsive manner any developing interests and abilities” among female students.¹⁷⁵ The *2010 Clarification* adds several factors to consider when determining how frequently to conduct an assessment, including, but not limited to:

- the degree to which the previous assessment captured the interests and abilities of the institution’s students and admitted students of the underrepresented sex;
- changes in demographics or student population at the institution; and
- whether there have been complaints from the underrepresented sex with regard to a lack of athletic opportunities or requests for the addition of new teams.¹⁷⁶

Moreover, if an educational institution conducts a survey that “detect[s] levels of student interest and ability in any sport that were close to the minimum number of players required to sustain a team,”¹⁷⁷ the *2010 Clarification* indicates that the institution should conduct surveys more frequently, apparently to capture the exact moment that student interest rises to a level sufficient to sustain a team. The *2005 Additional Clarification* embraced these concepts as well, but stated that a survey with a high response rate at an institution with a demographically stable population of students “might serve for several years,” as long as “there are no complaints from the underrepresented sex with regard to a lack of athletic opportunities.”¹⁷⁸

Item seven discusses surveys directly, acknowledging that “a properly designed and implemented survey is one tool that can assist an institution in capturing information on students’ interests and abilities.”¹⁷⁹ It does note that a survey comprises only one component of an institution’s overall assessment of compliance with Part Three, and states that the OCR “will not accept an institution’s reliance on a survey alone, regardless of the response rate, to determine whether [the educational institution] is fully and effectively accommodating the interests and abilities of [women].”¹⁸⁰ By making this statement, the OCR clearly is attempting to address the

174. *2010 Clarification*, *supra* note 23, at 5.

175. *1996 Clarification*, *supra* note 10, at 8.

176. *2010 Clarification*, *supra* note 23, at 7.

177. *Id.*

178. *2005 Additional Clarification*, *supra* note 15, at 11.

179. *Id.* *2010 Clarification*, *supra* note 23, at 8.

180. *Id.*

concerns of those who objected to the 2005 Model Survey on the (erroneous) belief that survey results could create a shield for an educational institution that, in the absence of substantial proportionality, chose not to add any participation opportunities for women.¹⁸¹ The *2005 Additional Clarification* clearly stated the additional factors that would mitigate against relying solely on survey results, including any “recent broad-based petition from an existing club team for elevation to varsity status,”¹⁸² and any “direct and very persuasive” requests to add athletic teams.¹⁸³ Thus, while appearing to differentiate the use of surveys under the *2010 Clarification* from the use of the Model Survey under the *2005 Additional Clarification*, the OCR really changes nothing.

Item seven clearly states that the OCR does not endorse or sanction any particular survey. Thus, an educational institution probably could still use the 2005 Model Survey, or something like it, but any survey instrument may be subject to scrutiny.¹⁸⁴ The *2010 Clarification* then lists and discusses separately the factors it will examine in any survey, including: survey content; survey target population; response rates and treatment of non-responses; confidentiality protections; and survey frequency.¹⁸⁵

Under “survey content,” the clarification discusses how to inform students of the survey purpose, how to ensure it has collected information regarding all relevant sports, and how to collect follow-up information from students who have expressed an interest in athletics.¹⁸⁶ For “purpose,” the clarification offers the following statement to include in a survey:

This data collection is being conducted for evaluation, research, and planning purposes and may be used along with other information to determine whether [the institution] is effectively accommodating the athletic interests and abilities of its students, including whether to add additional teams.¹⁸⁷

181. See, e.g., 2005 NWLC STATEMENT, *supra* note 17, at 2; Schuman, *supra* note 21, at A38.

182. *2005 Additional Clarification*, *supra* note 15, at 6 n.10.

183. *Id.* at 2–3.

184. *2010 Clarification*, *supra* note 23, at 9.

185. *Id.*

186. *Id.* at 9–10.

187. *Id.* at 9.

This does not differ greatly from the purpose statement provided in the 2005 Model Survey:

This data collection is being conducted to determine the extent to which the athletic interests and abilities of students at XXX University are being met by the current offerings of recreational, intramural, club and intercollegiate athletics. The information, which is being requested from all students, will be used by the university for evaluation, research, and planning purposes.¹⁸⁸

It could be argued that the 2005 Model Survey actually presents a stronger statement of purpose, because it addresses student interests first and university research needs second. Nevertheless, both statements contain the same information, but together raise the question of why the OCR felt the need to change the language in the 2010 version.

In the *2010 Clarification*, the OCR provides a table that shows how an educational institution might assess student interest and ability in certain sports¹⁸⁹—a chart very similar in format to a chart presented in the *2005 Additional Clarification*.¹⁹⁰ Interestingly, however, the *2010 Clarification* lists only twenty-three sports to consider for both men and women,¹⁹¹ while the *2005 Additional Clarification* offered thirty, because it also included seven “emerging sports.”¹⁹² Thus, an argument can be made that the *2005 Additional Clarification* actually offered a superior survey in that it allowed for early identification of emerging trends.

With regard to contacting interested students, the *2010 Clarification*, just like the 2005 Model Survey, suggests that educational institutions conduct the survey confidentially, but also find a way to allow interested students to provide contact information for follow-up.¹⁹³

The OCR will also look at the survey target population, specifically whether the survey reaches all full-time undergraduate students or a random sampling, and recommends a census of the entire student body—just like the 2005 Model Survey—to avoid problems inherent in selecting the sampling mechanism and sample size, the calculation of sampling error,

188. *2005 Additional Clarification*, *supra* note 15, at 15.

189. *2010 Clarification*, *supra* note 23, at 10.

190. *2005 Additional Clarification*, *supra* note 15, at 20.

191. *2010 Clarification*, *supra* note 23, at 9 n.20.

192. *2005 Additional Clarification*, *supra* note 15, at 19. The seven emerging sports comprised archery, badminton, equestrian, rugby, squash, synchronized swimming, and team handball—a list of sports that appeal to both men and women.

193. *2010 Clarification*, *supra* note 23, at 10; *2005 Additional Clarification*, *supra* note 15, at 21.

and the use of estimates derived from samples.¹⁹⁴ The *2010 Clarification* also indicates that if an educational institution chooses to survey a subset of the undergraduate population, “the larger the sample, the more weight the [OCR] will accord the estimate.”¹⁹⁵ The *2005 Additional Clarification*, on the other hand, made a much stronger statement regarding sample versus census surveys, calling census surveys “superior in almost every respect.”¹⁹⁶ Thus, the *2010 Clarification* appears to provide weaker guidance in this regard.

Treatment of non-responses proved a very challenging aspect of developing widespread acceptance for the 2005 Model Survey.¹⁹⁷ The 2005 Model Survey—just like the accepted surveys that educational institutions had developed for themselves before the OCR provided its survey—assumed that non-response equates to a lack of interest, as long as the survey instrument clearly explained this assumption.¹⁹⁸ The *2005 Additional Clarification* indicated that a survey instrument could explain this assumption by sending an e-mail containing a web link to the survey, and by stating in the e-mail that “if a student does not to respond to the survey, the institution will understand that the student is not interested in additional athletic participation.”¹⁹⁹

Like the 2005 Model Survey, the *2010 Clarification* indicates that the OCR will evaluate whether any survey “is administered in a manner designed to generate high response rates and how institutions treat responses and non-responses.”²⁰⁰ It provides examples of how to generate a high response rate and how to follow-up with non-responders.²⁰¹ But the *2010 Clarification* also states that the OCR “does *not* consider non-responses to surveys as evidence of lack of interest or ability in athletics,”²⁰² yet provides absolutely no guidance on what non-responses *do* indicate. Rather, the clarification simply follows up this comment with a general restatement that the OCR will consider multiple indicators of

194. *2010 Clarification*, *supra* note 23, at 10–11; *2005 Additional Clarification*, *supra* note 15, at 10.

195. *2010 Clarification*, *supra* note 23, at 11.

196. *2005 Additional Clarification*, *supra* note 15, at 10.

197. The NWLC, for example, complained that the 2005 Model Survey’s treatment of non-response bias and student self-assessment of ability “is flawed and inconsistent with the requirements of prior [OCR] policy,” but did not identify those inconsistent policies. 2005 NWLC STATEMENT, *supra* note 17, at 3.

198. For a more detailed discussion of this point, *see* Pieronek, *supra* note 17, at 132–33.

199. *2005 Additional Clarification*, *supra* note 15, at 12.

200. *2010 Clarification*, *supra* note 23, at 11.

201. *Id.* at 11–12.

202. *Id.* at 12 (emphasis added).

interest and ability.²⁰³

The confidentiality provisions in the *2010 Clarification* do not differ from those in the *2005 Additional Clarification*. Both documents require confidentiality in administering the survey, except to the extent needed to follow up with students who have expressed interest in being contacted by the institution.²⁰⁴

Item eight reminds educational institutions that the OCR will evaluate multiple indicators to assess whether there exists at the institution a sufficient number of interested and able students to sustain a team. And, like Item two, it borrows directly from the *2005 Additional Clarification* for the list of factors to consider, including the:

- minimum number of participants needed for a particular sport;
- opinions of athletic directors and coaches concerning the abilities required to field an intercollegiate team; and
- size of a team in a particular sport at institutions in the governing athletic association or conference to which the institution belongs or in the institution's competitive regions.²⁰⁵

But while the *2005 Additional Clarification* indicated that the OCR would “defer[] to the decisions of the athletic directors and coaches,”²⁰⁶ in evaluating whether a sufficient number of students exists to field a team, the *2010 Clarification* provides no such latitude to athletic administrators.²⁰⁷

Thus, while these four aspects of evaluating an educational institution's assessment processes, including surveys, do borrow heavily from the *2005 Additional Clarification*, it is clear that the *2010 Clarification* weakens some of the protections that would allow educational institutions to rely on surveys to gather reliable data, particularly, those protections that generated the most controversy back in 2005. In some ways, the guidance provided in the *2010 Clarification* could be interpreted as fuzzier or less definite than that provided in 2005, so it ultimately might prove less useful. And it is also clear that the *2010 Clarification* does more than simply return Title IX compliance to the standards set out in 1996.

203. *Id.*

204. *2010 Clarification*, *supra* note 23, at 12; *2005 Additional Clarification*, *supra* note 15, at 11.

205. *2010 Clarification*, *supra* note 23, at 12; *see also 2005 Additional Clarification*, *supra* note 15, at 11–12, for comparable criteria.

206. *2005 Additional Clarification*, *supra* note 15, at 11.

207. *2010 Clarification*, *supra* note 23, at 12–13.

c. More Monitoring, Evaluating and Reporting: Item Six

Item Six addresses “Effective Procedures for Evaluating Requests to Add Teams and Assessing Participation” and appears to add some new considerations that will affect educational institutions that choose to comply with Title IX under Part Three. In particular, the OCR

recommends that institutions have effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of [female] students . . . , including easily understood policies and procedures for receiving and responding to requests for additional teams, and wide dissemination of such policies and procedures to existing and newly admitted students, as well as to coaches and other employees.²⁰⁸

This new requirement actually mirrors what the OCR regulations require for educational institutions to demonstrate Title IX compliance across the institution, and not just in its athletic programs. For example, the 1975 Implementing Regulations require an educational institution to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX],”²⁰⁹ and requires that such policies and procedures be disseminated broadly.²¹⁰ But this recommendation raises the question of whether issues relevant to athletics must be handled separately from other Title IX issues at an educational institution, and whether an institution’s normal Title IX grievance procedures will suffice.

In addition, the OCR recommends that educational institutions develop procedures for collecting, and then actually collect, a significant amount of data relevant to the participation of women in club and intramural sports,²¹¹ which may prove useful when determining which teams to elevate to varsity status and when. But the OCR also recommends going beyond the situation at the institution itself, and suggests that educational institutions also evaluate and document “the participation of [women] in high school athletic programs, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.”²¹² For educational institutions with a more local or regional reach, this might prove a reasonable task. For national institutions that draw from across the country, this could prove more difficult. Nevertheless, the OCR notes that this type of documentation “may be

208. *Id.* at 8.

209. 34 C.F.R. § 106.8(b) (2011).

210. *Id.* at § 106.9.

211. 2010 Clarification, *supra* note 23, at 8.

212. *Id.*

needed in order for an institution to demonstrate that it is assessing interests and abilities in compliance with Part Three.”²¹³ Thus, an educational institution apparently needs to amass vast quantities of data regarding conditions off its campus to prove that it has a grasp of trends in girls’ high school sports and that it has plans to respond to those trends.

Finally, Item six also implies that an educational institution’s Title IX coordinator, as required by the 1975 Implementing Regulations,²¹⁴ might not be the appropriate individual to carry out Title IX responsibilities regarding athletics. It suggests that an educational institution should “consider whether the monitoring and documentation of participation in club, intramural, and interscholastic sports and the processing of requests for the addition or elevation of athletic teams should be part of the responsibilities of their Title IX coordinators in conjunction with their athletic departments,”²¹⁵ and offers educational institutions the option of creating “a Title IX committee to carry out these functions.”²¹⁶ By this “recommendation”—the implementation of which the OCR undoubtedly will regard favorably—the OCR actually requires more of an institution with regard to its athletics enterprise than it requires with regard to an institution’s academic enterprise.

ii. Reasonable Expectation of Competition: How to Answer the Third Question

In addressing the third of the three questions to ask when evaluating compliance under the interests and abilities criterion—that is, whether there exists a reasonable expectation of competition for any team the institution might choose to create in response to expressed interests and abilities—the *2010 Clarification* adds nothing new, and uses language identical to that in the *1996 Clarification*²¹⁷ and similar to that in the *2005 Additional Clarification*.²¹⁸ The OCR will look at “available competitive opportunities in the geographic area in which the institution’s athletes primarily compete,”²¹⁹ considering the institution’s usual competition and potential competition located nearby.

213. *Id.*

214. 34 C.F.R. § 106.8(a) (2011).

215. *2010 Clarification*, *supra* note 23, at 8.

216. *Id.* The document also indicates that the Title IX coordinator should be part of the committee, and that the committee should receive appropriate training.

217. *Id.* at 13; *1996 Clarification*, *supra* note 10.

218. *2005 Additional Clarification*, *supra* note 15, at 12.

219. *2010 Clarification*, *supra* note 23, at 13.

VI. SIGNIFICANT ASPECTS OF THE 2010 CLARIFICATION

In many ways, the *2010 Clarification* changes little about how the OCR views compliance under Part Three—that is, how an institution demonstrates the full and effective satisfaction of interests and abilities of its female students. It alters nothing substantive in the *1996 Clarification* or the *2003 Further Clarification*. But it does more than just eliminate the use of the Model Survey and anything associated with the *2005 Additional Clarification*, because it actually incorporates some aspects of the *2005 Additional Clarification* in its discussion of surveys and assessments, and has examples to bring some clarity to the (real or perceived) vagaries of the *1996 Clarification*.

Much of the discussion in the *2010 Clarification* about the use of surveys sets out standards that mirror those in the *2005 Additional Clarification*. As first stated in the *2005 Additional Clarification*, the *2010 Clarification* prohibits the use of survey results to eliminate a viable team.²²⁰ It lists factors to consider in determining how frequently to assess interest and ability that mirror those listed in the *1996 Clarification* and explicitly embraced in the *2005 Additional Clarification*.²²¹ It discusses the construction of the survey instrument itself and how to properly administer a survey, using language almost identical to that in the Model Survey User's Guide that accompanied the *2005 Additional Clarification*.²²² And it discusses the multiple indicators that an educational institution should evaluate when assessing whether there exists on campus a sufficient number of interested and able female students to sustain a new team – indicators first spelled out in the *2005 Additional Clarification*.²²³

The *2010 Clarification* also adds something new to Title IX compliance, in the form of a recommendation that educational institutions “have effective ongoing procedures for collecting, maintaining, and analyzing information” on women's athletic interests and abilities.²²⁴ It suggests a structure for a committee to monitor this particular aspect of Title IX compliance that goes beyond what the 1975 Implementing Regulations require in terms of Title IX compliance monitoring generally on campus.²²⁵ Although cast in the form of recommendations, educational institutions should be aware that the OCR could construe a failure to follow such recommendations as evidence of noncompliance with Part Three.

Most troubling about the *2010 Clarification*, however, is the complete

220. *2005 Additional Clarification*, *supra* note 15, at 7–8; *2010 Clarification*, *supra* note 23, at 5.

221. *2010 Clarification*, *supra* note 23, at 7–8.

222. *Id.* at 8–12.

223. *Id.* at 12–13.

224. *Id.* at 8.

225. *See generally* 34 C.F.R. §§ 106.8-106.9 (2011).

disregard for the unbiased statistical methods that factored into the development of the 2005 Model Survey. So, although the *2010 Clarification* allows for the use of surveys, educational institutions cannot use the one survey developed by a national institute that specializes in statistical methods.²²⁶ Now, any survey used must adhere to the same goals for survey content and administration, but cannot be *that* survey. This once again introduces a heightened level of vagueness to Part Three compliance, undoubtedly making it less attractive than the objectively measurable Part One, the substantial proportionality test.

In the years between 1992 and 2002, the OCR conducted 130 Title IX investigations and found that eighty-six of the investigated institutions complied with Title IX under Part Three. Fifty-seven of those eighty-six institutions used surveys to demonstrate compliance.²²⁷ The National Institute of Statistical Sciences examined the surveys used, identified the flaws, and constructed the Model Survey to remedy the flaws in surveys that had, nevertheless, proved sufficient to demonstrate Title IX compliance during that decade.²²⁸

CONCLUSION

It is difficult to escape the conclusion that the *2010 Clarification* now makes it more difficult to comply with Title IX under Part Three. Even with the vagueness of the Clinton administration's *1996 Clarification*, some educational institutions, using their own survey instruments, managed to prove that their athletic programs met the needs of their female students. Through the *2005 Additional Clarification* and Model Survey, the Bush administration's OCR sought to use the best features of those surveys, remedy identified flaws, and present for general use a survey designed to identify unmet student interest in athletics. But critics blasted the survey as a method to avoid adding opportunities for women, and, in response, the Obama administration's OCR has created a situation that imposes on educational institutions the requirements of survey development and administration that led to the Model Survey, but leaves them on their own to create a survey that meets those requirements.

This move will likely have the effect of driving intercollegiate athletic programs back to the only objective measure of compliance that exists, substantial proportionality. And proportionality, unfortunately, "demand[s] that schools ignore actual student interest in sports and manipulate their athletic programs such that gender ratios match[] that of the undergraduate

226. *2005 Additional Clarification*, *supra* note 15, at 9–14; *2010 Clarification*, *supra* note 23, at 8–10.

227. *2005 Additional Clarification*, *supra* note 15, at 6.

228. *See* Pieronek, *supra* note 17, at 125–29.

student population.”²²⁹ Thus, “statistical proportionality triumph[s] not by proving that men and women [have] identical interests in sports, but by making actual interest in sports irrelevant to Title IX compliance.”²³⁰

229. 2010 USCCR REPORT, *supra* note 158, at 8 (capturing comments by Jessica Gavora).

230. *Id.*