
TITLE IX, THE NCAA, AND INTERCOLLEGIATE ATHLETICS

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I. INTRODUCTION

A very important issue in intercollegiate athletics is gender equity. The number of women on varsity teams has risen, as have women's teams' budgets.¹ Gender equity remains an important issue in intercollegiate athletics, and colleges and universities that receive federal funds must comply with the mandates of Title IX.² Additionally, NCAA Division I schools must face certification and recertification, which requires examination of gender issues.³

The National Collegiate Athletic Association was founded in 1906, and celebrates a century of accomplishments in 2006.⁴ The NCAA began administering women's athletics programs in 1980.⁵ The purpose of the NCAA is "to govern competition in a fair, safe, *equitable*, and sportsmanlike manner."⁶

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex by any educational program or activity receiving federal assistance.⁷ A Policy Interpretation issued in 1979, derived from a 1975 implementing regulation,⁸ clarified areas to be considered when determining equal opportunities

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1. Welch Suggs, *Female Athletes Thrive, but Budget Pressures Loom*, 47 CHRON. HIGHER EDUC., May 18, 2001, at A45.

2. 20 U.S.C. § 1681(a) (2000).

3. 2006–07 NCAA Division I Athletics Certification Handbook 10, http://www.ncaa.org/library/membership/d1_athletics_cert_handbook/2006-07/2006-07_athletics_certification_handbook.pdf (last visited Oct. 8, 2006) [hereinafter *NCAA Certification Handbook*]. In Division I certification, it is the responsibility of each institution to implement the Association's principle of gender equity. *Id.*

4. About the NCAA: The History of NCAA, http://web1.ncaa.org/cent/about_History.jsp (last visited Oct. 8, 2006).

5. *Id.*

6. The Online Resource for the National Collegiate Athletic Association, <http://www.ncaa.org/wps/portal> (follow "About the NCAA" hyperlink; then follow "Overview" hyperlink; then follow "Our Mission" hyperlink) (last visited Oct. 8, 2006) (emphasis added).

7. 20 U.S.C. § 1681(a) (2000).

8. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and

in intercollegiate athletics: athletic scholarships; other program areas; and effective accommodation of interests and abilities.⁹ Title IX and the Policy Interpretation have been the subject of extensive litigation.¹⁰ Colleges and universities have made progress towards compliance with Title IX;¹¹ further progress, however, is still needed.¹²

The NCAA does not evaluate Title IX compliance for its member institutions;¹³ the Office for Civil Rights in the Department of Education is charged with Title IX compliance oversight.¹⁴ The NCAA does, however, facilitate compliance in some ways, such as having the required gender equity plans in the Division I recertification self-study instrument¹⁵ include the areas covered by the 1979 Policy Interpretation.¹⁶

First, this article will briefly examine the history of the NCAA and Title IX, specifically discussing their overlap in gender equity. Second, this article will discuss how the NCAA can further assist its more than 1,250 member institutions¹⁷ to achieve the NCAA's purpose of competition in a fair, safe, equitable, and sportsmanlike manner,¹⁸ and to continue to move towards compliance with Title IX.¹⁹ Finally, this article will conclude with recommendations for colleges and universities concerning Title IX and Division I member recertification with the NCAA.

A. Title IX — A Brief History

Title IX of the Education Amendments of 1972 was enacted by Congress to prohibit discrimination on the basis of sex in any education program or activity receiving federal funds.²⁰ In 1975, an implementing regulation was promulgated

Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

9. *Id.* at 71,415.

10. *See* sources cited *infra* notes 76–84 and accompanying text.

11. *See* Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 551, 611 (Winter 2003).

12. *Id.*

13. *NCAA Certification Handbook*, *supra* note 3. In the certification process, neither the NCAA nor the peer reviewers will evaluate whether an institution is legally compliant with Title IX. *Id.*

14. Valerie M. Bonnette, Title IX Basics 3 (Jan. 16, 1996), http://www.ncaa.org/library/general_achieving_gender_equity/title_ix_basics.pdf.

15. 2006–07 NCAA Division I Athletics Certification Self-Study Instrument 27 (2006), http://www.ncaa.org/library/membership/d1_self-study_instr/2006-07/2006-07_self-study_instrument.pdf.

16. *See infra* note 44.

17. *See supra* note 6.

18. *Id.*

19. 20 U.S.C. § 1681(a) (2000).

20. *Id.* (“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 . . .”).

which specifically addressed discrimination on the basis of sex in athletics, including intercollegiate athletics.²¹

In 1979, a Policy Interpretation was issued by the Department of Health, Education, and Welfare specifically for intercollegiate athletics, to provide guidance on what constitutes compliance with Title IX.²² This Policy Interpretation will be examined, as it is the basis for challenging an alleged lack of gender equity in intercollegiate athletics.²³ The Policy Interpretation also sets the template for the required gender equity plan for NCAA recertification of Division I members.²⁴

One area that colleges and universities receiving federal funds must consider when determining equal opportunity in athletics is financial assistance. Institutions receiving federal funds must provide reasonable opportunities for the award of athletic financial assistance for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics.²⁵

Under the Policy Interpretation, a number of other athletic program benefits and opportunities must also be equal for members of both sexes. These athletic program benefits and opportunities include equipment and supplies (such as uniforms and apparel); sports-specific and general equipment and supplies; instructional devices; and conditioning and weight training equipment.²⁶ The

21. 34 C.F.R. § 106.41(a)–(c) (2005).

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

Id. at § 106.41(a). Separate teams are allowed if “selection for the teams is based upon competitive skill or if the activity is a contact sport.” *Id.* at § 106.41(b). If there is no team for the members of the other sex, however, then a try-out for the team must be allowed unless it is a contact sport, including boxing, wrestling, rugby, ice hockey, football, or basketball. *Id.* Equal opportunity must be provided based upon the following factors:

- (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.

Id. at § 106.41(c).

22. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413. *See also* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (holding that Title IX provides for a private right of action). This case involved admission into medical school and was not an intercollegiate athletics case. However, it is also applicable to athletics.

23. *See* sources cited *infra* notes 78–93 and accompanying text.

24. *NCAA Certification Handbook*, *supra* note 3.

25. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415. Proportionally equal amounts of financial assistance are to be available to men’s and women’s programs. *Id.*

26. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and

scheduling of games and practice times,²⁷ travel and per diem allowances,²⁸ and the opportunity to receive coaching²⁹ and academic tutoring³⁰ must also be equivalent for members of both sexes. Other areas of equivalence must include: locker rooms and practice and competitive facilities;³¹ the provision of medical and training facilities and services;³² housing and dining facilities and services;³³ publicity;³⁴ recruitment of student athletes;³⁵ and the provision of support

Intercollegiate Athletics, 44 Fed. Reg. at 71,416. Compliance is assessed by examining the equivalence of: the quality, amount, suitability, maintenance and replacement, and availability of equipment and supplies. *Id.*

27. *Id.* Compliance is assessed by examining: the number of competitive events per sport; the number and length of practice opportunities; the time of day competitive events are scheduled; the time of day practice opportunities are scheduled; and the opportunities to engage in available pre-season and post-season competition. *Id.*

28. *Id.* Compliance is assessed by examining: modes of transportation; housing furnished during travel; length of stay before and after competitive events; per diem allowances; and dining arrangements. *Id.*

29. *Id.* Factors relevant to evaluating compliance in coaching include, *inter alia*: relative availability of full-time coaches; relative availability of part-time and assistant coaches; and relative availability of graduate assistants. *Id.* The Policy Interpretation further states that there are nondiscriminatory factors which may affect the compensation of coaches. *Id.* The range and nature of the coach's duties, the coach's experience, the number of student athletes coached, and the number of assistants should be considered along with the level of compensation. *Id.* When assigning coaches, the training, experience, and professional qualifications and standing should be assessed. *Id.* Compliance in compensation of coaches should be assessed for equivalence in: rate of compensation (per sport, per season); duration of contracts; conditions relating to contract renewal; experience; nature of coaching duties performed; working conditions; and other terms and conditions of employment. *Id.*

30. *Id.* When examining compliance, the availability of, procedures for, and criteria for obtaining tutorial assistance must be equivalent. *Id.* Evaluating compliance in tutor assignments requires assessing the equivalence of tutor qualifications, training, experience, and other qualifications. *Id.* Additionally, to determine whether the tutors' compensation is equivalent, evaluators must assess the hourly wage by nature subjects tutored, pupil loads per tutoring season, tutor qualifications, experience, and the terms and conditions of employment. *Id.* *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069 (9th Cir. 1999), involved a suit brought by a head women's basketball coach under Title IX, the Equal Pay Act, and state law. The university paid the head coach of the women's team less than the head coach of the men's basketball team, but did not violate the law because the men's team coach had substantially higher qualifications and more responsibilities. *Stanley*, 178 F.3d at 1076-77.

31. Title IX of the Education Amendments of 1972, a Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,417. The following are assessed: quality and availability of the facilities provided for practice and competitive events; exclusivity of use of facilities provided for practice and competitive events; availability of locker rooms; quality of locker rooms; maintenance of practice and competitive facilities; and preparation of facilities for practice and competitive events. *Id.*

32. *Id.* The following must be equivalent for men and women: availability of medical personnel and assistance; health, accident and injury insurance coverage; availability and quality of weight and training facilities; availability and quality of conditioning facilities; and availability and qualifications of athletic trainers. *Id.*

33. *Id.* The housing provided, as well as special services as part of the housing arrangement, must be equivalent. *Id.*

34. *Id.* Compliance is assessed by examining equivalence of: availability and quality of sports information personnel; access to other publicity resources for men's and women's

services.³⁶

The Policy Interpretation calls for the effective accommodation of student interests and abilities,³⁷ by providing both participation opportunities for individuals of each sex in intercollegiate athletics and competitive team schedules that equally reflect the abilities of athletes of each sex. Compliance in the area of effective accommodation of interests and abilities is assessed in any one of three ways: (1) proportionality; (2) responsiveness to the interests and abilities of the underrepresented sex by a history and continuing practice of program expansion; or (3) accommodation of the interests and abilities of the underrepresented sex.³⁸

In 1980, the Department of Education was created. The Department of Education's Office for Civil Rights enforces Title IX.³⁹ In 1984, the Supreme Court held that Title IX applied only to the college and university programs that receive federal funds.⁴⁰ Congress, by the Civil Rights Restoration Act of 1987,

programs; and quantity and quality of publications and other promotional devices featuring men's and women's programs. *Id.*

35. *Id.* Recruitment practices must be examined including: whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit; whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex. *Id.*

36. *Id.* There must be equivalence in administrative, secretarial, and clerical assistance to men's and women's teams. *Id.*

37. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,417-18.

38. *Id.* at 71,418. The three-prong test states that compliance is assessed by one of the following: (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. *Id.* For a discussion of prong one, see Tshaka C. Randall, *A (Not So) Safe Harbor: Substantial Proportionality as a Measure of Effective Accommodation*, 5 TEX. REV. ENT. & SPORTS L. 79 (2003); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731 (2003) (assessing the level of competition for compliance by examining: (1) whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or (2) whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.).

39. 20 U.S.C. § 3441(a)(3) (2000). See generally Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331 (1999).

40. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

restored institution-wide application of Title IX if any part of the institution receives federal funds.⁴¹

In 1992, the Supreme Court held that monetary damages, including punitive damages, are available in a Title IX case.⁴² The Equity in Athletics Disclosure Act in 1994 required that, starting in 1996, coeducational institutions of higher education that participate in federal student financial aid programs and have intercollegiate athletics must file annual disclosure reports.⁴³ Also in 1996, the Department of Education's Office for Civil Rights issued a clarification of the three-prong test for effective accommodation of interests and abilities.⁴⁴ This clarification reiterated that only one prong needs to be satisfied and gave specific factors for analysis of each prong.⁴⁵

The twenty-fifth anniversary of Title IX occurred in 1997.⁴⁶ To celebrate that anniversary, the National Women's Law Center filed twenty-five complaints concerning athletic scholarship inequalities with the Office for Civil Rights.⁴⁷ As a result, the Office for Civil Rights stated in a letter that exact proportionality down to the dollar is not required; rather, any nondiscriminatory factors will be considered, and if any unexplained disparity is less than one percent of the entire budget for athletics scholarships, then there is a strong presumption that this disparity is reasonable.⁴⁸

In 2002, the Secretary of Education formed a Commission on Opportunity in Athletics to collect information and analyze issues to improve the standards for Title IX. A report, *Open to All, Title IX at Thirty*, was issued in 2003.⁴⁹ One

41. 20 U.S.C. § 1687 (West 2000 & Supp. 2006).

42. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). This was not an athletic case; it involved sexual harassment by a teacher and coach. See generally Ellen J. Vargyas, *Franklin v. Gwinnett County Public Schools and Its Impact on Title IX Enforcement*, 19 J.C. & U.L. 373 (1993).

43. Pub. L. 103-382, § 360B(c), 108 Stat. 3969 (1994).

44. U.S. Dep't of Educ., Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>. The OCR concluded that it recognizes that institutions face challenges in providing nondiscriminatory participation opportunities and will continue to assist institutions in ways to meet these challenges. *Id.*

45. *Id.*

46. See generally Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORTS & ENT. L. 391 (1997).

47. This author's institution was one of the twenty-five sued.

48. Letter from Dr. Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, U.S. Dep't of Educ., Office for Civil Rights, to Nancy Footer, Gen. Counsel, Bowling Green State Univ. (July 23, 1998), available at <http://www.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>. Ms. Footer's letter to the OCR led to this guidance letter. Ms. Footer, former general counsel at Bowling Green, is extremely knowledgeable on Title IX issues. See generally B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L.J. 273 (1999).

49. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, OPEN TO ALL: TITLE IX AT THIRTY (Feb. 23, 2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf>. See generally Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75 (2003); Suzanne Eckes, *The Thirtieth Anniversary of Title IX: Women Have Not*

recommendation was that the Department of Education should reaffirm its strong commitment to equal opportunity. Another suggested that any substantive adjustments should be developed through the normal federal rulemaking process.⁵⁰ Two other key themes were that the OCR should provide clear written guidelines and ensure that they are understood,⁵¹ and that the OCR should educate colleges and universities about rules concerning private funding of particular sports to prevent these sports from being dropped or other specific sports from being added.⁵²

In 2003, the Assistant Secretary for Civil Rights issued a Further Clarification of Intercollegiate Athletics Guidance Regarding Title IX Compliance.⁵³ The memorandum stated that eliminating teams is not favored. That policy was reemphasized in a later report from the Office for Civil Rights, *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three*.⁵⁴ The Office for Civil Rights complemented the report with a User's Guide⁵⁵ and a Model Survey,⁵⁶ which could be used for assessment of the third prong to fully and effectively accommodate the athletic interests and abilities of the under-represented sex. Also in 2005, the U.S. Supreme Court decided *Jackson v. Birmingham Board of Education*,⁵⁷ holding that Title IX's private right of action encompasses claims of retaliation against an individual who complained about sex discrimination.

The number of women playing college sports has surged from nearly 30,000 in 1971–72 to over 155,000 in 2001–02.⁵⁸ Full equality between men and women has

Reached the Finish Line, 13 S. CAL. REV. L. & WOMEN'S STUD. 3 (2003); Elizabeth A. Heuben, *Revolution, Numbers, IX*, 71 UMKC L. REV. 659 (2003); William C. Duncan, *Title IX at Thirty: Unanswered Questions*, 3 MARGINS 211 (2003); Apiyo F. Oloyo, *Athletics*, 4 GEO. J. GENDER & L. 377, 378–79 (2002).

50. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, OPEN TO ALL: TITLE IX AT THIRTY (Feb. 23, 2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf>.

51. *Id.*

52. *Id.*

53. Gerald Reynolds, Assistant Secretary of Civil Rights, U.S. Department of Education, Further Clarification of Intercollegiate Athletics Guidance Regarding Title IX Compliance (July 11, 2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

54. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE POLICY: THREE-PART TEST—PART THREE (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter *Additional Clarification*].

55. U.S. DEP'T OF EDUC., INSTITUTE OF EDUCATION SCIENCES, USER'S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX (2005), <http://nces.ed.gov/pubs2005/2005173.PDF>.

56. See sources cited *infra* notes 94–106 and accompanying text.

57. 544 U.S. 167 (2005); see generally Sue Ann Mota, *Title IX After Thirty-Four Years—Retaliation Is Not Allowed According to the Supreme Court in Jackson v. Birmingham Board of Education*, 13 VILL. SPORTS & ENT. L.J. 245 (2006).

58. See generally KAREN BLUMENTHAL, LET ME PLAY: THE STORY OF THE TITLE IX, THE LAW THAT CHANGED THE FUTURE OF GIRLS IN AMERICA (2005), excerpted in Karen Blumenthal, *Title IX's Next Hurdle*, WALL ST. J., July 6, 2005, at 31 (using data supplied by the NCAA, and showing that during the same time, the number of men playing college sports rose

not been reached and there remains room for improvement.⁵⁹ This article will discuss how the NCAA can assist member institutions in achieving Title IX compliance.

B. National Collegiate Athletic Association and Women's Sports—A Brief History

What is now called the NCAA was started as the Intercollegiate Athletic Association of the United States in 1906; the institution took its current name in 1910.⁶⁰ Initially, the institution focused on football.⁶¹ In 1976, the NCAA sued the Secretary of the Department of Health, Education, and Welfare, seeking declarative and injunctive relief to invalidate Title IX's Implementing Regulation.⁶² A federal district court in 1978 ruled that it lacked jurisdiction over the NCAA's challenge because the NCAA lacked standing both in its own right and as a representative of its member institutions.⁶³ On appeal, the Court of Appeals for the Tenth Circuit in 1980 in *National Collegiate Athletic Association v. Califano* reversed and held that the NCAA did have standing to sue on behalf of its members on the single claim in the amended complaint that the regulation would injure the NCAA and its members.⁶⁴ There is no recorded decision on the merits after the standing issue was resolved.

In 1988, the Supreme Court held, in *National Collegiate Athletics Association v. Tarkanian*, that the NCAA was not a state actor and therefore not subject to suit on due process allegations.⁶⁵ The Supreme Court later cited *Tarkanian* in 1999 when it unanimously held in *National Collegiate Athletics Association v. Smith* that receiving dues payments from its members was not sufficient—without more—to subject the NCAA to suit under Title IX.⁶⁶

from over 170,000 to over 212,000).

59. Gayle I. Horwitz, *Athletics*, 5 GEO. J. GENDER & L. 311, 328 (2004).

60. NCAA, The History of the NCAA, <http://www.ncaa.org/about/history.html> (last visited Nov. 8, 2006).

61. *Id.* See Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000) (stating that the NCAA began administering women's athletics programs in 1980).

62. *NCAA v. Califano*, 622 F.2d 1382 (10th Cir. 1980); *NCAA v. Califano*, 444 F. Supp. 425 (C.D. Kan. 1978).

63. 444 F. Supp. at 425.

64. 622 F.2d at 1383.

65. 488 U.S. 179 (1988).

66. 525 U.S. 459, 462 (1999). Smith sued the NCAA and included a Title IX claim, alleging that the organization discriminated against her on the basis of sex for refusing to waive a bylaw restricting post baccalaureate participation. Smith alleged that more waivers were granted for male student athletes than female student athletes. The district court granted the NCAA's motion to dismiss the Title IX claim because of Smith's failure to allege that the NCAA was a recipient of federal funds, and if it were assumed that the dues-paying members were recipients of federal funds, this was too far removed to subject the NCAA to the mandates of Title IX. *Smith v. NCAA*, 978 F. Supp. 213 (W.D. Pa. 1997). The Court of Appeals for the Third Circuit reversed, holding that the dues from member institutions which received federal funds would be sufficient to bring the NCAA under Title IX. *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998).

Even though the NCAA itself is not subject to Title IX, and does not evaluate whether its member institutions are in compliance with Title IX,⁶⁷ gender issues are one area that colleges and universities are required to address in the certification process for Division I schools, as approved at the 1993 NCAA Convention. Schools are required to have an approved written gender equity plan.⁶⁸ The second cycle of recertification of Division I schools began in 1999. In 2004 a revised certification process was approved. It includes an operating principle requiring that the approved prior gender equity plan has been implemented and that the institution has demonstrated a commitment to, and progress toward, fair and equitable treatment of both male and female student-athletes and athletic department personnel. The institution must also formally adopt a written gender equity plan that extends five years into the future.⁶⁹

In 1991, the NCAA surveyed its members concerning expenditures on women's and men's athletics to provide data relevant to gender issues, but not to measure Title IX compliance.⁷⁰ After this first survey, a gender equity task force was formed and charged with, among other things, subsequent surveys. The 2002–03 report showed few changes over the 2001–02 report, claiming slow change over twelve years.⁷¹

John Roberts argued the case before the Supreme Court on behalf of the NCAA. The Court cited *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988), on the issue that NCAA rules govern its members' intercollegiate athletics programs. *Smith*, 525 U.S. at 462–63. The dues paid by these members, however, are not sufficient by themselves to subject the NCAA itself to Title IX. *Smith*, 525 U.S. at 470. The Court did not address the issues of whether the NCAA directly or indirectly receiving federal financial assistance through the National Youth Sports Program subjects it to Title IX, or whether a recipient of federal funds that cedes controlling authority to another entity subjects that entity to Title IX. See Mathew R. Hammer, *Bump, Set, Spiked: Determining Whether the National Collegiate Athletic Association Is a Recipient of Federal Funds Under Title IX National Collegiate Athletic Ass'n v. Smith*, 65 MO. L. REV. 773 (2000); Thomas M. Rowland, *Level the Playing Field: The NCAA Should Be Subject to Title IX*, 7 SPORTS L.J. 173 (2000). On remand the Court of Appeals for the Third Circuit reversed the district court's denial of Smith's motion to amend her complaint to include the two grounds not addressed in the Supreme Court's decision. *Smith v. NCAA*, 266 F.3d 152, 163 (3d Cir. 2001). Ms. Smith was allowed to amend her Title IX complaint against the NCAA on the indirect receipt of federal funding from the National Youth Sports Program, but not on the ceded controlling authority grounds. *Id.*

67. *NCAA Certification Handbook*, *supra* note 3.

68. *Id.* The first cycle of certification had operating principles in four basic areas: governance and commitment to rules compliance; academic integrity; fiscal integrity; and equity, welfare, and sportsmanship. *Id.*

69. NCAA Athletics Certification Self-Study Instrument 27 (2004). The program areas to be reviewed for gender issues are the areas under the 1979 Policy Interpretation. *Id.* at 36.

70. 2002–03 NCAA GENDER EQUITY REPORT 8 (2004). This report is the most recent gender equity report released by the NCAA at the time of this publication.

71. *Id.* at 11. In most categories, women's athletics did not gain, and where there was a gain, it was minimal. *Id.* In every division except Division III, the total dollars spent on women's athletics grew, but total dollars spent on men's athletics grew just as much, or more. *Id.*

C. The NCAA, Its Members, and Title IX

Colleges and universities that receive federal funds and offer intercollegiate athletics must comply with Title IX⁷² as well as with the Policy Interpretation in the areas of the three-prong test for effective accommodation,⁷³ athletics scholarships,⁷⁴ and other athletic benefits and opportunities.⁷⁵ The NCAA has over 1,250 members, and its Division I members must go through a certification process that involves examining the areas covered by the Policy Interpretation and developing an institutional plan involving all of those areas, discussed next.

II. THE THREE-PRONG TEST FOR EFFECTIVE ACCOMMODATION

There have been several appellate court decisions involving the three-prong test, including a fairly recent unsuccessful challenge of the test. It is essential that colleges and universities are knowledgeable about and comply with the three-prong test. In *Cohen v. Brown University*, Brown University dropped four teams, two men's teams and two women's teams.⁷⁶ Members of the two dropped women's teams—volleyball and gymnastics—brought a class action alleging a Title IX violation.⁷⁷ The Court of Appeals for the First Circuit upheld the district court's finding that Brown violated Title IX and that the Policy Interpretation was consistent with the Title IX statute.⁷⁸ Similarly, when Colorado State University cut varsity fast-pitch softball, students and former members of the team sued under Title IX.⁷⁹ The Tenth Circuit, in *Roberts v. Colorado State Board of Agriculture*, found that none of the three-prongs were met.⁸⁰ In *Favia v. Indiana University of Pennsylvania*, after Indiana University of Pennsylvania announced plans to discontinue two men's and two women's teams, a class action was brought on behalf of female athletic program participants and all present and future IUP female students or potential students who were participating in, or who would seek to participate in, intercollegiate athletics.⁸¹ The Third Circuit upheld a preliminary injunction requiring the reinstatement of women's varsity field hockey and gymnastics.⁸² In *Pederson v. Louisiana State University*, female students at

72. 20 U.S.C. §1681(a) (2000).

73. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,417–18. See *supra* text accompanying notes 37–38.

74. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415. See *supra* text accompanying note 25.

75. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416. See *supra* text accompanying notes 26–30.

76. 991 F.2d 888 (1st Cir. 1993).

77. *Id.* at 892–93.

78. *Id.* at 906. See Sue Mota, *Title IX and Intercollegiate Athletics — The First Circuit Holds Brown University Not in Compliance*, 14 ENT. & SPORTS L. REV. 152 (1997).

79. *Roberts v. Colo. State Bd. of Agric.*, 998 F. 2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993).

80. *Id.* at 832.

81. *Favia v. Ind. Univ. of Pa.*, 7 F. 3d 332 (3d Cir. 1993).

82. *Id.* at 344.

Louisiana State University filed a Title IX complaint requesting an injunction ordering the university to field intercollegiate varsity women's fast pitch softball and soccer.⁸³ The Court of Appeals for the Fifth Circuit held that none of the three prongs were satisfied, stating that the Policy Interpretation is the proper analytical framework to assess Title IX compliance.⁸⁴

The elimination or capping of rosters on men's teams, and specifically on wrestling teams, has caused litigation over the three-prong test.⁸⁵ In 1999, the wrestling team at California State University in Bakersfield challenged squad size targets and requested declaratory and injunctive relief.⁸⁶ The university chose downsizing of the men's teams rather than elimination of any of the men's teams.⁸⁷ In *Neal v. Board of Trustees of California State Universities*, the Court of Appeals for the Ninth Circuit held that capping the roster of the wrestling team did not violate the Constitution or Title IX.⁸⁸ A challenge to dropping wrestling was also unsuccessful in *Chalenor v. University of North Dakota*.⁸⁹ The issue in *Chalenor* was whether Title IX prohibits a public college or university from eliminating a men's athletic team to reduce inequality in athletic participation between males and females.⁹⁰ The University of North Dakota cited both budgetary and gender equity reasons for cutting the men's wrestling team, and members sued, alleging a Title IX violation.⁹¹ The district court granted summary judgment for the University of North Dakota, and the appeals court affirmed.⁹² Most recently, in *National Wrestling Coaches Association v. Department of Education*, the Court of Appeals for the District of Columbia Circuit held that plaintiffs including the National Wrestling Association, the Committee to Save Bucknell, the Marquette Wrestling Club, the Yale Wrestling Association, and the College Sports Council lacked standing to challenge the Policy Interpretation's three-prong test and the 1996 clarification.⁹³

The OCR's Further Clarification in 2003 said that the three-prong test has worked well by offering colleges and universities flexibility in selecting a prong that best fits an institution's circumstances.⁹⁴ Reducing men's teams is not a

83. *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000).

84. *Id.* at 879.

85. *Kelley v. Board of Trustees* involved dropping a men's team while retaining a women's team was not a Title IX violation. 35 F.3d 265, 272-73 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). In *Boulahanis v. Board of Regents*, the appellate court upheld the cropping of men's sports to move towards proportionality. 198 F.3d 633, 641 (7th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000).

86. *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 771, 773 (9th Cir. 1999).

87. *Id.* at 765.

88. *Id.* at 772-73.

89. 291 F.3d 1042, 1047-48, 1050 (8th Cir. 2002).

90. *Id.* at 1043.

91. *Id.* at 1048.

92. *Id.* at 1044.

93. 366 F.3d 930, 958-59 (D.C. Cir. 2004), *cert. denied*, 126 S. Ct. 12 (2005). The court held that there was no standing, and even if there was, the availability of a private course of action directly against the universities would bar this case. *Id.* at 945.

94. *See Additional Clarification*, *supra* note 54 and accompanying text.

avored way of achieving compliance with the three-part test, according to the Further Clarification.⁹⁵ The OCR stated that while it will aggressively enforce Title IX, it will also work with colleges and universities to avoid sanctions.⁹⁶ Private sponsorship of athletics teams will continue to be allowed, according to the Further Clarification, but this does not change or diminish the academic institution's Title IX obligations.⁹⁷ Finally, the OCR will not allow variations in enforcement in different regions of the United States.⁹⁸

Of the 130 colleges and universities that the Office for Civil Rights investigated in the decade from 1992 to 2002, about two-thirds achieved compliance under part three of the three-prong test.⁹⁹ Because of the perceived uncertainty concerning this prong, the OCR issued in 2005 an Additional Clarification of the Three-Part Test, along with a web-based Model Survey that schools may use to assess student interest in sustaining a varsity team.¹⁰⁰ The Additional Clarification recommends that the Model Survey be conducted as a census of all undergraduate students or of undergraduate students of the underrepresented sex to avoid sample survey problems such as selection of the sample size, calculation of sampling error, and selection of the sampling mechanism.¹⁰¹ Further, the Model Survey must be administered periodically.¹⁰²

The OCR has been commended by one author for acknowledging that there is a problem with institutional compliance under the three-part test and for issuing the Additional Clarification.¹⁰³ The NCAA, however, does not favor the use of the Model Survey¹⁰⁴ and has issued a resolution urging the Department of Education to rescind the Additional Clarification.¹⁰⁵ The NCAA resolution urges its

95. *Id.* at 5.

96. *Id.* at 3.

97. *Id.*

98. *Id.* at 24.

99. See *Additional Clarification*, *supra* note 54, at 2; see also C. Peter Goplerud III, *Title IX: Part Three Could be the Key*, 14 MARQ. SPORTS L. REV. 123 (2003).

100. *Additional Clarification*, *supra* note 54, at 5.

101. *Additional Clarification*, *supra* note 54, at 5–6. The institution may require students to complete the Model Survey (census), or provide it in a context in which students must encounter it, such as in the registration process. *Id.* It could also be sent via e-mail, and the OCR will interpret no response by a student as lack of interest. *Id.* The census must include the full list of sports in the Model Survey, which includes all varsity sports, including emerging sports, recognized by the NCAA, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association. *Id.* at 7.

102. *Id.* at 6.

103. Robin M. Preussel, *Successful Challenge Ruling Reversed: Why the Office for Civil Rights' Survey Proposal May Be Well-Intentioned but Misguided*, 13 SPORTS LAW. J. 79, 118 (2006).

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

105. *Id.*

members to decline to use the procedures in the Additional Clarification.¹⁰⁶ The resolution itself provided no further guidance, other than the guidance issued by the OCR in the 1996 Clarification.¹⁰⁷ Nonetheless, two commentators have suggested that regardless of whether a college's administrators agree or not, it would be a "serious mistake" to overlook the usefulness of the Additional Clarification as part of the institution's Title IX compliance efforts.¹⁰⁸

III. ATHLETICS SCHOLARSHIPS

The Implementing Regulation requires that, if a college or university awards athletic scholarships, scholarship dollars be awarded in proportion to the number of each sex participating in intercollegiate athletics.¹⁰⁹ The Policy Interpretation requires that the total amount of scholarship aid made available to men and women be substantially proportionate to their overall participation rates at that institution.¹¹⁰ This rule is different from the proportionality prong of the three-prong test, which looks at proportionality to the student body as a whole.¹¹¹ An analysis of athletic scholarships requires examining the scholarship amounts and levels of participation.¹¹² This rule is independent of any NCAA or other athletic association rule that limits scholarships.

The Policy Interpretation states that the Department of Education's Office for Civil Rights will determine whether an institution is compliant by dividing the amounts of financial aid available for the members of each sex by the numbers of male or female participants in the athletics program.¹¹³ An institution may be in

106. *Id.*

107. This author respectfully suggests that the NCAA could then provide some additional clarification to its members, perhaps compiling "best practices" of its members to achieve compliance.

108. John J. Almond & Daniel A. Cohen, *Navigating Into the New "Safe Harbor": Model Interest Surveys as a New Tool for Title IX Compliance programs*, 8 VAND. J. ENT. & TECH. L. 1, 2 (2005).

109. 34 C.F.R. § 106.37(c) (2006). For example, if fifty-five percent of student-athletes are female, then fifty-five percent of the scholarship funds must go to female student-athletes. *Id.*

110. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415. *See supra* text accompanying note 25. Under the Policy Interpretation, participants are those student athletes: (a) who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and (b) who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and (c) who are listed on the eligibility or squad lists maintained for each sport; or (d) who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415.

111. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418. *See supra* text accompanying note 38.

112. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415.

113. *Id.* at 71,418. The amount of athletics scholarships awarded to women divided by the number of female participants will be compared to the amount of athletics scholarships awarded

compliance if the comparison results in substantially equal amounts, or if a resulting disparity may be explained by other factors such as out-of-state scholarships at a public institution or reasonable decisions on program development.¹¹⁴ It is important to note that the Policy Interpretation only looks at the amount spent on male versus female student-athletes, not at proportionate numbers of scholarships for men or women or individual scholarships of equal dollar value.¹¹⁵

In a 1998 Policy Guidance for Athletic Scholarships, the Office for Civil Rights further clarified that the relevant disparity in awards is the difference between the annual aggregate amount of money athletes of one sex received and the amount they would have received if their share of the entire annual budget for athletic scholarships had been awarded in proportion to gender participation rates.¹¹⁶ For example, if there is a million dollar budget for athletic scholarships and males are fifty-five percent of athletics participants, then female student-athletes should receive four hundred fifty thousand dollars in athletic financial assistance; anything significantly less is disparate treatment. The Office for Civil Rights recognized that there was confusion in the past on the issue of Title IX compliance standards for athletic scholarships,¹¹⁷ and while proportionality does not need to be exact, there is a high threshold test for determining substantial proportionality of scholarship amounts.¹¹⁸

The Office for Civil Rights will decide whether institutions are compliant on a case-by-case basis.¹¹⁹ Some disparities may be explained by justifications that the Policy Interpretation allows, such as out-of-state scholarships or program development. Other justifications include legitimate efforts to comply with Title IX, such as participation requirements.¹²⁰ There may be unexpected fluctuations due to an athlete deciding to attend another institution. Once legitimate disparities are taken into account, if any unexplained disparity in scholarship dollars up to one percent of the entire budget for athletic scholarships, the OCR presumes that the disparity is reasonable and based on legitimate nondiscriminatory factors.¹²¹

to men divided by the number of male participants. *Id.*

114. *Id.*

115. *Id.*

116. U.S. Dep't of Educ., Office for Civil Rights, Norma V. Cantú, Assistant Secretary, Dear Colleague Letter: Bowling Green State University (July 23, 1998), *available at* <http://www.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

117. *Id.* (citing the OCR's 1990 Athletics Investigator's Manual, which stated that statistical tests may, in some cases, result in compliance despite a disparity as large as three to five percent). The 1998 Policy Guidance for Athletic Scholarships clarified that statistical tests are not appropriate with regard to athletic scholarships as they are in other discrimination contexts because a college or university directly controls its allocation of financial aid to men's and women's teams and the allocation affects only one sex. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* (citing *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1005-06 (S.D. Iowa 1995)).

121. *Id.* The 1998 Policy Guidance reinforces that the evaluation will still be done on a case-by-case basis. The Policy Guidance first gives the example of a school where one percent of the entire athletic scholarship budget is less than one full scholarship, then the disparity of up to the

NCAA members that award athletic scholarships must be careful to comply with Title IX in this area. With a variance of only one percent, colleges and universities must carefully calculate each year the exact scholarship dollars and the accurate participation numbers. It is better to err on the side of awarding athletic assistance to the underrepresented sex. The Implementing Regulation permits institutions to award a disproportionately higher aggregate of scholarships to the underrepresented sex.¹²²

The NCAA bylaws allow colleges and universities to award either scholarships or grants-in-aid to student athletes.¹²³ The NCAA defines financial aid as all institutional and other financial aid such as scholarships, grants, tuition waivers, employee dependent tuition benefits, and loans.¹²⁴ Other financial aid, such as aid through an outside program or non-athletic aid, is also included in the definition of financial aid.¹²⁵ The NCAA limits the value of financial aid awards that an institution may provide in any given year in women's and men's sports.¹²⁶ While it is beyond the scope of this article, the NCAA and other researchers should study the effect of the existing scholarship limits, gender equity, and compliance with Title IX to see if the limits could be adjusted to help member institutions.

For the calculation of athletic scholarships, some students are not counted, including fifth year student athletes who have exhausted eligibility, academically ineligible students, and male athletes who scrimmage on women's teams.¹²⁷ The tangential issue of male practice players thus is not a factor for calculating the proportionality of scholarships, and these male students may not receive financial assistance. This issue does, however, raise concerns for member institutions. Opponents argue that using male practice players conflicts with providing equitable opportunities for female student athletes, who may be on the bench, and using male practice squads may increase female athletes' injuries.¹²⁸ Proponents argue that it makes the female teams more competitive.¹²⁹ While not a Title IX

value of one full scholarship is equitable and nondiscriminatory. *Id.* If there is direct evidence of discriminatory intent, however, then even less than a one percent disparity could rebut the presumption of compliance. *Id.*

122. 45 C.F.R. § 106.3(b) (1980).

123. NCAA, 2006-07 NCAA DIVISION I MANUAL, BYLAW 15.01.1 (2006), available at http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

124. *Id.* at BYLAW 15.02.4.

125. *Id.* Elements of financial aid include tuition and fees, room and board, books, and other expenses related to attendance. *Id.* at BYLAW 15.2.

126. *Id.* at BYLAW 15.5.3. Perhaps the NCAA could evaluate whether even more adjustment of the scholarship awards would be helpful to more member institutions toward Title IX Compliance. Division III student-athletes do not receive athletics-related aid. *Id.* at BYLAW 15.01.3.

127. *See id.* at BYLAW 15.5.1.8 (discussing fifth year student athletes who have exhausted eligibility); *id.* at BYLAW 15.5.1.7 (discussing academically ineligible students); Michelle Hosick, *Male Practice or Malpractice*, THE NCAA NEWS, May 8, 2006 (discussing male athletes who scrimmage on women's teams).

128. *See generally* Hosick, *supra* note 127 (stating that male practice players must be academically eligible).

129. *Id.*

issue, this issue is one for the NCAA to grapple with.

IV. ATHLETIC PROGRAM BENEFITS AND OPPORTUNITIES

The academic institution must maintain equivalent athletic program benefits and opportunities, including equipment and supplies, travel and per diem allowances, and the opportunity to receive coaching and academic tutoring. Further, locker rooms and practice and competitive facilities must also be equivalent. The educational institution must equitably provide medical and training facilities and services, housing and dining facilities and services, and publicity. Finally, recruitment and support services must also be equitable.¹³⁰ In the 2002–03 NCAA Gender-Equity Report, the proportion of money spent on women’s athletics showed slight increases that were approximately equal to or smaller than increases in men’s athletics.¹³¹ Consequently, many member institutions need to do more work to achieve equivalence.¹³²

In Division I recertification, which requires broad campus participation, institutions must develop gender equity plans that cover each area of the Policy Interpretation.¹³³ This helps Division I members minimally address the program areas, but the gender-equity plan committee should take a comprehensive and exhaustive look at each of the program areas in light of the Policy Interpretation.¹³⁴ Each member of the institution’s gender-equity planning committee should be familiar with the Policy Interpretation and the committee must thoroughly and methodically evaluate each program area to move the institution towards compliance with Title IX. It is the institution’s obligation to comply with Title IX; the NCAA does not monitor Title IX compliance.¹³⁵

Institutions must have equivalent equipment and supplies, including uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment.¹³⁶

130. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416. *See supra* text accompanying notes 26–30.

131. NCAA, 2002–03 GENDER-EQUITY REPORT 11 (2004). In 2001–02, men’s sports total expenses were 66% of the total, and women’s were 34%. *Id.* at 23. The percentages remained the same in 2002–03, although women’s expenses went up \$305,000 from \$3,135,200 to \$3,440,200, while men’s expenditures went up from \$5,995,200 to \$6,550,400. *Id.* at 23.

132. NCAA v. Smith, 525 U.S. 459, 462 (1999). *See supra* text accompanying note 66.

133. The program areas to be reviewed for gender issues are the areas from the Policy Interpretation of Athletics. These areas are scholarships, accommodation of interests and abilities, and the eleven program areas. NCAA, 2005–06 DIVISION I ATHLETICS CERTIFICATION SELF-STUDY INSTRUMENT (2005), http://www.ncaa.org/library/membership/d1_self-study_instr/2005-06/2005-06_d1_cert_self_study_instr.pdf.

134. This author recommends that the focus remains on compliance with the Policy Interpretation. *See* Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413.

135. *See* Bonnette, *supra* note 14 and accompanying text. Additional resources may assist the gender equity planning team. *See, e.g.*, VALERIE MCMURTIE BONNETTE & MARY VON EULER, TITLE IX AND INTERCOLLEGIATE ATHLETICS: HOW IT ALL WORKS—IN PLAIN ENGLISH (2004).

136. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and

Colleges and universities must assess equipment and supplies for quality, amount, suitability, maintenance and replacement, and availability. Considering the amount of equipment and supplies even a small athletics program uses, this could seem a daunting task. However, even though the systematic assessment is difficult, it is necessary for numerous factors, including varying preferences in all of these areas by different sports, coaches, and athletes. The gender equity plan should remedy any lack of equivalence.

Assessing the scheduling of games and practice times may seem to be more straightforward than assessing other program areas; the Policy Interpretation requires that the number of competitive events per sport, the number and length of practice opportunities, the time of day competitive events are scheduled, and the opportunities to engage in available pre- and post-season competition all be assessed for equivalence.¹³⁷ Coaches and student-athletes' preferences may cause some variation here as well, but variances must be equitable. Some post-season opportunities may arise for different teams in different years. Some problems, such as the time of day practices are scheduled for teams practicing in the same facility during the same season can be remedied by alternating teams' practice schedules, perhaps on an annual basis due to student-athletes' class schedules. Even seemingly minor issues, such as one team staying on the court or field into another team's practice schedule, similar to a faculty member staying in a classroom past class time, can rise above an annoyance and become an equity issue but can easily be resolved by the coaches and teams respecting the schedule or requiring that the team leave the field or court if the behavior is repeated. A systematic assessment of the entire area of scheduling of games and practice times, for issues that are large or seemingly small, must also be performed, and institutions must address any lack of equivalence.

For the issue of travel and per diem allowances, institutions can assess their compliance with gender equity by examining modes of transportation, housing during travel, length of stay before and after competitive events, per diem allowances, and dining arrangements.¹³⁸ Equivalence for many of the factors does not necessarily mean spending the same amount of money; rather, the quality issues must be assessed. The modes of transportation for same-sized men's and women's teams traveling the same distance need to be equivalent. The type of housing, including the number of student-athletes per room and their length of stay, also needs to be equivalent. The quality of dining arrangements provided and per diem allowances must also be assessed for equivalence. The gender equity plan should address any lack of equivalence.

The opportunity for athletes to receive coaching and tutoring and the compensation that those coaches and tutors receive must be equivalent.¹³⁹ The

Intercollegiate Athletics, 44 Fed. Reg. at 71,416.

137. *Id.*

138. Even the issue of whether the coach makes the travel and dining arrangements for some teams and other teams have an athletics department administrator to handle this could be an issue. *Id.*

139. *Id.* at 71,416.

Policy Interpretation states that the opportunity to receive coaching includes the relative availability of full-time, assistant, and part-time assistant coaches, as well as graduate assistants. Training, experience, professional standing, and other professional qualifications must be equivalent. Coaches' compensation must be equivalent in the rate of compensation per sport. Issues such as duration of contracts, conditions relating to contract renewal, experience, the nature of coaching duties and working conditions, and other terms and conditions of employment such as pre-season commitments are to be considered.¹⁴⁰ Further, the Policy Interpretation recognizes that other nondiscriminatory factors, such as the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistants supervised, and the level of competition, may represent differences in skill, effort, responsibility, or working conditions, which justify differences in compensation in certain circumstances. The Implementing Regulation additionally prohibits discrimination on the basis of sex in employment in education programs and activities.¹⁴¹ In 1997, the Equal Employment Opportunity Commission issued an Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions.¹⁴² In *Stanley v. University of Southern California*,¹⁴³ Stanley, the former head coach of USC's women's basketball team, claimed violations of Title IX and the Equal Pay Act, along with wrongful discharge under state law. The Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the University of Southern California.¹⁴⁴

Some key issues to be aware of in the assessment of coaching equivalence include having the same number of coaches with the same duration of contract (for example, one year as opposed to nine months) in men's and women's teams in the same sports, within NCAA limitations.¹⁴⁵ The duration of the contracts and rate of compensation, factoring in the non-discriminatory factors listed above, must also be evaluated for equivalence.

Tutoring must also be assessed for equivalence, including the availability, procedures, and criteria for obtaining tutoring.¹⁴⁶ Thus, tutoring and other support services must be afforded to all student athletes equally, regardless of gender.

140. *Id.*

141. 34 C.F.R. § 106.51 (2006).

142. The U.S. Equal Employment Opportunity Commission, EEOC Notice No. 915.002, Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions (Oct. 29, 1997), available at <http://www.eeoc.gov/policy/docs/coaches.html>. This guidance analyzes Equal Pay Act and Title VII claims which could be an issue for coaches. The EEOC concluded that there is widespread disparity in coaches' pay and that it will analyze such cases carefully. *Id.*

143. *Stanley v. Univ. of S. Cal.*, 178 F.2d 1069, 1074 (9th Cir. 1999).

144. *Id.* at 1079. See generally Andrea M. Giampetro-Meyer, *Recognizing and Remediating Individual and Institutional Gender-Based Wage Discrimination in Sport*, 37 AM. BUS. L.J. 343, 365-68 (2000).

145. See NCAA DIVISION I MANUAL, Limitations on the Number and Duties of Coaches, Bylaw 11.7.

146. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416.

Tutor qualification, training, and experience must be equivalent.¹⁴⁷ Tutor compensation must be equivalent for men's and women's tutors based on factors, such as rate of pay by nature of the subject tutored, the number of student athletes tutored in a season, and tutor qualifications and experience.¹⁴⁸ If tutoring assistance is provided, then women's and men's teams should have equal access to equivalently qualified tutors.

Institutions must provide equivalent locker rooms, practice, and competitive facilities. Factors such as the quality, availability, and exclusive use of facilities for practice and competitive events, the availability and quality of locker rooms, and the maintenance and preparation of facilities for practice and competitions must be assessed.¹⁴⁹ All members of the committee should view each locker room and facility, or at least by the same members, for continuity in assessment. The college or university may have to reallocate, renovate, or even build locker rooms and facilities to achieve equity. The gender equity plan could offer different options to achieve equity.

Medical and training facilities and services must also be equivalent. Institutions should address the following relevant factors: the availability of medical personnel and assistance, insurance, and availability and quality of weight and training and conditioning facilities and qualifications of the athletic trainers.¹⁵⁰ This area is especially important for the health and safety of student-athletes. For training rooms, one option is that all student-athletes may use the facilities equally, or sports could be alternated in the facilities equitably. The gender equity plan should ensure that medical training facilities are available equitably.

Housing and dining services must be equivalent, including special services such as laundry facilities, parking spaces, and housekeeping services.¹⁵¹ Student athletes' individual and team tastes may vary in these areas, but these services as well must be provided equivalently. One potential area of difficulty is the housing of certain teams in hotels before home matches. This can become an equity issue if such housing is provided for men's teams, and women's teams also want, but are not afforded, this benefit.

Publicity must be equivalent and institutions must assess the availability and quality of sports information personnel, access to other publicity resources, and quantity and quality of publications and other promotional devices.¹⁵² Printed materials and publicity staff may need to be added or shifted to achieve equity. It is not, however, an equity issue if both men's and women's teams lack, or have low quality, publications.

If equal athletic opportunities are not available for both male and female students, then the recruitment practices for teams for both sexes will be evaluated. The assessment must examine whether coaches or other athletic personnel are

147. *Id.*

148. *Id.* at 71,617.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

provided with substantially equal opportunities to recruit, whether the financial and other resources for recruitment are adequately equivalent, and whether the differences afforded to prospective student athletes have a disproportionately limiting effect on the recruitment of students of either sex.¹⁵³ Thus, there must be equivalent opportunities to recruit prospective student athletes by coaches of men's and women's teams. In addition to budgets and the ability to recruit students from other states and distant locales, courtesy cars may be an issue here. Courtesy cars must be assigned equitably, and some cars may need to be leased to achieve equity in this area. The gender equity plan should address any lack of equivalence.

Finally, support services such as administrative and clerical support must be equivalent, based on an assessment of factors such as the amount of administrative, clerical, and secretarial assistance provided to men's and women's programs.¹⁵⁴ Additionally, the office space, equipment, and supplies should be evaluated under this area.¹⁵⁵ It is important for the same committee members to see the office facilities to determine if the offices and equipment are equitably assigned. As in other areas, staff and space may have to be reassigned to achieve equity under the plan.

Thus, a systematic and thorough assessment of all factors of all the program areas must be conducted to determine equivalency. This may be done in the context of NCAA recertification by a well-trained committee with broad campus representation. Committee members must be willing and available to spend the time and effort required to complete this large task, and be willing to ask difficult questions and without accepting the dismissive response that it has always been done that way. Committee members must not merely conduct "random samples," or only evaluate women's sports. Committee members should obtain information from student athletes and coaches by questionnaires and interviews. Members on the gender equity committee must not be those with an "ax to grind" or be on the committee merely to favor the member's favorite sport. The committee members must be willing to recommend what is necessary to achieve equity. Committee members also should be aware that the plan must include what is necessary to achieve equity, and not simply give underrepresented teams what is ideal for the team; men's and women's teams may both be equivalent, but have less than what players, coaches, parents, or boosters want for the teams. Finally, it is essential that the plan move colleges and universities towards compliance with Title IX; consequences for lack of compliance mandate this.

V. CONCLUSION

The National Collegiate Athletics Association is committed to gender equity for student-athletes.¹⁵⁶ For example, the NCAA offers Title IX seminars for its

153. *Id.*

154. *Id.*

155. VALERIE BONNETTE & LAMAR DANIEL, OFFICE FOR CIVIL RIGHTS, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL (1990), available at <http://eric.ed.gov> (search in "ERIC #" for search terms "ED400763").

156. *Supra* note 6 and accompanying text.

members.¹⁵⁷ Any organization, however, has room to improve, and the NCAA could further assist its members in a number of ways. In addition to gathering data, the NCAA could also collect “best practices” of its members in the area of gender equity. Specifically in the area of recertification, gender equity plans which have moved members towards Title IX compliance could be shared with member institutions developing plans.¹⁵⁸ The NCAA could require that the Division I member institutions not only have a gender equity plan, but also require that the plan moves the member towards compliance with Title IX.¹⁵⁹

The NCAA could also review roster and scholarship limits¹⁶⁰ to see if these could be adjusted to help member institutions in the area of financial assistance, keeping in mind that Title IX addresses total dollars spent and not numbers of participants who receive the scholarship dollars.

NCAA Division I members should use the recertification period as a time to involve and educate the entire campus community on the importance of gender equity in athletics as well as the requirements of the Policy Interpretation. If done properly, the gender equity plan, a required part of Division I certification, will require a great deal of time and effort to systematically assess all areas of the Policy Interpretation. Colleges and universities should view this as an opportunity to involve many planning committee members from all parts of campus who are willing to make a substantial time commitment for reaching two very important goals—becoming or staying compliant with Title IX and becoming recertified.¹⁶¹ Even though the NCAA does not currently require it, the gender equity plan should bring the institution into, or at least move the institution well towards, compliance with Title IX. NCAA members should, if at all financially feasible, avoid cutting men’s sports to achieve compliance with Title IX. Adding new athletic opportunities for women is the preferred route.¹⁶² Colleges and universities should

157. See NCAA, 2005 Gender Equity and Issues Forum on Title IX, http://www2.ncaa.org/portal/media_and_events/press_room/2005/april/agenda.pdf (last visited Oct. 18, 2006). If any university counsel or athletics department staff are not already conversant with Title IX requirements, such training could be very beneficial, especially if the institution will be facing NCAA recertification.

158. These could be made available to the NCAA Peer Review Teams, as well. This author’s institution had an outstanding, knowledgeable, and helpful peer review team led by an enormously capable chair. These “best practices” documents could be given to future peer review teams before site visits.

159. See Jay Larson, Note, *All Sports Are Not Created Equal: College Football and a Proposal to Amend the Title IX Proportionality Prong*, 88 MINN. L. REV. 1598 (June 2004). It has been proposed also that football and men’s basketball expenditures be capped, but this could raise antitrust concerns. Darryl C. Wilson, *Title IX’s Collegiate Sports Application Raises Serious Questions Regarding the Role of the NCAA*, 31 J. MARSHALL L. REV. 1303, 1316 (1998).

160. Sara A. Elliot & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS SPORT 1, 12 (2001).

161. Stated more negatively, this process shouldn’t become an opportunity to try to advance one’s own personal agenda or favorite sport if there aren’t compliance issues involving that sport, at the expense of teams that actually need resources or attention for equity issues.

162. Deborah Brake, *Revisiting Title IX’s Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U.J. GENDER SOC. POL’Y & L. 453, 466 (2004). The co-chair of the National Wrestling Coach’s Association stated that 350 men’s college athletics programs were eliminated

continue to enhance promotions and marketing for women's sports as these teams continue to draw spectators who have grown up with women's sports.¹⁶³

In conclusion, the NCAA, its members, and all colleges and universities receiving federal funds must work together, to achieve compliance with Title IX and provide equitable treatment and opportunities for all student athletes.

in a decade. David Klinker, *Why Conforming With Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J. SPORT L. 73 (2003). *But see* Daniel R. Marburger & Nancy Hogshead-Makoi, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?*, 14 MARQ. SPORTS L.J. 65 (2003). *See also* Suzanne Sangree, *The Secretary's Commission on Opportunity in Athletics Squandered Its Opportunity to Understand Commercial Collegiate Sports: Why They Eliminate Minor Men's Sports and Prevent Title IX from Achieving Full Gender Equality*, 3 MARGINS 257 (2003).

163. Welch Suggs, *Tragedy and Triumph in Title IX*, 7 VAND. J. ENT. L. & PRAC. 421, 435 (2005).