

TITLE IX ATHLETICS

Accommodating Interests and Abilities



U.S. COMMISSION ON CIVIL RIGHTS
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BRIEFING
REPORT



FEBRUARY 2010

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TITLE IX ATHLETICS: ACCOMMODATING INTERESTS AND ABILITIES

A Briefing Before
The United States Commission on Civil Rights
Washington, DC

Briefing Report

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House

Dear Sirs and Madam:

The United States Commission on Civil Rights (Commission) is pleased to transmit this report, *Title IX Athletics: Accommodating Interest and Abilities*. A panel of experts briefed members of the Commission on the U.S. Department of Education's 2005 letter, "Additional Clarification of Intercollegiate Athletics Policy: Three Part Test—Part Three," which included a discussion of the then newly-developed Model Survey's strengths and weaknesses. Subsequently, the Commission developed findings and recommendations that are included in this report.

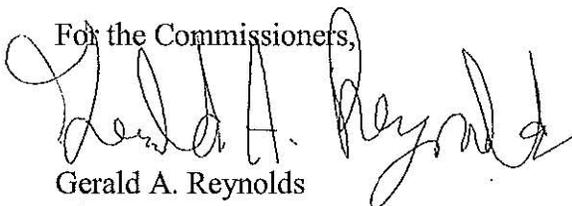
Among its findings, the Commission notes that the U.S. Department of Education's Office of Civil Rights has relied upon a three-part test for determining compliance with Title IX with respect to collegiate athletics since 1979. Colleges and universities can demonstrate compliance by 1) providing athletic opportunities for male and female students that are substantially proportionate to their respective full-time undergraduate enrollment; 2) demonstrating a history and continuing practice of program expansion of athletic opportunities for the underrepresented sex; or 3) demonstrating that they are fully and effectively accommodating the interest and ability of the underrepresented sex in the institution's athletic offerings.

Moreover, the Commission finds that the Department, in its 2003 clarification of Title IX regulations, encourages the use of student interest surveys in an effort to achieve compliance under the third prong of the three-part test. Most importantly, the Commission recognizes that at this time, the Model Survey, developed by the U.S. Department of Education in 2005, provides the best available method for attaining prong three compliance because it provides a reliable and rigorous method of ascertaining student interest in athletics.

The Commission recommends that the Department's Office for Civil Rights continue to encourage institutions to use the practices of the model survey as their primary means of complying with Title IX. The Commission also recommends that prong three of the regulations be revised to explicitly take into account the interest of both sexes. This would help restore Title IX to its original goal of providing equal opportunity for both male and female athletes.

Part A, which consists of the body of this report, was approved by a vote of 5-0 on September 11, 2009. Vote tallies for each of the Commission's findings and recommendations, which make up Part B of this report, are noted therein.

For the Commissioners,



Gerald A. Reynolds
Chairman

Table of Contents

Executive Summary.....	1
Findings and Recommendations.....	3
Summary of Proceedings.....	5
Daniel A. Cohen.....	6
Jessica L. Gavora.....	8
Jocelyn F. Samuels.....	11
Judith M. Sweet.....	14
David F. Black.....	16
Discussion.....	18
Administration of the Model Survey, Its Use and Response Rate.....	18
Surveys and Compliance under Prong Three.....	22
Opposing Views on the 2005 Additional Clarification and Proportionality.....	24
Men’s and Women’s Interest in Participation in Sports.....	28
Impact of Title IX, Sports Elimination, and Worldviews.....	29
Statements.....	33
Daniel A. Cohen.....	33
Jessica L. Gavora.....	46
Jocelyn F. Samuels.....	50
Judith M. Sweet.....	58
Stephanie J. Monroe.....	67
Public Comments.....	75
American Association of University Women.....	75
Eagle Forum.....	76
The Independent Women’s Forum.....	76
Women’s Sports Foundation.....	77
National Coalition for Women and Girls in Education.....	78
Don Sabo and Christine H. B. Grant.....	79
Dolores Halls, Anne-Marie Mallon, Majorie Mead, Valerie McNay, Nancy Mion, and.....	
Virginia Ralston.....	81

Commissioner Statements.....	82
Abigail Thernstrom, Vice Chair.....	83
Arlan D. Melendez and Michael Yaki (Rebuttal).....	87
Speaker Biographies.....	103
Daniel A. Cohen.....	103
Jessica L. Gavora.....	103
Jocelyn F. Samuels.....	104
Judith M. Sweet.....	104
David F. Black.....	105
 Appendix A: Further Clarification of Intercollegiate Athletics Policy Guidance Regarding IX Compliance from Gerald Reynolds, Assistant Secretary for Civil Rights, U.S. Department of Education, Washington, DC, July 11, 2003.....	106
 Appendix B: Additional Clarification of Intercollegiate Athletics Policy: Three- Part Test, Part Three, from James F. Manning, Delegated the Authority of the Assistant Secretary for Civil Rights, U.S. Department of Education, Washington, DC, March 17, 2005.....	109
 Appendix C: Clarification of Intercollegiate Athletics Policy Guidance: The Three- Part Test, Norma V. Cant, Assistant Secretary for Civil Rights, U.S. Department of Education, Washington, DC, Jan. 16, 1996.....	112
 Appendix D: Limitations of the U.S. Department of Education’s Online Survey Method for Measuring Athletic Interest and Ability on U.S.A. Campuses, Don Sabo, Ph.D., and Christine H.B. Grant, Ph.D., June 2005.....	126
 Appendix E: Go Out and Play: Youth Sports in America, Executive Summary, Women’s Sports Foundation.....	133
 Appendix F: Gender Equity: Men’s and Women’s Participation in Higher Education, U.S. Government Accountability Office Report (GAO-01-128) to the Ranking Minority Member, Subcommittee on Criminal Justice, Drug Policy and Human Resources Committee on Government Reform, U.S. House of Representatives. Washington, DC, Dec. 2000.....	139
 Appendix G: Who’s Playing College Sports? Trends in Participation, Executive Summary, John Cheslock, Ph.D., Women’s Sports Foundation, June 5, 2007.....	141
 Appendix H: User’s Guide to Developing Student Interest Surveys Under Title IX, U.S. Department of Education, March 2005.....	171

Executive Summary

Title IX of the Higher Education Amendments Act of 1972 prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance, including athletics. Since 1979, one way in which eligible educational institutions can show compliance with Title IX is by demonstrating that the institution's present program "fully and effectively" accommodates the "interests and abilities" of the sex that is underrepresented among intercollegiate athletes. Eligible educational institutions could also demonstrate compliance either by providing intercollegiate level participation opportunities for male and female students in numbers "substantially proportionate" to their respective enrollments or by showing a "history and continuing practice" of expanding these opportunities in a manner demonstrably responsive to the developing interest and abilities of the members of the underrepresented sex.

The Office for Civil Rights (OCR) of the U.S. Department of Education is responsible for enforcing Title IX and issued further guidance on the "interests and abilities" compliance option in March 2005. Under this guidance, an institution will be found in compliance with this option unless there exists a sport(s) for the underrepresented sex for which all three of the following conditions are met: 1) unmet interest sufficient to sustain a varsity team in the sport(s); 2) sufficient ability to sustain an intercollegiate team in the sport(s); and 3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region. Thus, schools are not required to accommodate the interests and abilities of all their students or fulfill every request for the addition or elevation of particular sports, unless all three conditions are present. This guidance also included a model survey instrument to measure student interest in participating in intercollegiate varsity athletics. When this Model Survey indicates insufficient interest to field a varsity team, OCR will not exercise its discretion to conduct a compliance review of that institution's implementation of the three-part test.

This guidance was issued at a time when critics of Title IX claimed that rigid compliance forced the cancellation of many educational programs or teams for men, as many schools demonstrated Title IX compliance through "substantial proportionality." The 2005 guidance also prompted a strong and often negative reaction from the National Collegiate Athletic Association and many women's groups. In response, the U.S. Commission on Civil Rights assembled a panel of experts on May 11, 2007 including a U.S. Department of Education official, to discuss the guidance, the Model Survey's strengths and weaknesses, any findings emerging from institutions' use of the survey, and whether compliance with Title IX had improved over time. The Commission received oral and written testimony from Daniel A. Cohen, an attorney specializing in Title IX cases; Jessica Gavora, vice president of the College Sports Council; Jocelyn Samuels, vice president for education and employment at the National Women's Law Center; Judith Sweet, representing the National Collegiate Athletic Association (NCAA); David Black, then-deputy assistant secretary for enforcement of the U.S. Department of Education's Office for Civil Rights; and Stephanie Monroe, then-Assistant Secretary, Office for Civil Rights, United States Department of Education.

All five panelists fielded additional questions from the Commissioners covering a wide range of issues, including:

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

Based on the testimony, discussion, and a number of comments received from the public, the Commission found, among other things, that the Model Survey currently provides the best method available for attaining Prong Three compliance, because it offers institutions a flexible and practical, yet rigorous means of attaining a high student response rate.

Consequently, the Commission recommends that 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.

Furthermore, the Commission recommends that Prong Three regulations should be revised to take explicitly into account the interest of both sexes rather than just the interest of the underrepresented sex and that the Model Survey be structured accordingly. The Commission also asks that the NCAA 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.

Findings and Recommendations

Findings

1. Since 1979, the U.S. Department of Education's Office for Civil Rights has enforced the Title IX athletics law by requiring postsecondary institutions to satisfy any one part of a three-part test for compliance. The three parts are usually referred to as prongs, and require: a) substantially proportional representation of men and women in athletic participation; or b) substantial progress in providing opportunities for the underrepresented sex; or c) adequate accommodation of the interests and abilities of the underrepresented sex in the institution's athletic offerings.
2. In 1996, the U.S. Department of Education issued guidance that specified additional factors (other than a survey) for measuring interest that needed to be taken into account in order to achieve compliance using Prong Three. A survey by itself was deemed to be insufficient.
3. Critics charged that the 1996 policy guidance on Prong Three was too vague to offer institutions a satisfactory means of attaining compliance. As a result, many institutions likely opted to use Prong One's proportional representation method, which provided a legal "safe harbor" for Title IX compliance.
4. Panelists reported instances of colleges and universities dropping men's sports programs in order to reach Title IX compliance under the proportional representation requirement.
5. In its 2003 clarification of Title IX regulations, the U.S. Department of Education encouraged the use of student interest surveys in order to achieve Prong Three compliance. For compliance under Prong Three, an institution must consider student interest, student ability, and availability of competition. More specifically, an institution must show: a) there is no unmet interest among students; b) if there is unmet interest, it must show insufficient ability among students to sustain a team in the sport; and c) if there is interest and ability, it must show no likelihood of competition in the region in which the institution is located. Satisfaction of these three elements is sufficient to comply with Prong Three.
6. In its 2005 additional clarification, the Department of Education developed the Model Survey method, which is a specially designed survey colleges and universities can use to ascertain student interest in athletics.
7. At this point in time, the Model Survey provides the best method available for attaining Prong Three compliance, because it offers institutions a flexible and practical, yet rigorous means of attaining high student response rates. The U.S. Department of Education recommends that all students be required to complete the survey as part of mandatory class registration. Institutions that follow these survey procedures faithfully would be deemed to be in compliance with Prong Three of Title IX.

8. While the National Collegiate Athletic Association (NCAA) has long maintained that ascertaining student interest is a valid means of complying with Title IX, it has been critical of the 2005 Additional Clarification provided by the Department of Education and has urged institutions not to use the Model Survey.

[Chairman Reynolds and Commissioners Gaziano, Heriot, and Taylor voted in favor of these findings. Commissioner Kirsanow abstained. Vice Chair Thernstrom and Commissioners Melendez and Yaki were not present for the vote.]

Recommendations

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. Prong 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.

[Chairman Reynolds and Commissioners Gaziano, Heriot, and Taylor voted in favor of these recommendations. Commissioner Kirsanow abstained. Vice Chair Thernstrom and Commissioners Melendez and Yaki were not present for the vote.]

Summary of Proceedings

As enacted, Title IX of the Higher Education Amendments Act of 1972 prohibited sex discrimination in federally funded education programs and activities.¹ Two years later, Congress expressly applied this prohibition to intercollegiate sports.² The U.S. Department of Education (then Health, Education and Welfare), issued implementing regulations in 1975. With respect to athletics programs, the regulation specifies that a:

recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the Director will consider, among other factors [w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.³

The U.S. Department of Education subsequently issued policy guidance in 1979, 1996, 2003, and 2005 to explain in part what is meant by “interest.” These documents advanced a three-prong test that the Department’s Office for Civil Rights (OCR) uses to determine education institutions’ compliance with Title IX regarding sex discrimination in athletics. The test examines whether an institution offers men and women opportunities to participate in sports that are substantially proportionate to their respective enrollments; or has established a good faith history and ongoing practice of providing increased opportunities for the underrepresented sex; or fully and effectively accommodates the athletic interests and abilities of the underrepresented sex.

OCR issued the last of these guidance documents, “Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three,” on March 17, 2005, accompanied by a User’s Guide to Developing Student Interest Surveys Under Title IX, developed by the National Center for Education Statistics in March 2005. According to OCR’s Web site, “The Additional Clarification outlines specific factors that guide OCR’s analysis of the third option for compliance with the “three-part test,” a test used to assess whether institutions are effectively accommodating the interests and abilities of male and female student athletes under Title IX of the Education Amendments of 1972. The User’s Guide contains a model survey instrument to measure student interest in participating in intercollegiate varsity athletics.”⁴

¹ Pub. L. 92-18, 86 Stat. 373 (codified as amended 20 U.S.C. §§ 1681–1688 (2009)). Section 901(a) of the statute states that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

² The Educational Amendments of 1974, Pub. L. 93-380, § 844, 88 Stat. 612 (1974).

³ 34 C.F.R. § 106.41 (2009).

⁴ See <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html> (accessed Feb. 26, 2009). Central to the development is the report, Title IX Data Collection: Technical Manual for Developing the User’s Guide” by Alan F. Karr and Ashish P. Sanil of the National Institute of Statistical Sciences and the Research Triangle Park. In a “Dear Colleague” letter of March 17, 2005, OCR stated:

Daniel A. Cohen

Daniel A. Cohen, an attorney specializing in Title IX cases, stated that his task as an attorney was to inform clients about the law and help them comply,⁵ and as such, he neither supported nor opposed the 2005 Additional Clarification.⁶ For schools seeking compliance under Prong Three, however, he generally favored use of the Model Survey.⁷ According to him, much of the criticism of the 2005 Additional Clarification had been unfair, but it was important to distinguish between general Title IX policy concerns and criticisms specific to the 2005 Additional Clarification itself.⁸ He said the test for measuring compliance with Prong Three had been in place since 1979,⁹ and that three factors have to be present simultaneously for a school to be considered out of compliance with Prong Three: evidence of unmet interest in a sport or sports at the institution, evidence of interested students possessing sufficient ability to sustain a team, and a likelihood of athletic competition in the region.¹⁰

Mr. Cohen said with respect to measuring interest, Title IX had always focused on a school's current and admitted students, not future or potential ones.¹¹ The 1996 Clarification recommended that schools monitor a number of indicators that gauge interest in sports directly, he said.¹² Its list of indicators was thorough, but the guidance was so vague that schools had no way of knowing when they had attained compliance, he said. He remarked further that no indicators were considered dispositive or more persuasive than others, and it was unclear at what point a showing of some interest might rise to the level of sufficient unmet interest to require the addition of a team.¹³ He said that schools developed subjective measures to gauge student interest in athletics to demonstrate compliance with Prong Three, which often included varying self-administered surveys.¹⁴ According to Mr. Cohen, of the schools that OCR investigated between 1992 and 2002, about two-thirds sought compliance with Title IX under

Based on [its] experience investigating complaints and conducting compliance reviews involving the three-part test, [it] believes that institutions may benefit from further specific guidance on part three....An institution will be found in compliance with part three unless there exists a sport(s) for the underrepresented sex for which all three of the following conditions are met: (1) unmet interest sufficient to sustain a varsity team in the sport(s); (2) sufficient ability to sustain an intercollegiate team in the sport(s); and (3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region.

U.S. Department of Education, Office for Civil Rights, "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three," March 17, 2005, pp. iii–iv.

⁵ Ibid., p. 26.

⁶ Ibid., p. 26.

⁷ Ibid., pp. 26–27.

⁸ Ibid., p. 27.

⁹ Ibid., p. 27.

¹⁰ Ibid., pp. 27–28.

¹¹ Ibid., pp. 28–29.

¹² Ibid., p. 28. Since 1996, he said the U.S. Department of Education's Office for Civil Rights recommended that schools monitor the athletic interests of local nonstudents and high school students as an indirect way of gauging future, potential interest in a sport. *See also* Mr. Cohen's supplemental statement.

¹³ Ibid., pp. 28–29.

¹⁴ Ibid., p. 29.

Prong Three.¹⁵ Of these, about three-quarters used some form of survey to assist them in measuring interest.¹⁶

Mr. Cohen stated that the Commission on Opportunity in Athletics, convened in 2002 by then-Secretary of Education Rod Paige, studied Title IX and the 1996 Clarification extensively.¹⁷ In meetings held across the country, he said collegiate athletic administrators repeatedly informed Commission members that the 1996 Clarification had its merits but was so ambiguous that they could not determine when compliance was achieved under Prong Three.¹⁸ Many schools resorted to using proportionality, according to Mr. Cohen, because it was measurable and school officials knew when compliance with Title IX had been attained.¹⁹

Mr. Cohen said OCR commissioned independent, expert statisticians to evaluate the different survey approaches schools had employed and submitted to OCR between 1992 and 2002.²⁰ Drawing on best practices, the statisticians then designed a streamlined Web-based model survey, he stated.²¹ This tool for measuring interest in sports became the centerpiece of the 2005 Additional Clarification, he said.²²

According to Mr. Cohen, OCR provided guidance for administering the Model Survey in the 2005 Additional Clarification and built safeguards to ensure the data collected would be reliable.²³ An often overlooked safeguard, he said, was the requirement that the Model Survey be administered in a manner that generated a high response rate.²⁴ Unless this condition was met, he said, OCR would not assume survey findings to be reliable and would consider other indications of interest, including those listed in the 1996 Clarification.²⁵ Mr. Cohen claimed that a well-administered Model Survey would identify most direct indications of interest, and thus the 2005 Additional Clarification was not inconsistent with the 1996 Clarification. The Model Survey simply provided a more direct way to measure the same indications of interest, he further claimed.²⁶ In light of this safeguard requiring that the Model Survey be administered in a manner designed to generate a high response rate, the pejorative characterization of the Model Survey as simply an e-mailed questionnaire was incorrect.²⁷

OCR's preferred method of Model Survey administration was one in which students must complete the survey or purposefully choose to bypass it, as this would result in a 100 percent

¹⁵ *Ibid.*, p. 29.

¹⁶ *Ibid.*, p. 29.

¹⁷ *Ibid.*, p. 29.

¹⁸ *Ibid.*, p. 29.

¹⁹ *Ibid.*, pp. 29–30.

²⁰ *Ibid.*, p. 30.

²¹ *Ibid.*, p. 30.

²² *Ibid.*, p. 30.

²³ *Ibid.*, p. 30.

²⁴ *Ibid.*, pp. 30–31.

²⁵ *Ibid.*, p. 31.

²⁶ *Ibid.*, p. 31. *See also* Mr. Cohen's supplemental statement.

²⁷ *Ibid.*, p. 31.

response rate.²⁸ Specifically, OCR recommended making the Model Survey a part of mandatory class registration.²⁹ Mr. Cohen stated that even if a school decided to distribute the Model Survey via e-mail initially (as the 2005 Additional Clarification permits), OCR still required sufficient follow-up efforts to ensure a high response rate.³⁰ In his opinion, the follow-up issue has been criticized because what is considered “sufficient” follow-up is subjective and open to debate.³¹ Mr. Cohen then reiterated that the preferred methodology for administering the Model Survey was via a mandatory response methodology, not e-mail.³²

Mr. Cohen claimed that the 2005 Additional Clarification was a vast improvement over the 1996 Clarification because it gave schools a clearer road map for complying with Prong Three.³³ OCR, he stated, will defer to the findings of a survey that is administered according to its instructions.³⁴ Schools, he said, now have the added advantage of knowing when they have attained compliance,³⁵ and he urged those relying on Prong Three to consider if their compliance efforts would benefit from following OCR’s guidance in the 2005 Additional Clarification.³⁶

Jessica L. Gavora

Ms. Jessica Gavora stated that, for over a decade, Title IX compliance had been based on statistical proportionality, which posited that absent discrimination, men and women would participate in athletics at the same rate.³⁷ She claimed that statistical proportionality triumphed not by proving that men and women had identical interests in sports, but by making actual interest in sports irrelevant to Title IX compliance.³⁸ She stated that proportionality demanded that schools ignore actual student interest in sports and manipulate their athletic programs such that gender ratios matched that of the undergraduate student population.³⁹

Ms. Gavora presented the College Sports Council’s proposed amendment to Title IX’s implementing regulation as a way to return Title IX to its original anti-discriminatory purpose, protect the gains women have made, and above all, reflect the interests of student athletes.⁴⁰ This proposed amendment would require schools to equally accommodate the

²⁸ *Ibid.*, p. 31.

²⁹ *Ibid.*, p. 31.

³⁰ *Ibid.*, p. 32.

³¹ *Ibid.*, p. 32.

³² *Ibid.*, p. 32.

³³ *Ibid.*, pp. 33–34.

³⁴ *Ibid.*, p. 33.

³⁵ *Ibid.*, p. 33.

³⁶ *Ibid.*, p. 34.

³⁷ Jessica Gavora, Testimony before the U.S. Commission on Civil Rights, briefing on Title IX Athletics: Accommodating Interests and Abilities, Washington, DC, May 11, 2007, transcript, p. 35, (hereafter cited as Gavora Testimony, Briefing Transcript).

³⁸ *Ibid.*, p. 35.

³⁹ *Ibid.*, p. 35.

⁴⁰ *Ibid.*, p. 41.

interests of both sexes, rather than just the interests of the underrepresented sex.⁴¹ Ms. Gavora stated that both she and the College Sports Council supported without reservation the spirit and intent of Title IX.⁴² According to her, the proposed change would preserve and protect the law for new generations of male and female American athletes of all ages.⁴³

Although the College Sports Council strongly supports this amendment, Ms. Gavora stated that in the absence of such an amendment, the organization viewed the benefit of the Model Survey as reinforcing the notion that the government, when judging an institution's compliance with Title IX, recognized women's ability to express and act on their own interests.⁴⁴ She claimed that the reaction of critics such as the Women's Sports Foundation⁴⁵ and National Women's Law Center⁴⁶ to the Model Survey has been to refute interest as a measure of compliance, even though many such critics had professed that interest was an acceptable measure of compliance.⁴⁷ For example, she said two prominent defenders of Title IX status quo stated that surveys were inadequate to ascertain the relative interest of men and women in sports because men were culturally more likely to profess an interest than women, even if the latter were interested.⁴⁸ The critics, she said, also argued that ascertaining student interest in athletics only served to inhibit change in a school's sports program since women interested in a particular sport would not attend an institution that did not offer it already.⁴⁹ Ms. Gavora stated that to the extent the critics' arguments were meritorious, their proposed remedies were so broad and ill-defined that Prong Three would revert to being vague and unworkable.⁵⁰ By way of example, she stated that in addition to the Model Survey, critics demand that schools also consult with local club sports, youth coaches, high schools, junior high schools, and elementary schools, as well as consider national trends, in determining women's sports opportunities.⁵¹ Ms. Gavora said the amorphous nature and scope of these requirements would make it near impossible for well-meaning administrators to seek compliance under Prong Three and would ensure that schools' lawyers and Title IX consultants continued to advise adherence to substantial proportionality.⁵²

According to Ms. Gavora, the role of the NCAA deserved scrutiny.⁵³ She remarked that although many single-issue critics of the Model Survey and the NCAA had long maintained that measuring and fulfilling interest was a valid means of compliance with Title IX, the NCAA

⁴¹ *Ibid.*, pp. 41–42.

⁴² *Ibid.*, p. 42.

⁴³ *Ibid.*, p. 42.

⁴⁴ *Ibid.*, p. 36.

⁴⁵ See <http://www.womenssportsfoundation.org/Content/Articles/Issues/Title-IX/T/Title-IX-MythFact.aspx?> (accessed Feb. 26, 2009).

⁴⁶ See <http://www.nwlc.org/details.cfm?id=2233§ion=newsroom> (accessed Feb. 26, 2009).

⁴⁷ Gavora Testimony, Briefing Transcript, pp. 36–37.

⁴⁸ *Ibid.*, p. 37.

⁴⁹ *Ibid.*, pp. 37–38.

⁵⁰ *Ibid.*, p. 38.

⁵¹ *Ibid.*, p. 38.

⁵² *Ibid.*, p. 38.

⁵³ *Ibid.*, p. 38.

vehemently denounced the instrument.⁵⁴ She pointed out that the NCAA, unlike the critics, had a responsibility to represent all collegiate athletes, not just female athletes.⁵⁵ A day before this briefing, she said, the NCAA, Women's Sports Foundation, and others participated in a news conference to pre-empt discussion of the Model Survey.⁵⁶ The Women's Sports Foundation and the National Women's Law Center, according to her, had clearly expressed their support for the status quo in the enforcement of Title IX; their only objection was that statistical proportionality was not applied aggressively enough.⁵⁷ Special interest groups had the right to voice these opinions, she asserted, but the NCAA did not because of its unique status representing all collegiate athletes.⁵⁸ She stated that in 2006, Title IX was fully or partly responsible for the loss of hundreds of athletic opportunities at Rutgers University, James Madison University, Ohio University, Butler University, Clarion University, and Slippery Rock University. She asked if the NCAA supported this status quo.⁵⁹

According to Ms. Gavora, no school had employed the Model Survey to demonstrate compliance with Title IX because the NCAA, which periodically reviewed member institutions for commitment to gender equity, had expressly asked them not to do so.⁶⁰ In addition, she said, interest groups that routinely sue colleges and universities under Title IX had publicly stated that the Model Survey was an illegitimate and illegal tool.⁶¹ According to Ms. Gavora, far more troubling than the negative publicity and litigation over the use of the Model Survey was the fact that the instrument relied on a flawed Prong Three.⁶² Prong Three, which was applicable only to schools that had not attained statistical proportionality, only required accommodation of the interest of the underrepresented sex, which more often than not were women, she said.⁶³

To illustrate, Ms. Gavora gave the example of James Madison University, which offered 28 athletic teams to students—13 for men and 15 for women. James Madison's athletic rosters could not keep pace with the growth in its female student population, already at 61 percent. As such, the Model Survey offered no protection for existing teams, so when two women's club teams sought varsity status, the University had no recourse but to achieve statistical proportionality by cutting ten teams.⁶⁴

Ms. Gavora referred Commissioners to the College Sports Council's proposed amendment to Title IX's implementing regulation, which she claimed would return Title IX to its original anti-discriminatory purpose, protect the gains women have made, and above all, reflect the interests

⁵⁴ *Ibid.*, p. 38.

⁵⁵ *Ibid.*, pp. 38–39.

⁵⁶ *Ibid.*, pp. 38–39.

⁵⁷ *Ibid.*, p. 39.

⁵⁸ *Ibid.*, p. 39.

⁵⁹ *Ibid.*, p. 39.

⁶⁰ *Ibid.*, pp. 39–40.

⁶¹ *Ibid.*, p. 40.

⁶² *Ibid.*, p. 40.

⁶³ *Ibid.*, p. 40.

⁶⁴ *Ibid.*, p. 41.

of student athletes.⁶⁵ This proposed amendment would require schools to equally accommodate the interests of both sexes, rather than just the interests of the underrepresented sex.⁶⁶ Ms. Gavora stated that both she and the College Sports Council supported without reservation the spirit and intent of Title IX.⁶⁷ According to her, the proposed change would preserve and protect the law for new generations of male and female American athletes of all ages.⁶⁸

Jocelyn F. Samuels

According to Ms. Jocelyn Samuels, the 2005 Additional Clarification conflicted with longstanding U.S. Department of Education policy, violated basic principles of equality under the law, and threatened to stall or reverse the progress that women have made under Title IX.⁶⁹ As such, she called for its rescission.⁷⁰ She stated that compliance with Title IX's participation requirements was assessed by means of a three-part test and that frequent attacks had been resoundingly rejected.⁷¹ According to her, nine federal appellate courts had upheld the test, and prior administrations had applied it uniformly.⁷² She stated that in July 2003, the U.S. Department of Education reaffirmed its commitment to continue to apply its longstanding interpretations of Title IX, and rejected the recommendations of the Commission on Opportunity in Athletics⁷³ that, according to her, would have dramatically reduced and undermined women's rights to equal opportunity.⁷⁴

Ms. Samuels stated the 2005 Additional Clarification was inconsistent with the law and prior U.S. Department of Education policies for several reasons:

For one, Ms. Samuels claimed the 2005 Additional Clarification impermissibly allowed schools to use solely results from an e-mail survey to evaluate whether they had satisfied their obligation to provide equal opportunity.⁷⁵ According to her, courts have recognized consistently that student interest cannot be measured properly apart from opportunity, since interest and ability rarely develop in a vacuum.⁷⁶ Consequently, she claimed the findings from the surveys reflected the discrimination that had already limited and continues to limit

⁶⁵ Ibid., p. 41.

⁶⁶ Ibid., pp. 41–42.

⁶⁷ Ibid., p. 42.

⁶⁸ Ibid., p. 42.

⁶⁹ Jocelyn Samuels Testimony before the U.S. Commission on Civil Rights, briefing on Title IX Athletics: Accommodating Interests and Abilities, Washington, DC, May 11, 2007, transcript, p. 43, (hereafter cited as Samuels Testimony, Briefing Transcript).

⁷⁰ Ibid., p. 43.

⁷¹ Ibid., p. 43.

⁷² Ibid., p. 43.

⁷³ Ibid., p. 43.

⁷⁴ Ibid., p. 43.

⁷⁵ Ibid., p. 44.

⁷⁶ Ibid., p. 44. For example, she said the United States Court of Appeals for the First Circuit has stated that interest develops with the availability of opportunity and experience. *See also Cohen v. Brown University*, 101 F.3d 155, 179 (1st Cir. 1996).

women's opportunities to participate in sports.⁷⁷ Relying on them as the basis to establish future opportunities for women, she said, continued the cycle of discrimination and enshrined the status quo of women's lower participation level in athletics.⁷⁸ According to her, it was for these reasons the 1996 Clarification and prior policies of the U.S. Department of Education endorsed a range of factors that schools must consider in evaluating women's interests.⁷⁹ Ms. Samuels said these factors were very specific, including for example, student requests to elevate a team from club to varsity status, opinions of coaches and athletics administrators, and surveys of the types of sports being played in high schools and communities from which universities typically draw students.⁸⁰ According to her, the U.S. Department of Education's decision to eliminate schools' obligation to consider these factors did not serve students well.⁸¹

Second, by restricting the Model Survey to current and admitted students, the 2005 Additional Clarification ignored the reality that students were unlikely to attend a school that did not offer a sport in which they had an interest.⁸² She said in failing to require schools to look beyond their campuses, the 2005 Additional Clarification allowed them to restrict sports offerings, claim they were satisfying the interests of students that were content with existing offerings, and presume Title IX compliance.⁸³ In addition, Ms. Samuels asserted, it effectively required women to show they can fill a new team by relying on students already within the school's current student body, while leaving schools free to recruit male players with performance assessments, incentives, and invitations to visit campus.⁸⁴ Citing a U.S. Court of Appeals for the Fifth Circuit decision,⁸⁵ she said that the heart of this contention was "an institution with no coach, no facilities, no varsity team, no scholarships and no recruiting in a given sport must have on campus enough national caliber athletes to field a competitive varsity team in that sport before a court can find sufficient interest and abilities to exist. It should go without saying that adopting this criterion would eliminate an effective accommodation claimed by any plaintiff at any time."⁸⁶

Third, the survey methodology the 2005 Clarification chose was deeply flawed because a school is permitted to accept nonresponse as evidence of a lack of interest.⁸⁷ She argued that students do not respond to an e-mail survey for a variety of reasons that may be wholly unrelated to interest in sports participation, such as not having received the e-mail, insufficient response time, or that the message was blocked by spam filters.⁸⁸ Similarly, she argued that the survey

⁷⁷ Ibid, pp. 43–44.

⁷⁸ Ibid., pp. 44–45.

⁷⁹ Ibid., p. 45.

⁸⁰ Ibid., p. 45.

⁸¹ Ibid., p. 45.

⁸² Ibid., pp. 45–46.

⁸³ Ibid., p. 46.

⁸⁴ Ibid., p. 46.

⁸⁵ See *Pederson v. Louisiana. State Univ.*, 213 F3d 858, 878 (5th Cir. 2000).

⁸⁶ Samuels Testimony, Briefing Transcript, pp. 46–47.

⁸⁷ Ibid., p. 47.

⁸⁸ Ibid., p. 47.

methodology was unsound, violating basic principles governing response rates.⁸⁹ She observed that NCAA guidelines found response rates below 60 percent to be suspect.⁹⁰ The 2005 Additional Clarification, she stated, allowed schools to claim a response rate of 100 percent⁹¹ when the actual response rate, in her opinion, would likely be rejected by a court.⁹² The survey methodology was also unfair, she said, because the 2005 Additional Clarification authorized schools to rely on a woman's self-assessment of lack of ability to compete as evidence of her actual ability.⁹³ She stated that if given the opportunity, many students who played sports in high school possess the ability to play at college level, and to accept their self-assessment without consulting coaches and qualified others was a disservice to them.⁹⁴

Fourth, according to Ms. Samuels, the 2005 Clarification shifted the burden of proof of interest in sports to female students and represented a real change from prior law.⁹⁵ This shift, she said, was contrary to the requirement of full accommodation of female athletes' interests and abilities.⁹⁶ In addition, she stated that opponents of the three-part test have interpreted Prong Three to mean that schools are required only to accommodate the relative interests of their students.⁹⁷ The relative interest argument, she contended, discounted the fact that schools seeking compliance under Prong Three were already failing to offer female students equal opportunities to participate in sports.⁹⁸ She added that it drew on inaccurate and impermissible stereotypes of women being inherently less interested in sports than men, which was unlawful under Title IX and disproved by the surge in the numbers of women participating in sports since the statute's enactment.⁹⁹

Finally, according to Ms. Samuels, the 2005 Additional Clarification provided inadequate oversight by the U.S. Department of Education, which she claimed tended to assume compliance. Apparently, this was evidenced by the fact that it had no mechanism in place for OCR to assess a school's claim it had done enough to ensure the Model Survey was delivered to a sufficient number of students and the response rate was adequate.¹⁰⁰ In her view, the presumption of compliance was an inadequate response by an agency with a responsibility to enforce the law and to ensure that all students had equal opportunity to participate in sports and freely exercise their civil rights.¹⁰¹

⁸⁹ Ibid., p. 47.

⁹⁰ Ibid., pp. 47–48.

⁹¹ Ibid., p. 48.

⁹² Ibid., p. 48.

⁹³ Ibid., p. 48.

⁹⁴ Ibid., p. 48.

⁹⁵ Ibid., p. 49.

⁹⁶ Ibid., p. 49.

⁹⁷ Ibid., p. 49.

⁹⁸ Ibid., p. 49.

⁹⁹ Ibid., p. 49.

¹⁰⁰ Ibid., pp. 49–50.

¹⁰¹ Ibid., p. 50.

Judith M. Sweet

Ms. Judith Sweet said she was probably the only panelist with experience in campus athletics before and after the passage of Title IX, which she said resulted in improved opportunities for women in sports.¹⁰² She stated she had observed the commitment of the NCAA and universities as they sought to promote equity, as well as the resulting advances in campus and NCAA programs.¹⁰³ According to her, disparity in opportunities and support for women remained significant, and the goals of Title IX were far from realized.¹⁰⁴

Ms. Sweet said the NCAA's Executive Committee¹⁰⁵ and its president, Myles Brand, reviewed and rejected the 2005 Additional Clarification as a means for assessing interest and Title IX compliance.¹⁰⁶ The U.S. Department of Education's 1996 Clarification, according to Ms. Sweet, indicated that surveys were but one of several approaches an institution must use to evaluate women's interest in sports; on the other hand, she said, the 2005 Additional Clarification permitted an electronic survey to be the sole measure, which she claimed appeared contrived to show that females were not interested in participation.¹⁰⁷ She charged that the survey methodology permitted institutional manipulation to prove a lack of interest on women's part;¹⁰⁸ and a review of data collected under the Equity in Athletics Disclosure Act¹⁰⁹ showed that not all institutions were committed to equal opportunity and Title IX compliance.¹¹⁰

¹⁰² Judith Sweet, Testimony before the U.S. Commission on Civil Rights, briefing on Title IX Athletics: Accommodating Interests and Abilities, Washington, DC, May 11, 2007, transcript, pp. 50–51, (hereafter cited as Sweet Testimony, Briefing Transcript).

¹⁰³ *Ibid.*, pp. 51–52.

¹⁰⁴ *Ibid.*, p. 52.

¹⁰⁵ *Ibid.*, p. 52. The executive committee is made up of university presidents and chancellors representing NCAA's three divisions.

¹⁰⁶ *Ibid.*, p. 52. Ms. Sweet said the executive committee and President Brand, following review and rejection of the 2005 Additional Clarification, outlined its flaws in a letter to Secretary of Education, Margaret Spellings, and in a resolution to the NCAA membership. Ms. Sweet submitted both documents to the commission as part of the briefing record.

¹⁰⁷ *Ibid.*, pp. 52–53.

¹⁰⁸ *Ibid.*, p. 53.

¹⁰⁹ *See* The Equity in Athletics Disclosure Act, Pub. L. 103-382, 108 Stat. 3518 (codified at 20 U.S.C. §1092 (2009)). The Department of Education stated that, "The Equity in Athletics Disclosure Act is designed to make prospective students aware of a school's commitment to providing equitable athletic opportunities for its men and women students. Any co-educational institution of higher education that participates in a federal student aid program must prepare an EADA report by October 15 [of each year]. Institutions must also report data to the U.S. Department of Education via this [mandatory] online survey. The data are then migrated to the Office of Postsecondary Education's public Web site." The U.S. Department of Education, Office of Postsecondary Education, Equity in Athletics Disclosure Act (EADA) Survey, <http://surveys.ope.ed.gov/athletics/> (accessed Jan. 16, 2009).

¹¹⁰ Sweet Testimony, Briefing Transcript, p. 53. According to Ms. Sweet, 35 years after Title IX's passage, women still only receive 43 percent of athletics participating opportunities, 38 percent of operating budgets, and 33 percent of recruiting budgets. She added that in 2005–2006, female high school athletes numbered three million and NCAA collegiate female athletes, 180,000; she stated that the size of the high school pool suggests that there would be a larger number of participants if more collegiate level opportunities were available.

The 2005 Additional Clarification, according to Ms. Sweet, also gave noncompliant institutions an easy way to claim compliance with Prong Three through use of an electronic survey that interpreted nonresponse as an indication of a lack of interest.¹¹¹ This, she said, was its greatest weakness,¹¹² adding that an NCAA study¹¹³ concluded the survey method did not meet accepted professional standards for assessing interest.¹¹⁴ She added that spam filters often block e-mails,¹¹⁵ and students have reported consistently that they rarely respond to on-line surveys.¹¹⁶ According to her, the NCAA leadership and membership strongly supported the 1996 Clarification and urged the withdrawal of the 2005 Additional Clarification.¹¹⁷

Ms. Sweet further stated that the 2005 Additional Clarification ignored the fact that institutions recruit athletics teams from regional or national pools of high school and community college students.¹¹⁸ Surveying an existing student population to ascertain interest, she said, eliminated the input of students who potentially would have attended that university had their preferred sport been sponsored.¹¹⁹ College presidents, chancellors, and athletics administrators, she stated, agreed that the 2005 Additional Guidance was contrary to the original intent of Title IX because a survey alone cannot assess interest comprehensively.¹²⁰ She added that the Model Survey was cumbersome, confusing, and unprecedented in length, detail, and method of dissemination.¹²¹ Very few universities or colleges, according to her, have acknowledged using the Model Survey.¹²² She observed that of the campuses OCR reviewed prior to 2005, close to two-thirds used Prong Three to achieve Title IX compliance, thus suggesting that the prior guidance on Prong Three was workable.¹²³

Ms. Sweet stated most university presidents, chancellors, and athletics administrators believed the 2005 Additional Clarification inappropriately made it easier to comply with Title IX, and was not truly in compliance with the spirit and intent of the law.¹²⁴ The intent of the three-part test, she said, was to provide flexibility to institutions in meeting Title IX goals, not make one particular prong a means for easier compliance.¹²⁵ She pointed out that the OCR's 2005

¹¹¹ *Ibid.*, p. 54.

¹¹² *Ibid.*, p. 55.

¹¹³ *Ibid.*, p. 55. The report from the study is "NCAA Data Analysis Research Network Report on the Recent Title IX Clarification," NCAA Data Analysis Research Network, 2005. Ms. Sweet submitted it to the Commission along with her written statement. The Research Network includes research faculty members from around the nation.

¹¹⁴ *Ibid.*, p. 55.

¹¹⁵ *Ibid.*, p. 55.

¹¹⁶ *Ibid.*, p. 55.

¹¹⁷ *Ibid.*, p. 55.

¹¹⁸ *Ibid.*, p. 56.

¹¹⁹ *Ibid.*, p. 56.

¹²⁰ *Ibid.*, p. 56.

¹²¹ *Ibid.*, p. 56.

¹²² *Ibid.*, p. 56.

¹²³ *Ibid.*, p. 57.

¹²⁴ *Ibid.*, p. 57.

¹²⁵ *Ibid.*, p. 58.

Additional Clarification acknowledged the Model Survey narrowed the scope for analysis of interests and abilities.¹²⁶

David F. Black

Mr. David Black stated that public discussion of Title IX, such as this briefing, brought focus to issues pertaining to various aspects of the law and could further compliance.¹²⁷ He said Congress enacted Title IX to eliminate sex discrimination in federally funded education programs and activities, including the classroom, class offerings, employment under such an education program or activity, and all extracurricular activities, and in 1974, extended coverage to athletics programs.¹²⁸ As a result of Title IX, he stated, more women than ever were participating in sports and attending and excelling in college and graduate programs.¹²⁹ He said discrimination continued to occur in access to educational programs, classroom activities, and athletic opportunities nationwide.¹³⁰ The U.S. Department of Education, he said, worked diligently to address complaints of Title IX violations in all areas,¹³¹ and provided technical assistance and tools to institutions to help them determine compliance with the law.¹³² The 2005 Additional Clarification, he said, furthered that mission.¹³³

Mr. Black acknowledged panelists' concerns about the 2005 Additional Clarification weakening protections for female athletes, but described them as a misunderstanding of the policy.¹³⁴ He said the 2005 Additional Clarification did not establish new substantive standards under Title IX, but instead, provided schools with further guidance of OCR's long-established athletic policies and practices.¹³⁵ According to him, the Department's 1979 intercollegiate athletics policy interpretation established a three-part test for OCR to use in determining if post-secondary institutions were providing nondiscriminatory athletic opportunities to their male and female athletes.¹³⁶ It identified three methods of legal compliance and allowed schools to choose any one of them freely, he said.¹³⁷ Under part three of that test, OCR permitted schools to demonstrate compliance by showing that they were accommodating the athletic interests and abilities of their male and female students.¹³⁸

¹²⁶ *Ibid.*, pp. 57–58.

¹²⁷ David Black, Testimony before the U.S. Commission on Civil Rights, briefing on Title IX Athletics: Accommodating Interests and Abilities, Washington, DC, May 11, 2007, transcript, p. 59, (hereafter cited as Black Testimony, Briefing Transcript).

¹²⁸ Black Testimony, Briefing Transcript, pp. 59–60.

¹²⁹ *Ibid.*, p. 60.

¹³⁰ *Ibid.*, p. 61.

¹³¹ *Ibid.*, p. 61.

¹³² *Ibid.*, p. 61.

¹³³ *Ibid.*, p. 61.

¹³⁴ *Ibid.*, p. 61.

¹³⁵ *Ibid.*, p. 61.

¹³⁶ *Ibid.*, pp. 61–62.

¹³⁷ *Ibid.*, p. 62.

¹³⁸ *Ibid.*, p. 62.

Mr. Black stated that for a number of years, schools have elected to use athletic interest surveys.¹³⁹ According to him, the Model Survey, User's Guide, and the 2005 Additional Clarification were based on findings from statistical analyses of OCR's cases from 1992 to 2002 that employed athletic interest surveys under the three-part test.¹⁴⁰ He said that the National Center for Education Statistics (NCES), evaluated 130 of OCR's cases, two-thirds of which used part three to comply with the three-part test.¹⁴¹ More than half of those that chose part three used interest surveys, which he claimed were flawed, because they relied on a limited pool of students that resulted in a very low response rate.¹⁴² The Department issued the Model Survey and User's Guide to address these flaws, which he said gave schools a practical tool for assessing student interest,¹⁴³ but added that the survey could only be used if it was administered in a manner consistent with NCES recommendations in the User's Guide.¹⁴⁴ According to Mr. Black, the 2005 Additional Clarification promoted compliance with Title IX by first clarifying the obligations of schools under the three-part test (a commitment OCR made in the 1996 Clarification and the 2003 Dear Colleague letter), and then by making it easier for them to assess their own compliance with part three and determine how they could bring themselves into compliance.¹⁴⁵

¹³⁹ *Ibid.*, p. 62.

¹⁴⁰ *Ibid.*, p. 62.

¹⁴¹ *Ibid.*, p. 63.

¹⁴² *Ibid.*, p. 63.

¹⁴³ *Ibid.*, p. 63.

¹⁴⁴ *Ibid.*, p. 63.

¹⁴⁵ *Ibid.*, pp. 63–64.

Discussion

Administration of the Model Survey, Its Use and Response Rate

Commissioner Kirsanow commented on Mr. Cohen's remark that administering the Model Survey required more than a simple e-mail solicitation, and Ms. Samuel's and Ms. Sweet's disagreement with that statement.¹ Mr. Cohen replied that sending an e-mail alone was not permissible under the 2005 Additional Clarification.² A school may initially distribute the Model Survey using e-mail, he said, but it had to follow up on it as well.³ What was considered "sufficient follow-up," he continued, was subjective and open to debate.⁴ Commissioner Kirsanow then asked whether under Prong Three, surveys were sent to the entire student body or to the underrepresented sex.⁵ Mr. Cohen replied that the 2005 Additional Clarification allowed two alternatives; the first and recommended method was administration of the Model Survey to the entire student body, whereas the second involved surveying all members of the underrepresented sex.⁶ In response to Commissioner Kirsanow's inquiry into schools' practices with respect to administering the Model Survey, Mr. Cohen said he was not aware of any school that had employed an e-mail methodology, but was familiar with mandatory response methods.⁷ For example, if a school chose to administer the Model Survey as part of its application process, every student must respond or purposefully bypass the survey, in which case that "response" would be interpreted as showing a lack of interest, he remarked.⁸ Under the requirements of OCR, he said, a nonresponse was considered as such only if all students had been given easy access to respond to the census, its purpose had been explained clearly, and the students had been informed that the school treated nonresponses as an indication of lack of interest in sports participation.⁹

Ms. Samuels said a report prepared by the National Coalition for Women and Girls in Education¹⁰ included statistical and methodological analyses of the perceived flaws of the 2005 Additional Clarification survey methodology.¹¹ She added that the mandatory approach had statistical problems.¹² While the 2005 Additional Clarification called for schools to ensure a reasonable response rate, she claimed it failed to provide guidance on how this was to be done, a

¹ U.S. Commission on Civil Rights, briefing on Title IX Athletics: Accommodating Interests and Abilities, Washington, DC, May 11, 2007, transcript (hereafter cited as Title IX Athletics, Briefing Transcript), pp. 64–65.

² Title IX Athletics, Briefing Transcript, p. 65.

³ *Ibid.*, p. 65.

⁴ *Ibid.*, p. 65.

⁵ *Ibid.*, p. 66.

⁶ *Ibid.*, p. 66.

⁷ *Ibid.*, p. 66.

⁸ *Ibid.*, pp. 66–67.

⁹ *Ibid.*, p. 67.

¹⁰ See <http://www.womenssportsfoundation.org/Content/Articles/Issues/Equity-Issues/N/NCWGE-Coalition-Report-on-Title-IX.aspx> (accessed Feb. 26, 2009).

¹¹ *Ibid.*, p. 68.

¹² *Ibid.*, p. 68.

point also made by Mr. Cohen if the survey was administered via email.¹³ She further said the 2005 Additional Clarification made no provision for OCR oversight or monitoring to evaluate whether schools had engaged in a sufficient effort to ensure that students respond.¹⁴

Ms. Sweet reported she had once asked a group of 200 undergraduate students if they had ever responded to an e-mail survey, and none replied affirmatively.¹⁵ She asked, similarly, a group of 50 graduate students. Only a marketing student said she had responded to a survey, because, Ms. Sweet explained, the student understood the importance of surveys.¹⁶ Ms. Sweet observed that based on the responses of these students, one would have to conclude that they have no interest in participating in athletics, yet they are all currently involved in sports.¹⁷ As for institutional use of the Model Survey, she said that one institution modified it to determine the types of sports that might be added to its program in the future, not to measure interest.¹⁸ She said this institution found it cumbersome, and that even a cash incentive failed to attain more than a 25 percent response rate.¹⁹ Commissioner Kirsanow then asked if the survey was only a minimal means to gauge interest and whether a university was prohibited from using other measures.²⁰ Ms. Sweet said if an institution was committed to complying with Title IX fully, then it would use a variety of approaches to determine interest, but if it was seeking an easy way to meet Prong Three, then the survey was the answer, since the 2005 Additional Clarification mandated no further effort.²¹

Mr. Black said the Department examined the handbooks of several universities and discovered that most had policies on e-mailed communications with students. For example, he stated, Purdue University, University of Texas, Syracuse University, and New York University informed students that e-mail was a presumed mode of communication and they were expected to read them.²² He also clarified that the e-mail survey or notice of the survey was not from OCR, but was sent as an official e-mail from the university.²³ He added that universities also had e-mail policies regarding spam; Stanford University, for example, was capable of turning off spam filters to ensure that students would receive official university e-mails.²⁴ Commissioner Yaki said that cell phone text message alerts were more popular with students and more effective than e-mails at informing the public.²⁵

¹³ Ibid., p. 68.

¹⁴ Ibid., p. 69.

¹⁵ Ibid., p. 69.

¹⁶ Ibid., p. 69.

¹⁷ Ibid., p. 69.

¹⁸ Ibid., p. 70.

¹⁹ Ibid., p. 70.

²⁰ Ibid., p. 70.

²¹ Ibid., pp. 70–71.

²² Ibid., p. 71.

²³ Ibid., p. 71.

²⁴ Ibid., p. 71.

²⁵ Ibid., p. 111.

According to Mr. Black, the preferred method to administer the Model Survey was in conjunction with a mandatory event, such as class registration.²⁶ The use of e-mail was an option, he said, but only if the institution followed the strict guidance in OCR's User's Guide, namely: 1) the school conducted a census, 2) students were notified of the survey's purpose, 3) students were informed that nonresponse would be deemed as a lack of interest response on their part, and 4) the school made a reasonable effort to follow up, such as an additional official e-mail or contacting students who had not responded.²⁷ Mr. Cohen drew attention to an important point in the 2005 Additional Clarification that, according to him, was often overlooked: "Schools may either require students to complete the census or provide the census in a context in which most students will complete it."²⁸ He stated, in light of this, it was incorrect to assume that schools could properly administer the Model Survey by sending a single e-mail.²⁹ He added that OCR would not defer to an institution if it had not administered the e-mail survey in a manner in which most students would respond.³⁰

Mr. Black disputed the assertion that OCR would not "look behind the numbers" if a school administered the Model Survey. He clarified that, if the school raised use of the Survey as a defense to a Title IX complaint investigation, OCR would still investigate to see if the school administered the survey consistent with the Users' Guide.³¹ He further clarified what the Model Survey measured, saying that it did not measure the extent of women's interest in sports, whether they continued to be interested in sports, or even if their degree of interest was comparable to the men's.³² The Model Survey, he stated, was a way of identifying female student interest in additional athletic opportunities, and that e-mail was a direct way of ascertaining student interest in athletic participation.³³ For example, it takes 25 students to make up a softball team, and the purpose of the Model Survey is to identify those 25 students who are interested in softball, he said.³⁴ The response rate may be two percent, he explained, but if the responses are from the 25 students interested in softball, the institution is now eligible to add the sport, and assess the ability of the interested students.³⁵ Vice Chair Thernstrom asked if there had been a serious problem with the response rate.³⁶ Ms. Samuels responded that no mechanism existed to systematically assess which schools or whether any schools were using the Model Survey.³⁷ She said research showed that responses to e-mail surveys were extremely low.³⁸ Chairman Reynolds pointed out that the Commission's interest was not in predicting the problems that could unfold in the future, but the pattern of the data, given that the Model Survey

²⁶ *Ibid.*, p. 72.

²⁷ *Ibid.*, p. 72.

²⁸ *Ibid.*, p. 74. According to Mr. Cohen, the quote may be found on p. 7 of the 2005 Additional Clarification.

²⁹ *Ibid.*, pp. 74–75.

³⁰ *Ibid.*, p. 75.

³¹ *Ibid.*, p. 72.

³² *Ibid.*, p. 73.

³³ *Ibid.*, p. 73.

³⁴ *Ibid.*, p. 73.

³⁵ *Ibid.*, pp. 73–74.

³⁶ *Ibid.*, p. 75.

³⁷ *Ibid.*, p. 75.

³⁸ *Ibid.*, p. 76.

was a new approach and the NCAA had urged colleges not to use it.³⁹ Vice Chair Thernstrom expressed concern about the lack of hard data on response rates to the Model Survey, aside from the anecdotal evidence Ms. Samuels was prepared to share with the Commission.⁴⁰

With regard to Ms. Samuels' comment on a lack of a mechanism to collect data, Mr. Black said when institutions received federal funds, the U.S. Department of Education required them to sign an assurance of compliance with federal civil rights laws, including Title IX, although it did not seek information on how they planned to conform.⁴¹ He pointed out that the flexibility in the three-part test allowed an institution to comply under Prong One at one time point, and seek compliance under Prong Three, with its attendant need to assess interest, at another time point (e.g., when enrollment changes).⁴² As such, he said imposing a reporting requirement on schools was difficult.⁴³ He added that schools have expressed interest in surveys generally, and in the past, OCR has mandated their use to monitor unmet interest in light of violations; however, it did not require use of the Model Survey and, to his knowledge, no institutions subjected to OCR investigation had employed it.⁴⁴

Chairman Reynolds asked if OCR could inquire about an institution's survey response rate during a compliance review.⁴⁵ Mr. Black replied that if OCR chose a representative group of institutions, then it could infer a response rate, to the extent these schools used the Model Survey to seek compliance under Prong Three.⁴⁶ He reported that one school had a response rate to a survey other than the Model Survey of two percent, and was still required to add a team.⁴⁷ Mr. Cohen added that response rates were dependent on the method of administration, and was unaware of any school that had fielded the Model Survey via e-mail, although he knew of instances in which the mandatory response methodology was employed.⁴⁸ According to him, one school that administered the Model Survey as a mandatory part of its application process attained a response rate of 100 percent.⁴⁹ He also said schools were aware of problems using e-mail to administer the Model Survey, and tried to avoid that method because it made them vulnerable to attack based simply on their good faith efforts to comply with the law.⁵⁰ He described a school that used a survey to determine athletic interest, and an advocacy group that announced its intention to make the situation a litigation test case on the Model Survey, even though it had not been used in that instance.⁵¹ He charged that the advocacy group attacked the school even though it had attempted to comply with the law using a legal method, decided to

³⁹ Ibid., p. 76.

⁴⁰ Ibid., p. 77.

⁴¹ Ibid., pp. 77–78.

⁴² Ibid., p. 78.

⁴³ Ibid., p. 78.

⁴⁴ Ibid., p. 78.

⁴⁵ Ibid., p. 79.

⁴⁶ Ibid., p. 79.

⁴⁷ Ibid., p. 79.

⁴⁸ Ibid., p. 80.

⁴⁹ Ibid., p. 80.

⁵⁰ Ibid., p. 81.

⁵¹ Ibid., pp. 81–82.

add a women's team, and sought compliance through proportionality.⁵² Fear of such attacks, he said, motivated schools to conceal their compliance efforts.⁵³

Surveys and Compliance under Prong Three

Commissioner Braceras said her questions were more policy oriented than those previously addressed,⁵⁴ and asked Ms. Samuels whether her objections were specific to the Model Survey or to the use of surveys under the third prong.⁵⁵ Ms. Samuels replied that as she testified, surveys were inherently unreliable as the only means to evaluate sufficient athletic interest because they tended to measure women's lack of exposure to sports.⁵⁶ Commissioner Braceras expressed concern that Ms. Samuels would be satisfied only with near or full proportionality,⁵⁷ but Ms. Samuels replied that there were three independent means to comply with Title IX, one of which was Prong Three.⁵⁸ The 1996 Clarification, she said, set forth the appropriate and lawful standards under Title IX, and surveys were permissible as one of several measures for assessing if schools were providing adequate, fair, and equal opportunities to women.⁵⁹ She added she would not find fault if a school complied with Prong Three under the 1996 Clarification.⁶⁰

Chairman Reynolds asked if the Model Survey could be modified without having it return to the exact approach of the 1996 Clarification, which did not offer guidance to school administrators.⁶¹ According to Ms. Samuels, about two-thirds of the schools investigated by OCR complied with Prong Three under the 1996 Clarification, and it was misguided to suggest the 1996 Clarification did not provide adequate guidance.⁶² Commissioner Braceras then asked Ms. Samuels if ascertaining interest and ability was an appropriate method of proving compliance with Title IX.⁶³ She said it was, as long as assessment was done in compliance with the 1996 Clarification and provided for the full accommodation of the interests of the underrepresented sex.⁶⁴

Commissioner Heriot asked Ms. Samuels' thoughts on how a school could comply with Prong Three.⁶⁵ Ms. Samuels replied that the 1996 Clarification provided a very detailed road map; schools, for example, could conduct surveys, but should also consult their coaches and administrators, consider the high school sports played in their recruiting area, and consider

⁵² *Ibid.*, p. 82.

⁵³ *Ibid.*, p. 82.

⁵⁴ *Ibid.*, p. 82.

⁵⁵ *Ibid.*, p. 83.

⁵⁶ *Ibid.*, pp. 83–84.

⁵⁷ *Ibid.*, p. 84.

⁵⁸ *Ibid.*, p. 84.

⁵⁹ *Ibid.*, p. 85.

⁶⁰ *Ibid.*, p. 86.

⁶¹ *Ibid.*, p. 86.

⁶² *Ibid.*, p. 86.

⁶³ *Ibid.*, p. 87.

⁶⁴ *Ibid.*, p. 87.

⁶⁵ *Ibid.*, pp. 87–88.

requests from their female students.⁶⁶ Commissioner Braceras asked Ms. Samuels whether she would be satisfied if, after following the road map, schools discovered that only 43 percent of athletic opportunities should be provided to women, even though women comprised 60 percent of the enrollment.⁶⁷ Ms. Samuels said she would be satisfied, but doubted that would be the finding. She also stated that there was widespread noncompliance with the law.⁶⁸

Ms. Gavora said that in the U.S. Department of Education's transmittal letter accompanying the 1996 Clarification, the then assistant secretary for civil rights indicated proportionality was a safe harbor for schools seeking compliance.⁶⁹ She observed that in the process of conducting research for a book, she reviewed the claim that two-thirds of the schools investigated by OCR chose Prong Three to comply with the law.⁷⁰ She stated that she found about 64 percent of schools under OCR compliance review employed Prong Three, but the investigations invariably ended with agreements requiring the addition of women's teams or elimination of men's teams.⁷¹ This, she claimed, resulted in a move further toward proportionality.⁷²

Mr. Black sought to clarify several points.⁷³ According to him, the 1979 policy, which underwent formal notice and comment under the Administrative Procedures Act, was the controlling factor, but still allowed institutions to choose freely nondiscriminatory methods by which to determine their students' athletic interest and abilities.⁷⁴ With respect to the 1996 Clarification, he said the department solicited feedback from institutions but did not subject it to formal notice and comment.⁷⁵ With respect to the oft-referenced "two-thirds" figure, he said OCR reviewed cases not in compliance with proportionality, and found two-thirds of them chose to comply with Title IX using part three.⁷⁶ He added that Title IX requires schools to provide equal opportunity for admitted or enrolled students.⁷⁷

Commissioner Braceras repeated her concerns over whether anything less than full proportionality necessarily indicates discrimination in the provision of athletic participation opportunities (panelists had mentioned that 43 percent of college athletics participants are women, while women comprise 60 percent of the student body). She cited the example of the University of Massachusetts, which is working to establish a women's ice hockey program to meet growing female interest in the sport. Commissioner Braceras stated that the absence of

⁶⁶ Ibid., p. 88.

⁶⁷ Ibid., p. 88.

⁶⁸ Ibid., p. 88.

⁶⁹ Ibid., p. 89.

⁷⁰ Ibid., p. 89.

⁷¹ Ibid., p. 90.

⁷² Ibid., p. 90.

⁷³ Ibid., p. 92.

⁷⁴ Ibid., p. 92.

⁷⁵ Ibid., p. 92.

⁷⁶ Ibid., p. 93.

⁷⁷ Ibid., p. 93.

such a program now is not evidence of discrimination, but is instead reflecting of interest in the sport percolating up from the high school level.⁷⁸

Commissioner Kirsanow observed that Prong Three references a survey with respect to interest and ability. He asked Mr. Cohen whether coaches or survey respondents assess ability. Mr. Cohen responded that while the survey asks respondents to identify their own ability, the school is required to assess ability after there is a requisite demonstration of interest. The additional clarification presents a number of different ways to assess ability, including coaches' opinions.⁷⁹ Commissioner Kirsanow then asked if, in the event that the Model Survey indicates an increase in men's interest in sports or an increase in their unmet interests that exceeds that of women, a school has ever added men's sports programs. Ms. Gavora responded that Prong Three only requires meeting the interest of the underrepresented sex. Mr. Cohen added that once a school reaches compliance with any prong under the policy guidance it is free to add sports for either sex.⁸⁰ Commissioner Taylor expressed doubts that a school would do this, since a school could preclude an OCR investigation completely by resorting to Prong One (proportionality).⁸¹

Opposing Views on the 2005 Additional Clarification and Proportionality

Commissioner Yaki asked the panelists to explain why there was a perception that the administration of Title IX required clarification, when in fact a 2001 Government Accountability Office study (GAO)⁸² found the law did not really have an impact on men's programs.⁸³ He also asked Ms. Samuels and Ms. Sweet to identify the issue to which the briefing panel was seeking resolution, since data did not suggest that Title IX's benefits for young women and girls came at the expense of men.⁸⁴ Ms. Samuels replied that existing data showed that opportunities for both men and women had grown since Title IX.⁸⁵ She said a report updating data in a 2001 GAO study would be released in June 2007.⁸⁶ Some specific men's sports had suffered decline, she said, but Title IX bore no responsibility.⁸⁷ According to her, institutions consider a wide range of factors when deciding what sports to offer, including the popularity of the sport, liability concerns, availability of adequate coaching staff, and, most

⁷⁸ Ibid., pp. 95–96.

⁷⁹ Ibid., pp. 165–66.

⁸⁰ Ibid., p. 167.

⁸¹ Ibid., p. 168.

⁸² United States General Accounting Office, *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams*, Report No. GAO-01-297, March 2001 <http://www.gao.gov/new.items/d01297.pdf> (accessed Jan. 16, 2009).

⁸³ Title IX Athletics, Briefing Transcript, p. 98.

⁸⁴ Ibid., p. 98.

⁸⁵ Ibid., p. 99.

⁸⁶ Ibid., p. 99. After the briefing, Ms. Samuels provided a copy of the report "Title IX Athletics Policies: Issues and Data for Education Decision Makers," A Report from the National Coalition for Women and Girls in Education, updated May 10, 2007, <http://www.ncwge.org> (accessed Nov. 21, 2008).

⁸⁷ Ibid., p. 99.

importantly, budget.⁸⁸ She said football and men's basketball consume three-quarters of schools' entire budgets for men's sports and, as a result, little remains for broad-based opportunities.⁸⁹

Ms. Gavora said the NCAA was the sole repository of data on intercollegiate sports participation, which in itself was problematic.⁹⁰ She stated that for the most part, NCAA did not account for new institutional members when determining sports participation by men and women.⁹¹ When the GAO factored that into its analysis, Ms. Gavora said it found a 12 percent decrease in opportunities for men from the late 1980s to the mid-1990s.⁹² She reported that the College Sports Council recently found clear declines in men's opportunities using data corrected for new membership, though she said she was not implying this was all due to Title IX.⁹³ Currently, she said, only 17 men's collegiate gymnastic programs remained, while track opportunities for men and sports opportunities for male minority athletes were declining precipitously, and football accounted for only 11 percent of NCAA teams.⁹⁴

Commissioner Yaki asked Ms. Sweet to explain the NCAA's acceptance of the 1996 Clarification and rejection of the 2005 Additional Clarification.⁹⁵ Ms. Sweet reiterated that the former was a comprehensive approach to assessing interest and ability, whereas the 2005 Additional Clarification allowed an institution to survey the existing student population to evaluate interest using a flawed method.⁹⁶ Recruitment, she said, was an important aspect of intercollegiate athletics and it was insufficient to consider only students already on campus.⁹⁷ Mr. Black countered that recruitment was a separate issue, and an institution had an obligation to meet the needs of its current students.⁹⁸ The Model Survey, according to him, captured many of the factors of the 1996 Clarification, which required, among others, examination of national trends in sports.⁹⁹ It did this by obligating institutions to ascertain student interest in every single sport recognized by major athletic associations, he said.¹⁰⁰ He added that it captured the opinions of coaches and athletic directors as well because they have the authority to add sports to the

⁸⁸ *Ibid.*, p. 99.

⁸⁹ *Ibid.*, pp. 99–100. Commissioner Kirsanow interjected that these same sports were also providing three-quarters of a school's revenue. Ms. Samuels said data showed that the vast majority of schools did not even cover the costs of these sports, much less provide subsidies for others. Ms. Sweet remarked that there was difference between revenue-producing and profit-producing. According to her, recent NCAA research showed that perhaps six out almost 1,000 schools would actually have a net profit. Commissioner Kirsanow stated that schools make decisions on where to direct revenue based on a variety of reasons, including the desire to highlight the school, attract alumni contributions and student applications, and other reasons that are market-based.

⁹⁰ *Ibid.*, p. 104.

⁹¹ *Ibid.*, p. 104.

⁹² *Ibid.*, p. 104.

⁹³ *Ibid.*, p. 104.

⁹⁴ *Ibid.*, pp. 104–05.

⁹⁵ *Ibid.*, p. 106.

⁹⁶ *Ibid.*, p. 106.

⁹⁷ *Ibid.*, p. 106.

⁹⁸ *Ibid.*, p. 107.

⁹⁹ *Ibid.*, p. 108.

¹⁰⁰ *Ibid.*, p. 108.

survey.¹⁰¹ Mr. Cohen said he agreed with Ms. Sweet that it was an important societal goal to continue to expand opportunities for women in athletics, but that the debate about whether colleges should monitor outside interests in athletics was not germane to the 2005 Additional Clarification.¹⁰² The latter properly tracked the law, which requires institutions to meet the interests and abilities of their current and admitted students, a focus that had been in place since 1979, he remarked.¹⁰³

Commissioner Yaki asked Ms. Samuels to provide a historical background on the changes to the three-prong test.¹⁰⁴ Ms. Samuels responded that the U.S. Department of Education created the Commission on Opportunity in Athletics in 2002. A majority of this group's 15 commissioners represented NCAA Division I-A schools.¹⁰⁵ According to her, these institutions had the most difficulty complying with Title IX and therefore the greatest incentive in weakening standards.¹⁰⁶ At the end of a series of regional meetings, in which witnesses testifying against Title IX far outnumbered those supporting it, the Commission on Opportunity in Sports proposed 22 recommendations, she explained.¹⁰⁷ It was her belief that a significant number of them would have brought damaging changes to the Department's longstanding athletics policies.¹⁰⁸ Prior presidential administrations had applied these policies and every court that examined them found them acceptable, she reiterated.¹⁰⁹ The U.S. Department of Education eventually rejected the recommendations and strongly supported the prevailing Title IX standards instead, she stated.¹¹⁰ In July 2003, the Department issued a further clarification expressly rejecting the recommendations and affirming enforcement of the longstanding policies and provision of technical assistance, according to her.¹¹¹ The 2005 Additional Clarification, issued on a Friday afternoon without public notice or comment, directly conflicted with the Department's July 2003 commitment, she said.¹¹² Commissioner Braceras disagreed with Ms. Samuels that universities were attempting to weaken Title IX.¹¹³ Ms. Samuels replied that universities offering big football and men's basketball programs were facing financial constraints, yet wished to continue running them in the same way.¹¹⁴ Thus, she continued, they were seeking easier ways to comply with Title IX and demonstrate that they were already satisfying fully the interests of women students.¹¹⁵

¹⁰¹ *Ibid.*, p. 108.

¹⁰² *Ibid.*, p. 109.

¹⁰³ *Ibid.*, pp. 110–11. *See also* Mr. Cohen's supplemental statement.

¹⁰⁴ *Ibid.*, p. 112.

¹⁰⁵ *Ibid.*, p. 112.

¹⁰⁶ *Ibid.*, p. 112.

¹⁰⁷ *Ibid.*, p. 112.

¹⁰⁸ *Ibid.*, p. 112.

¹⁰⁹ *Ibid.*, pp. 112–13.

¹¹⁰ *Ibid.*, p. 113.

¹¹¹ *Ibid.*, p. 113.

¹¹² *Ibid.*, p. 113.

¹¹³ *Ibid.*, pp. 113–14.

¹¹⁴ *Ibid.*, p. 114.

¹¹⁵ *Ibid.*, p. 115.

Commissioner Yaki asked why the Bush Administration was providing clarifications and procedures that would ease institutions' compliance with Title IX and yet weaken the program, as advocates believed.¹¹⁶ Chairman Reynolds observed that if this was a method for avoiding a school's obligation to add women's teams, it was a poor idea.¹¹⁷ The 2005 Additional Clarification, he continued, would augment the burden on schools over time if women's interest and ability continued to increase.¹¹⁸ Mr. Black replied that its purpose was to give schools a tool to identify unmet interest.¹¹⁹ He agreed with Chairman Reynolds, adding that large universities did not want to use this tool because they would find unmet interest.¹²⁰ Ms. Gavora said the requirement to add women's teams if unmet interest was found was a reason for the current bias toward proportionality.¹²¹ Ms. Samuels argued that schools already in compliance under Prong One (proportionality), did not need to add teams, and Prong Three came into play only when they had not met substantial proportionality, or were unable to show a continuing pattern of adding teams for the underrepresented sex.¹²²

Chairman Reynolds said he would like to use a different perspective to discuss a school's choice of prongs one, two, or three.¹²³ As an administrator, he said, the issue is the likelihood of incurring additional transaction costs.¹²⁴ Prong One, he said, provided a way of complying with the law without incurring many transactional costs, since an institution had no further requirement on attaining substantial proportionality.¹²⁵ Prongs Two and Three are more expensive approaches because athletic directors need legal advice to determine when they have satisfied the law.¹²⁶ Vice Chair Thernstrom said that the incentives to institute policies that ensure proportionality are enormous.¹²⁷ Ms. Samuels replied that an institution satisfies equity when it meets any one of the three prongs of the three-part test, as long as the prongs are appropriately and lawfully applied and interpreted.¹²⁸ Proportionality, she said, was one way a school could show it was offering equality of opportunity, and its elimination would deny women the opportunity to participate in sports based on the principle that men and women were equally interested in and able to compete in athletics.¹²⁹

Commissioner Taylor asked Ms. Samuels to explain a previous comment, that the status quo would be frozen if Prong One was eliminated.¹³⁰ She replied that Prong One assumed every

¹¹⁶ *Ibid.*, p 115.

¹¹⁷ *Ibid.*, p 115.

¹¹⁸ *Ibid.*, p. 116.

¹¹⁹ *Ibid.*, p. 116.

¹²⁰ *Ibid.*, p. 116.

¹²¹ *Ibid.*, p. 116.

¹²² *Ibid.*, pp. 116–17.

¹²³ *Ibid.*, p. 119.

¹²⁴ *Ibid.*, p. 119.

¹²⁵ *Ibid.*, p. 119.

¹²⁶ *Ibid.*, pp. 119–20.

¹²⁷ *Ibid.*, p. 123.

¹²⁸ *Ibid.*, p. 125.

¹²⁹ *Ibid.*, p. 125.

¹³⁰ *Ibid.*, p. 139.

student on campus would have an equal opportunity to play sports, whereas Prongs Two and Three presume that women had less than equal opportunity.¹³¹ There were ways for schools to satisfy the law when the latter condition prevailed, she said, such as continuing to add teams for women and being able to demonstrate such a history, or showing that they were able to satisfy fully women's interests.¹³² Commissioner Braceras said, and Commissioner Taylor concurred, that Ms. Samuels' response suggested she viewed Prongs Two and Three as transitions to Prong One.¹³³

Men's and Women's Interest in Participation in Sports

Commissioner Braceras challenged Ms. Samuels' previous statement that men and women were equally interested in sports.¹³⁴ Ms. Samuels said the belief that women were less interested in sports was a stereotype, impermissible under the law and disproved by facts.¹³⁵ Since the enactment of Title IX, she said, women's participation in sports had continued to grow, and women showed up in large numbers to take advantage of opportunities when they were offered.¹³⁶ Commissioner Braceras argued that they did not show up in the same proportion as men.¹³⁷ Ms. Samuels countered that culture and availability of opportunities in schools remained geared toward male participation.¹³⁸ Chairman Reynolds asked Mr. Cohen about the availability of data on the relative interests of boys and girls in athletics.¹³⁹ He replied that an institution could employ the Model Survey to gather the empirical evidence.¹⁴⁰ Ms. Gavora said that as part of a consent decree with the National Organization for Women, the University of California system surveyed its member institutions and found that among students indicating interest in athletics, 60 percent were men and 40 percent women. She added that the College Board's survey of students taking college entrance examinations (i.e., the Preliminary Scholastic Achievement Test (PSAT) and the Scholastic Achievement Test (SAT)), revealed a similar breakdown in percentages with respect to interest in sports, and that data on participation in voluntary club sports and intramural sports on campuses showed males outnumbering females overwhelmingly.¹⁴¹ Ms. Samuels said she disagreed vehemently that there was evidence showing women were less interested in sports than men.¹⁴² According to her, survey responses indicating less interest in sports among women, or lower participation levels, were results of lingering lack of exposure and the second-class status of opportunities for women.¹⁴³

¹³¹ *Ibid.*, p. 140.

¹³² *Ibid.*, p. 140.

¹³³ *Ibid.*, p. 142.

¹³⁴ *Ibid.*, p. 125.

¹³⁵ *Ibid.*, pp. 126–27.

¹³⁶ *Ibid.*, p. 127.

¹³⁷ *Ibid.*, p. 127.

¹³⁸ *Ibid.*, p. 128.

¹³⁹ *Ibid.*, p. 130.

¹⁴⁰ *Ibid.*, pp. 130–31.

¹⁴¹ *Ibid.*, p. 132.

¹⁴² *Ibid.*, p. 133.

¹⁴³ *Ibid.*, p. 133.

Commissioner Heriot took issue with some panelists' assertion that even an expressed lack of interest in response to a survey was not enough to determine interest, but rather lack of exposure to pre-existing athletic opportunities. She asked whether this debate on athletic opportunities could mean that the U.S. Department of Education should consider issuing regulations on curricular and other extracurricular activities where women may be underrepresented, such as science and mathematics classes. Ms. Samuels responded that athletics is unique because it is a program that is explicitly and permissibly sex-segregated in the first instance.¹⁴⁴ Commissioner Heriot countered that, once we do not take survey respondents at their word, we should logically extend the reach of the Title IX of Intercollegiate Athletics Policy Guidance to any school activity in which females may be underrepresented.¹⁴⁵

Ms. Sweet said men had been participating in athletics much longer than women.¹⁴⁶ For example, she said that the NCAA celebrated its centennial anniversary in 2006, but had been sponsoring collegiate athletic opportunities for women for only 25 years.¹⁴⁷ Speaking of her personal experience, she said despite her love of sports, no opportunities were available in high school and college.¹⁴⁸ She credited the influence of Title IX in bringing about more sports opportunities for women.¹⁴⁹ The law was relevant at all levels of education, she observed, and, since its passage, dramatic changes in career opportunities for women have occurred in medicine and science, although less so in engineering.¹⁵⁰ Prior to Title IX, she said, the nation's campuses had about 30,000 female athletes; today, there are more than 200,000 because of the commitments colleges made to provide new opportunities, which young women now clamored to fill.¹⁵¹

Impact of Title IX, Sports Elimination, and Worldviews

Vice Chair Thernstrom said the status of women and how they thought of themselves had undergone decades of transformative change, and Title IX was but one of many factors contributing to an enormous increase in women participating in athletics today.¹⁵² She claimed that Ms. Samuels and Ms. Sweet harbored an image of women that belonged more in the 1950s, meaning women had a need for Title IX to confirm their potential as athletes.¹⁵³ Ms. Gavora said that women on today's campuses felt completely empowered compared to previous generations, were fully aware of their majority status, and questioned the need for Title IX, believing that it hurt male colleagues when schools eliminated men's sports to seek compliance.¹⁵⁴ Nevertheless, Ms. Gavora added that Title IX remained necessary.¹⁵⁵

¹⁴⁴ Ibid., p. 144.

¹⁴⁵ Ibid., p. 147.

¹⁴⁶ Ibid., p. 149.

¹⁴⁷ Ibid., p. 149.

¹⁴⁸ Ibid., p. 150.

¹⁴⁹ Ibid., p. 150.

¹⁵⁰ Ibid., p. 150.

¹⁵¹ Ibid., p. 150.

¹⁵² Ibid., p. 151.

¹⁵³ Ibid., p. 173.

¹⁵⁴ Ibid., p. 152.

¹⁵⁵ Ibid., p. 152.

Ms. Sweet reiterated that colleges and universities made the decisions to eliminate men's sports opportunities, despite the fact that Title IX has no such requirement and the NCAA opposed such moves.¹⁵⁶ Commissioner Heriot responded that to claim elimination of men's teams was not due to Title IX was disingenuous given the limitation of institutional funds and the need to achieve proportionality, which was perceived as the safe harbor for schools.¹⁵⁷ Ms. Sweet responded that institutions had a requirement to provide equity, not to cut men's sports.¹⁵⁸ Commissioner Braceras asked how institutions could find the funds to ensure equity without eliminating some opportunities for men.¹⁵⁹ Ms. Sweet replied that an institution with which she was once affiliated had 23 sports, but did not drop any despite several years of budget cuts because of a deliberate choice to allocate resources differently.¹⁶⁰ Every institution, she indicated, had similar opportunities, but some choose, instead, to put more resources into a select number of sports.¹⁶¹

Commissioner Kirsanow said that a GAO report¹⁶² showed schools eliminated various types and numbers of men's teams; 170 wrestling teams, 90 gymnastic teams, 80 tennis teams, 45 track teams, and various numbers of swim and football teams. He asked if evidence existed that Title IX had some impact on elimination of men's teams, and if schools eliminated female teams during the period that the men's teams were cut.¹⁶³ Ms. Gavora replied that ongoing anecdotal evidence put the blame on Title IX.¹⁶⁴ She and Commissioner Braceras both responded that schools have eliminated female teams.¹⁶⁵ Ms. Sweet said in regard to gymnastics, schools eliminated 60 men's teams and 80 women's teams in a certain period.¹⁶⁶

Commissioner Braceras posed a hypothetical question to Ms. Sweet: if in a given year, the College Board's survey of PSAT and SAT test takers found 60 percent of men and 40 percent of women expressed an interest in sports, why would a school not be in compliance if its sports participation rate mirrored the finding?¹⁶⁷ Ms. Sweet responded that surveys as sole measures of interest froze past bias against women's participation in sports.¹⁶⁸ She said many high school and college students had informed her that if they had not seen females participating in sports, they would not have known they could do so as well; a point just as relevant to elementary school

¹⁵⁶ Ibid., p. 153.

¹⁵⁷ Ibid., p. 154.

¹⁵⁸ Ibid., p. 154.

¹⁵⁹ Ibid., p. 154.

¹⁶⁰ Ibid., pp. 154–55.

¹⁶¹ Ibid., pp. 155–56.

¹⁶² United States General Accounting Office, *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams*, Report No. GAO-001-297, March 2001.

¹⁶³ Title IX Athletics, Briefing Transcript, pp. 169–70.

¹⁶⁴ Ibid., p. 170.

¹⁶⁵ Ibid., p. 170.

¹⁶⁶ Ibid., p. 171.

¹⁶⁷ Ibid., p. 156.

¹⁶⁸ Ibid., pp. 156–57.

students.¹⁶⁹ Interest in sports was thus influenced by what one saw, she observed.¹⁷⁰ Commissioner Braceras said Ms. Sweet's response suggested that ascertaining the current interest and ability of students at not only the college level, but also those in the pipeline (PSAT and SAT test takers), was insufficient to satisfy her sociological worldview.¹⁷¹ Commissioner Yaki disagreed with Commissioner Braceras's interpretation.¹⁷² He said Ms. Sweet meant that surveys in and of themselves were inherently limited because they were looking backward.¹⁷³ If one were in an environment in which one did not see young women playing ice hockey, for example, one would be unaware of the possibility.¹⁷⁴ He added that advocates of women's opportunities in sports had a strong bias, as would any underrepresented group, to ensure that opportunities and access to them were available.¹⁷⁵ This was the promise of Title IX, according to him.¹⁷⁶

Commissioner Braceras contrasted two worldviews: one posited that elimination of discrimination would eventually lead to a 50/50 representation;¹⁷⁷ the other assumed that, even absent discrimination, disparities existed among different subgroups.¹⁷⁸ She stated that if both worldviews could not be bridged, it would be impossible to determine which type of survey or prong of the test was best for compliance.¹⁷⁹ Commissioner Yaki said that by creating this dichotomy, Commissioner Braceras had simply highlighted the philosophical difference between the majority and minority members of the Commission.¹⁸⁰ He said he supported an affirmative approach that used the power of the law and government to create a better society.¹⁸¹ Mr. Cohen distinguished between general policy concerns that seek to improve opportunities for women, and the three-prong test, which is a narrower aspect of the law.¹⁸² Prong Three legally requires schools to meet the interests and abilities of current or admitted students, which is distinct from such global concerns, he said.¹⁸³

Commissioner Kirsanow asked Mr. Cohen to explain the process by which institutions determined ability in a sport.¹⁸⁴ He replied that the Model Survey included a question asking students to self-identify their ability level in a sport but that the school would be required to

¹⁶⁹ *Ibid.*, pp. 158–59.

¹⁷⁰ *Ibid.*, p. 158.

¹⁷¹ *Ibid.*, p. 159.

¹⁷² *Ibid.*, p. 159.

¹⁷³ *Ibid.*, p. 159.

¹⁷⁴ *Ibid.*, pp. 159–60.

¹⁷⁵ *Ibid.*, p. 160.

¹⁷⁶ *Ibid.*, p. 160.

¹⁷⁷ *Ibid.*, p. 162.

¹⁷⁸ *Ibid.*, p. 162.

¹⁷⁹ *Ibid.*, p. 162.

¹⁸⁰ *Ibid.*, p. 162.

¹⁸¹ *Ibid.*, pp. 162–63.

¹⁸² *Ibid.*, p. 164.

¹⁸³ *Ibid.*, pp. 164–65.

¹⁸⁴ *Ibid.*, p. 165.

assess ability following a requisite showing of unmet interest.¹⁸⁵ Commissioner Kirsanow then asked if any colleges had increased men's sports in the face of findings from the Model Survey that demonstrated an increase in men's unmet interest or an increase that exceeded that of females.¹⁸⁶ Mr. Cohen reminded him that Prong Three was concerned with the underrepresented sex.¹⁸⁷ He continued that when a school is in compliance with Title IX under any prong, it is free to add men's or women's sports.¹⁸⁸ If a school added women's sports or demonstrated a lack of unmet interest by female students or otherwise reached a point where the women on campus were receiving adequate opportunities under the law, then there was an opportunity to add a men's sport.¹⁸⁹

¹⁸⁵ *Ibid.*, pp. 165–66.

¹⁸⁶ *Ibid.*, p. 166.

¹⁸⁷ *Ibid.*, p. 167.

¹⁸⁸ *Ibid.*, p. 167.

¹⁸⁹ *Ibid.*, p. 167.

Statements

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May 8, 2007

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

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

Dear Mr. Marcus:

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

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

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

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Mr. Kenneth L. Marcus

May 8, 2007

Page 2

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

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

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

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

ROGERS & HARDIN

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Mr. Kenneth L. Marcus
May 8, 2007
Page 3

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

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

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

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

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

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Mr. Kenneth L. Marcus

May 8, 2007

Page 4

OCR's prior guidance led to some confusion. See 8 Vand. J. Ent. & Tech. L. at 33 ns.134-135.

That issue has now properly been put to rest.

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

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

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

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

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Mr. Kenneth L. Marcus
May 8, 2007
Page 5

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

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

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

ROGERS & HARDIN

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Mr. Kenneth L. Marcus

May 8, 2007

Page 6

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

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

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

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

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

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

ROGERS & HARDIN

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Mr. Kenneth L. Marcus
May 8, 2007
Page 7

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

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

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

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

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

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Mr. Kenneth L. Marcus

May 8, 2007

Page 8

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

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

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

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

ROGERS & HARDIN

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Mr. Kenneth L. Marcus
May 8, 2007
Page 9

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

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

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

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

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

Very truly yours,



Daniel A. Cohen

DAC/cm

*Daniel A. Cohen – Supplemental Statement***ROGERS & HARDIN**

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June 1, 2007

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

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

Dear Mr. Marcus:

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

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

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

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

ROGERS & HARDIN

A LIMITED LIABILITY PARTNERSHIP

Mr. Kenneth L. Marcus

June 1, 2007

Page 2

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

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

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

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

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

ROGERS & HARDIN

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Mr. Kenneth L. Marcus
June 1, 2007
Page 4

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

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

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

Very truly yours,



Daniel A. Cohen

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

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

Jessica L. Gavora

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

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

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

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

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

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

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

Prong Three asks that schools “demonstrate that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present [athletic] program.” For decades schools have complained that the government's guidance for demonstrating compliance under Prong Three has been vague and subjective. In 1996 the Clinton Department of Education promised to provide clarity but never did. And in 2003 the President's Commission on Opportunity in Athletics unanimously adopted a resolution calling on the Office for Civil Rights to investigate ways for schools to show compliance under Prong Three through interest surveys.

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

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

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

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

The critics' second objection to the Model Survey is that surveying current students' interest in athletics only serves to freeze a school's sports program in the status quo. The theory is that women who are interested in a particular sport will not attend an institution that does not already offer that sport. Critics do not explain, however, why this same phenomenon does not likewise adversely impact men's college choices.

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

And here the role of the National Collegiate Athletic Administration deserves some scrutiny. Like many of the single issue critics of the Model Survey, the NCAA has long maintained that measuring and fulfilling interest is a valid method of compliance with Title IX. But the NCAA bears a burden that the National Women's Law Center does not: it exists to represent the interests of *all* collegiate athletes, not just female athletes. And yet it has objected to the government's attempt to provide the guidance its member institutions have long requested. And its objections have been expressed with the same vehemence and in identical language to the objections of the special interest groups. The reason why, it turns out, is no mystery. On April 2, 2005—just days after the Model Survey was announced—NCAA President Myles Brand made a remarkable admission to the Washington Post. Referring to the Model

Survey, Brand said, “Whether that will be tested in court or some other way, we’re waiting to see what the Women’s Law Center and others might do. We’re supportive of their actions.”

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

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

But more important than the negative public relations and legal campaign targeting schools employing the Model Survey, the survey itself is a very limited tool for schools seeking to demonstrate Title IX compliance for this reason: It depends on Prong Three and Prong Three is itself flawed.

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

So if a school that has not reached statistical proportionality surveys its students and finds some unmet interest on the part of women and massive unmet interest on the part of men, it is obligated to fully accommodate only the women’s interest. What’s more, a school that is not proportional and has a women’s club team that requests varsity status—regardless of how many men’s club teams request the same—must accommodate that interest and that interest only.

James Madison University (JMU) is a case in point. Last fall, James Madison offered 28 athletic teams to its students—13 for men and 15 for women. Only six schools in Division I offered more athletic opportunities. But JMU’s female student population was 61 percent and growing and its athletic rosters couldn’t keep pace. JMU was in no position to add women’s teams. But the Model Survey offered no protection for its existing teams. When two women’s club teams petitioned for varsity status, JMU was forced to achieve statistical proportionality by cutting ten teams, seven for men, two for women and one co-ed team.

The College Sports Council has proposed a remedy for this absurd, senseless loss of opportunity that is occurring under Title IX today. It is a small change, not to the law but to

the implementing regulations, that will return Title IX to its original, anti-discrimination purpose, protect the gains of women, and above all, reflect the interests of students in athletics when judging an institution on its adherence to the law.

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

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

Thank you.

Jocelyn F. Samuels

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

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

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

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

- Demonstrate that intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollment; or
- Where the members of one sex have been and are underrepresented among intercollegiate athletes, show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; *or*
- Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as

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

² 20 U.S.C. §§ 1681-87 (1988).

that cited above, demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.³

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

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

The 2005 Clarification Violates Basic Principles of Equal Opportunity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

blindness—that is, for restricting their sports offerings and then claiming that they are satisfying the interests of those who are content with those restricted offerings.

The Clarification also ignores the ways in which schools typically recruit for men's teams. Most colleges assess prospective players regionally or nationally and recruit them with scholarship offers or non-financial benefits to apply to and attend an institution. The 2005 Clarification effectively requires women to show that they can fill a new team by relying entirely on students within their schools' current student bodies—a requirement that is not imposed on men's teams.

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

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

The 2005 Clarification Authorizes a Deeply Flawed Survey Methodology.

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

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

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

warning. To treat nonresponse as evidence of lack of interest is methodologically unsound and unfair to young women.

It also violates basic principles governing acceptable survey response rates. In one case,¹⁰ for example, a court rejected survey evidence used to argue compliance with Prong Three of the three-part test on the grounds that the survey, which achieved only a 39 percent response rate, was not a reliable means of measuring the institution's compliance with Title IX. The court noted that NCAA guidelines warn that response rates below 60 percent ““would almost always be cause for concern because almost half of those selected to represent your school did not participate in the study,”” and because the results ““could always be called into question and challenged for their representativeness.””¹¹ By authorizing schools to treat non-responses as if they were in fact responses, however, the Clarification allows the schools to create the fiction that 100% of surveyed students have responded. This fiction should not be allowed to obscure the reality that the Clarification permits schools to deny athletics opportunities to women based on actual response rates that would likely be rejected by any court examining the evidence.

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

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

Under the Department policies predating the 2005 Clarification, schools had the burden of showing—and the Office for Civil Rights the burden of rigorously evaluating claims—that, despite their failure to provide equal opportunities to their female students, schools were nonetheless fully accommodating women's interests and abilities. OCR, for example, required that all educational institutions undertake evaluations of interest “periodically so that the institution [could] identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex”¹⁴—and required that an institution justify

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

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

¹² 2005 Clarification at p. 10.

¹³ *Id.*

¹⁴ 1996 Clarification at p. 11.

any assertion that students were not interested in playing sports offered in the region.¹⁵ Under the 2005 Clarification, however, schools that have implemented the model survey are presumed to have complied with Title IX, unless students produce “direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team.”¹⁶ And although prior policies called for schools to consider sports offered in the communities from which they drew their students, the 2005 Clarification explicitly rejects the argument that “evidence that feeder high schools for the institution offer a particular interscholastic sport” is sufficient to sustain a female athlete’s burden.¹⁷

This shift in the burdens—forcing women to prove that they are interested in and entitled to equal treatment—is an inversion of basic civil rights principles. It also conflicts with a key purpose of Title IX—to encourage women’s interest in sports and eliminate stereotypes that discourage them from participating.¹⁸ It is particularly damaging for students in high school, where female students are likely to have had few or no sports opportunities that would inform their responses to an interest survey, and where students should be encouraged to try many different sports, not have their future opportunities limited by what they might have experienced or be interested in at that time.

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

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

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

Adding insult to injury, the 2005 Clarification does not require that the Office for Civil Rights monitor compliance to ensure that schools meet even the policy’s minimal requirements for survey use or interpret the results accurately. In fact, the 2005 Clarification explicitly states that “[w]here the Model Survey shows insufficient interest to field a varsity

¹⁵ *Id.* at p. 10.

¹⁶ 2005 Clarification at p.6.

¹⁷ *Id.* at p. 6, note 10.

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

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

team, OCR will not conduct a compliance review of that institution's implementation of the three-part test."²⁰ In addition to drastically weakening the standards for compliance with Prong Three of the three-part test, therefore, the Clarification provides no mechanism for the Department—or anyone else, for that matter—to evaluate the impact of schools' use of the model survey; to investigate the extent to which that survey has stalled or reduced women's participation opportunities; or to assess the ways in which it is being implemented on campuses.

The 2005 Clarification Threatens to Perpetuate Further Discrimination Against Female Athletes

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

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

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

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

What the data instead confirm is that women continue to be disadvantaged in every aspect of sports participation. Although women represent 53 percent of the students at Division I

²⁰ 2005 Clarification at p. 7.

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

²² U.S. General Accounting Office, *Report GAO 01-297, Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams*, March 8, 2001.

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

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

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

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

²⁵ *Id.*

Judith M. Sweet

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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May 6, 2005

VIA FACSIMILE

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

Dear Secretary Spellings:

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

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

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

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

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

National Collegiate Athletic Association

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

The Honorable Margaret Spellings
May 6, 2005
Page No. 2

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

Sincerely,

Sincerely,

Myles Brand
NCAA President

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

MB/CAC:ks

Attachment

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

NCAA EXECUTIVE COMMITTEE RESOLUTION

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

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

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

Now, therefore, be it RESOLVED that:

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

NCAA Data Analysis Research Network
Report on Recent Title IX Clarification

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

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

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

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

Stephanie J. Monroe



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

MAY 25 2007

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

Dear Mr. Marcus:

Thank you for the opportunity for the U.S. Department of Education, Office for Civil Rights (OCR) to participate in the U.S. Commission on Civil Rights (Commission) briefing entitled "Title Athletics: Accommodating Interests and Abilities," which was held on May 11, 2007. Enclosed please find OCR's response to the written questions submitted by the Commission.

Sincerely,

Handwritten signature of Stephanie Monroe in cursive script.
Stephanie Monroe

400 MARYLAND AVE., S.W., WASHINGTON, DC 20202-1100
www.ed.gov

Our mission is to ensure equal access to education and to promote educational excellence throughout the nation.

U.S. Commission on Civil Rights
Title IX Athletics Briefing:
Accommodating Interests and Abilities
(May 11, 2007)

Response of U.S. Department of Education, Office for Civil Rights

Question 1. “The extent to which each of the three prongs have been used by colleges and universities to demonstrate compliance with Title IX since 1979 till the Department of Education’s new guidance of March 17, 2005, and the degree to which they have shifted, if any, to the new guidance since that day.”

Response:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*, an anti-discrimination statute, which prohibits discrimination on the basis of sex in education programs or activities by recipients of Federal financial assistance. The Department’s regulation implementing Title IX, published in 1975, in part, requires recipients to provide equal athletic opportunity for members of both sexes and to effectively accommodate the interests and abilities of their male and female students to participate in intercollegiate athletics. See 34 C.F.R. § 106.41(c).

In the Intercollegiate Athletics Policy Interpretation published in 1979, the Department established a three-part test that OCR applies, in part, to determine whether an institution is effectively accommodating student athletic interests and abilities. An institution is in compliance with the three-part test if it has met any one of the following three parts of the test: (1) the percent of male and female athletes is substantially proportionate to the percent of male and female students enrolled at the school; or (2) the school has a history and continuing practice of expanding participation opportunities that is demonstrably responsive to the developing interests and abilities of the underrepresented sex; or (3) the school is fully and effectively accommodating the interests and abilities of the underrepresented sex. See 44 *Fed. Reg.* 71413, 71418 (1979).

On March 17, 2005, OCR issued the *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three* (Additional Clarification), as well as a *User’s Guide to Student Interest Surveys under Title IX* (User’s Guide) and a related technical report. The Additional Clarification and User’s Guide provide further guidance on recipients’ obligations under the three-part test and are designed to help recipients understand the flexibility afforded under the test. The Additional Clarification outlines specific factors that guide OCR’s analysis of the third option for compliance with the three-part test. The User’s Guide contains a sample survey instrument (“Model Survey”) that schools may choose to use to measure student athletic interest.

U.S. Commission on Civil Rights
OCR Response – Page 2 of 7

Title IX Athletics Briefing:
Accommodating Interests and Abilities

As a condition of receipt of Federal financial assistance, all recipients sign an assurance of compliance with Title IX (as well as the other civil rights statutes enforced by OCR). Although OCR investigates all complaints of discrimination and initiates discretionary compliance reviews, there is not (nor has there ever been) a reporting mechanism that requires colleges and universities to demonstrate to the Department, on an ongoing basis, how they will comply with the law or how they plan to remain in compliance. Absent an OCR investigation, colleges and universities are not required to routinely report to the Department which part of the three-part test they have chosen to comply with or whether they are choosing to use the Model Survey in order to achieve compliance with part three. With regard to OCR complaints and proactive compliance reviews, OCR has not analyzed its cases involving the three-part test for the entire time period requested. However, some of this data, covering approximately a 10-year time period, was analyzed at OCR's request by the National Center for Education Statistics (NCES) to develop the User's Guide. The results of this analysis are provided below.

NCES conducted a statistical analysis of 132 OCR cases involving the three-part test (130 colleges and universities) that were initiated and resolved from 1992-2002. Based upon a review of this data, NCES concluded that approximately 66% of the 130 postsecondary institutions chose to come into compliance using part three of the three-part test (86 of 130), approximately 28% used part one (36 of 130), and approximately 6% of the postsecondary institutions chose to comply with part two the three-part test (8 of 130). OCR is not aware of any institution that previously demonstrated compliance under one part of the three-part test and subsequently demonstrated to OCR that it is in compliance with a different part of the test after OCR issued the Additional Clarification on March 17, 2005.

It is not suitable to generalize these limited findings to all other postsecondary institutions or to determine whether the methods used by colleges and universities to demonstrate compliance "have shifted" after March 2005. Recipients have flexibility to select the method of compliance (part one, part two or part three of the three-part test) and the means they will use to achieve compliance with the selected method, such as whether they are using surveys to assess student athletic interest. A recipient's choice of how to comply with Title IX is not static, and a school may choose to alter its method of compliance consistent with its own unique needs. Schools have successfully used all three parts to comply with Title IX, and OCR encourages schools to continue to take advantage of the flexibility of the three-part test and consider which of the three parts best suits their individual circumstances.

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

Response:

OCR issued the Additional Clarification and User's Guide to reinforce the flexibility of the three-part test and to facilitate application of part three of the three part test for those

schools that choose to use it to ensure Title IX compliance. OCR recognized that, prior to the Additional Clarification, some institutions might have been uncertain about the factors OCR considers under part three. When OCR issued the Additional Clarification, that was the first time we provided schools with a practical tool to assess athletic interests using effective, unbiased methods. The Model Survey and the method of implementation were carefully designed by NCES to address deficiencies in survey instruments previously used by colleges and universities. The Model Survey provides a standardized methodology that maximizes the possibilities of obtaining correct information and facilitating responses. In particular, the Model Survey is designed to effectively capture information on student athletic interest, experience, and self-assessment of ability across multiple sports, while not unnecessarily complicating responses with superfluous or confusing questions.

The Model Survey and User's Guide provide schools with proven survey methods that afford students an easy opportunity to respond to the Survey, maximize the pool of students to whom the Survey is administered and the response rates. By recommending a census, rather than a sample survey, the User's Guide affords all full-time undergraduate women the opportunity to express interest in additional athletic opportunities, and it avoids several complex issues associated with sample surveys, including the selection of the sampling mechanism, selection of the sample size, and calculation of sampling error.

This approach provides schools with clear guidance on how they can adequately assess student interest under part three of the three part test, while simultaneously permitting schools to maintain flexibility over the administrative process. As a result, the Additional Clarification and Model Survey make it easier for schools to assess whether their own athletic programs are in compliance with part three and, if not, how they can bring themselves into compliance.

Because of the limited number of OCR cases and the short time period in which schools could choose to utilize the Model Survey, OCR cannot determine if the findings in OCR cases after issuance of the Additional Clarification represent a valid sample of postsecondary institutions or findings in future OCR investigations. As stated above, outside the context of an investigation to determine compliance with the civil rights laws, schools are not required to report to OCR whether they are choosing to use the Model Survey in order to achieve compliance with part three of the three-part test. We do not anticipate that every school will use the Model Survey, or any survey instrument at all. Schools are free to use nondiscriminatory methods of their choosing. It has never been OCR's policy to monitor the surveys or other assessment methods used by schools that choose to comply with part three of the three part test.

OCR is available to provide individualized technical assistance on the Additional Clarification and the use of interest surveys. We continue to proactively seek opportunities to educate recipients, educational and athletic organizations, administrators, parents and students regarding nondiscriminatory implementation of the Additional Clarification's guidelines and all aspects of recipients' Title IX obligations and options for compliance.

U.S. Commission on Civil Rights
OCR Response – Page 4 of 7

Title IX Athletics Briefing:
Accommodating Interests and Abilities

Question 3. “If the new guidance has made it easier for colleges and universities to demonstrate compliance with Title IX compared to prong one and to prong two, and if compliance with Title IX has generally improved over time, particularly since the new guidance’s introduction.”

Response :

OCR’s focus is on ensuring equal opportunity in athletics. The Additional Clarification and Model Survey further that mission and promote compliance with Title IX by giving schools a practical tool they may choose to use to assess student interest.

The Model Survey and User’s Guide are based on the statistical analysis of 132 OCR cases involving the three-part test during a ten-year period, specifically 1992–2002. Because NCES examined both the effective and problematic aspects of more than 50 survey instruments actually used by schools, the User’s Guide provides advice that is practical and informed by scientifically rigorous standards. The Model Survey is a simple, easy to use survey that schools can use — rather than having the burden of developing their own surveys, as schools have done in the past. As stated above, all recipients of Federal financial assistance are required to sign an assurance of compliance with Title IX. If a school chooses to comply with part three of the three part test, the Additional Clarification and Model Survey will make it easier for schools to assess whether their own athletic programs are in compliance and, if not, how they can bring themselves into compliance.

Although we believe the new guidance promotes compliance by clarifying one method schools may choose to use to demonstrate compliance, OCR does not request or collect information regarding with which part of the three-part test it is easiest to comply. OCR does not have enough data as a result of our investigations, since the issuance of the Additional Clarification, to determine whether there are improved compliance rates in OCR cases.

Question 4. “If the cost of using the new guidance (such as staffing) to show compliance is the same, higher, or lower than that of using prong one or two for (a) OCR and (b) the colleges and universities.”

Response:

OCR does not collect the type of data you are seeking. The flexibility of the three-part test permits each institution to determine for itself the most appropriate method of ensuring compliance consistent with its own circumstances. Although compliance with part three does not require expensive or elaborately scientific methods of assessment, OCR’s main focus is not on the cost of compliance, but on ensuring equal opportunity.

U.S. Commission on Civil Rights
OCR Response – Page 5 of 7

Title IX Athletics Briefing:
Accommodating Interests and Abilities

Question 5. “Since 1979, the proportion of colleges and universities that is required to demonstrate compliance due to (a) specific complaints against them and (b) OCR compliance reviews.”

Response :

OCR does not collect data on the number of postsecondary institutions that have or may have had athletic programs during this time period; thus, OCR is unable to provide information regarding the proportion of colleges and universities that were required to demonstrate compliance since 1979 due to (a) specific complaints against them and (b) OCR compliance reviews.

OCR has provided information below regarding the proportion of OCR complaints and compliance reviews involving the Title IX athletics regulations, in which postsecondary institutions were required to demonstrate compliance with the regulatory provision regarding effective accommodation of student interests and abilities. Due to OCR concerns regarding the maintenance of some of its case management data since the Department was established in 1980, this information is provided for Fiscal Year 1994 through February 28, 2007.

From October 1993 through February 28, 2007, OCR resolved approximately 311 postsecondary complaints alleging noncompliance with the Title IX athletics regulatory provisions. Of these cases, approximately 132 involved allegations of noncompliance with the regulatory provision requiring effective accommodation of student interests and abilities (42%); OCR conducted an investigation in 109 of these cases (83%).

In addition, OCR resolved approximately 37 postsecondary compliance reviews regarding the Title IX athletics regulatory provisions. Of these cases, OCR conducted investigations in all 29 of the reviews that involved effective accommodation of student interests and abilities (78%).

Question 6. “Some major ways in which complaints against colleges and universities are resolved.”

Response:

OCR currently uses an investigative approach that stresses full investigation of complaints. If OCR’s investigation finds areas of noncompliance with the civil rights laws, OCR enters into negotiations with recipients to correct the violations and reach a voluntary resolution agreement. If OCR has advised recipients of their failure to comply with the civil rights laws and has determined compliance cannot be secured by voluntary means, as a last resort, OCR seeks compliance through the administrative hearing process or refers cases to the U.S. Department of Justice for judicial enforcement.¹

¹ Cases also may be resolved in a variety of other ways. For example, cases may be administratively closed because: OCR does not have jurisdiction or the case is referred to another agency with appropriate

U.S. Commission on Civil Rights
OCR Response – Page 6 of 7

Title IX Athletics Briefing:
Accommodating Interests and Abilities

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

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

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

Nothing in Title IX or the three-part test requires the cutting or reduction of opportunities for the overrepresented sex. In cases where OCR finds evidence of noncompliance with the three-part test, OCR seeks remedies that do not involve the elimination of teams.

In examining the use of surveys and the consideration of additional factors by recipient institutions in OCR cases throughout the investigative, resolution and monitoring stages for the period October 1, 1992 through January 31, 2006, we found that as part of a voluntary compliance or resolution agreement entered into with OCR, many institutions agreed to conduct a student survey and to consider specific additional factors such as high school participation rates and intercollegiate sports offered in the recipient's normal competitive geographical region. We found that approximately half of all institutions' assessments of student interests and abilities and potential competitive opportunities included the consideration of student interest surveys as well as additional factors. Many of those surveys, pre-dating the Additional Clarification, did not meet the design or implementation standards that now are more readily available as a result of the Additional Clarification.

jurisdiction, the complaint is not timely, there is insufficient evidence to support a finding of noncompliance, or the complainant withdraws the complaint. A case may be resolved with OCR involvement or OCR may facilitate a resolution between the parties through "Early Complaint Resolution."

U.S. Commission on Civil Rights
OCR Response – Page 7 of 7

Title IX Athletics Briefing:
Accommodating Interests and Abilities

Question 7. “Please provide a copy of the Model Survey and all the necessary accompanying information.”

Response:

Attached is a copy of the U.S. Department of Education’s *Dear Colleague Letter* accompanying the *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three* and the *User’s Guide to Developing Student Interest Surveys Under Title IX*. These documents also are available on the Department’s internet site at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf>.

Also attached is a copy of the National Institute of Statistical Sciences’ Technical Report Number 150, *Title IX Data Collection: Technical Manual for Developing the User’s Guide* issued in February 2005. This document is available on the Department’s internet site at <http://www.ed.gov/about/offices/list/ocr/docs/title9technical-manual.pdf>.

Public Comments

During the public comment period, the Commission received correspondence and documents from representatives of four organizations and eight individuals. Of the organizations, the American Association of University Women and the Women's Sports Foundation were critical of the 2005 Additional Clarification, the Eagle Forum recommended the elimination of proportionality, and the Independent Women's Forum stated further guidance for the Model Survey was necessary. The National Women's Law Center submitted for the public record a report prepared by the National Coalition for Women and Girls in Education which recommended that the 2005 Additional Clarification be rescinded. Of the eight individuals that submitted public comments, six (Dolores Halls (Las Cruces, NM), Anne-Marie Mallon (Bernardston, MA), Valerie McNay (Boulder City, NV), Majorie Mead (Sun City, AZ), Nancy Mion (Bayport, NY), and Virginia Ralston (Germantown, TN), joined with the American Association of Women in urging the Commission to reconsider the 2005 Additional Clarification. The remaining two, Don Sabo (D'Youville College, Buffalo, NY) and Christine H. B. Grant (University of Iowa, Iowa City, IA) jointly critiqued the Model Survey methodology.

American Association of University Women

According to Ms. Lisa Maatz, director of public policy and government relations of the American Association of University Women (AAUW),¹ the 2005 Additional Clarification undermined Title IX and the progress women and girls had made since its enactment 35 years ago.² The guidance made it easier for schools to prove compliance by allowing the use of a less rigorous e-mail-based survey, she said.³ By treating nonresponses as indicative of a lack of interest, she said, the Model Survey failed to measure interest accurately.⁴ Previous OCR practices, she observed, took other factors into account, including the opinions of coaches and administrators, and participation rates in sports in area high schools or recreational leagues, and were therefore more accurate.⁵ These practices, she stated, had been in place through Republican and Democratic administrations and upheld by all eight of the federal courts that considered them. She added that the NCAA supported consideration of additional factors, and its Executive Committee urged the U.S. Department of Education to rescind the 2005 Additional Clarification and instead honor its 2003 commitment to long-standing Title IX athletics policies.⁶ She added the public overwhelmingly supported strong

¹The American Association of University Women (AAUW) "advocates education and equity. Since its founding in 1881, members have examined and taken positions on the fundamental issues of the day—educational, social, economic, and political." According to the association, commitment to its mission is "reflected in...public policy efforts, programs, the AAUW Leadership and Training Institute, and diversity initiatives." AAUW, <http://www.aauw.org/about/index.cfm> (accessed Oct. 21, 2008).

² Maatz Public Comment, Tracy Sherman, "Re: Public Comments for May 11 briefing on Title IX," e-mail to Christopher Byrnes, U.S. Commission on Civil Rights, June 5, 2007, 10:21 a.m.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

Title IX standards and cited results from a January 2003 *USA Today*/CNN poll that showed seven in ten adults familiar with Title IX thought that the law should be strengthened or left alone.⁷ In conclusion, she strongly urged the U.S. Commission on Civil Rights reconsider the 2005 Additional Clarification.⁸

Eagle Forum

According to Ms. Jessica Echard, executive director of the Eagle Forum,⁹ institutional use of proportionality to seek compliance with Title IX directly led to gender quotas on college campuses.¹⁰ She said many institutions attained proportionality through the elimination of men's teams, which prevented women athletes from training with and learning from male athletes. She recommended that the proportionality test be eliminated and a survey be instituted to gauge interest in athletic programs in the entire student body.¹¹ According to her, this would allow every student a voice in determining a school's sports programs and ensure a level and full playing field.¹²

The Independent Women's Forum

Ms. Allison Kasic, director of the Independent Women's Forum's campus programs, said as a result of Title IX, women found over time less discrimination, more opportunities, and increased status on campus.¹³ However, according to her, the law's enforcement mechanisms have not kept pace.¹⁴ Given budgetary and other factors, she said, schools viewed cutting men's teams and a small roster of women's as their only option for compliance under proportionality, even though this was never the intent of Title IX.¹⁵ She added that proportionality had a quantitative nature, while Prongs Two and Three were subjective; and that schools that sought compliance under either faced the threat of lawsuits from interest groups.¹⁶ According to her, interest surveys offered an opportunity toward measurability and the Model Survey was a step in the right direction.¹⁷ She observed that further guidance was necessary since schools were hesitant to make use of the survey fearing litigation by interest groups.¹⁸ The other benefit of interest surveys, she added, was that it allowed athletes a say in what sports would be sponsored. She concluded with the hope that the Commission would

⁷ Ibid.

⁸ Ibid.

⁹ Jessica Echard, "Title IX Public Comment," e-mail to Sock-Foon C. MacDougall, U.S. Commission on Civil Rights, June 4, 2007, 11:42 a.m.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Allison Kasic, "Re: Public Comment on Title IX," e-mail to Christopher Byrnes, U.S. Commission on Civil Rights, June 6, 2007, 9:27 a.m.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

encourage the U.S. Department of Education to provide further guidance on implementing the Model Survey.¹⁹

Women's Sports Foundation

The Women's Sports Foundation submitted a report titled "Who's Playing College Sports? Trends in Participation," along with its supplement, both dated June 2007.²⁰ According to the Women's Sports Foundation five major findings were evident:

- Women's athletic participation levels substantially increased during the late 1990s, but this growth slowed considerably in the early 2000s.²¹
- Women's participation level still lags far behind men's.²²
- Men's overall athletic participation levels increased over time.²³
- While a few men's sports suffered substantial declines, a larger number of men's sports enjoyed increases.²⁴
- The only group of higher education institutions that experienced declines in men's participation levels was NCAA Division I-A schools.²⁵

According to the Women's Sports Foundation, the policy implications of these findings include:

- Further weakening of Title IX, as represented by the March 2005 policy clarification, is unjustified.²⁶
- Title IX does not need to be reformed to stop large overall decreases in men's athletic participation because such decreases have not occurred.²⁷
- The debate over Title IX should not be based on the experience of a few individual sports.²⁸
- Efforts to analyze and stem reductions in men's sports should focus on Division I-A institutions, the only set of institutions that experienced declines. Future attempts to

¹⁹ Ibid.

²⁰ J. Cheslock, "Who's Playing College Sports? Trends in Participation," (East Meadow, NY: Women's Sports Foundation), June 5, 2007, p. 3. The report drew on data from two samples, the first consisted of a group of 738 NCAA colleges and universities (1995–96 and 2004–2005); the second sample consisted of 1,895 higher education institutions (2001–02 and 2004–05). Melanie Bennett, "Re: Title IX Hearing Public Record," e-mail to Sock-Foon C. MacDougall, U.S. Commission on Civil Rights, June, 8, 2007, 9:45 a.m.

²¹ Ibid., p. 3.

²² Ibid., p. 3.

²³ Ibid., p. 3.

²⁴ Ibid., p. 3.

²⁵ Ibid., p. 3.

²⁶ Ibid., p. 3.

²⁷ Ibid., p. 3.

²⁸ Ibid., p. 4.

explain the declines of men's athletic participation at Division I-A institutions should consider institutional policies and practices associated with the 'arms race' in athletic spending.²⁹

National Coalition for Women and Girls in Education

The National Coalition for Women and Girls in Education³⁰ stated that its report "Title IX Athletics Policies: Issues and Data for Education Decision Makers," demonstrated the following:

1. Female athletes are not receiving equal treatment or opportunities to participate 35 years after the passage of Title IX.³¹
2. The three-part test is flexible and lawful and reflects fundamental principles of equality.³²
3. Title IX has been wrongly blamed by its critics for cuts to some men's sports teams at some educational institutions.³³
4. As is demonstrated by the increase in women's participation in athletics since 1972, given the opportunity to play, women are just as interested in sports as men.³⁴
5. Over the last five years the gap between male and female athletic participation in high school grew from 1.13 million to 1.2 million opportunities.³⁵
6. Loss of male collegiate athletic participation opportunities is a myth. Male athletic participation continues to grow, and more male teams are added than are dropped.³⁶

Based on the above, the National Coalition for Women and Girls in Education made the following recommendations:

1. Mandate Collection of Title IX Data for High Schools³⁷

²⁹ Ibid., p. 4.

³⁰ "Title IX Athletics Policies: Issues and Data for Education Decision Makers," A report from the National Coalition for Women and Girls in Education, updated May 10, 2007, <http://www.ncwge.org> (accessed Nov. 21, 2008). Jocelyn Samuels, "Re: Report by the National Coalition for Women and Girls," e-mail to Sock-Foon C. MacDougall, U.S. Commission on Civil Rights, June 4, 2007, 3:36 p.m. The National Coalition for Women and Girls in Education (NCWGE) is a nonprofit organization of more than 50 groups dedicated to improving educational opportunities for girls and women. See <http://www.ncwge.org> (accessed Jan. 23, 2009).

³¹ Ibid., p. ii.

³² Ibid., p. ii.

³³ Ibid., p. ii.

³⁴ Ibid., p. iii.

³⁵ Ibid., p. iii.

³⁶ Ibid., p. iii.

³⁷ Ibid., p. iii.

2. Rescind the March 2005 ‘Clarification’³⁸
3. Improve Education³⁹
4. Control College Athletics Expenditures⁴⁰
5. Vigilant Enforcement⁴¹

Don Sabo and Christine H. B. Grant

According to Sabo and Grant, it would be methodologically misguided for institutions to use the U.S. Department of Education’s online survey method as the sole measure of compliance with Prong Three.⁴² They pointed out that sound methodology required use of multiple measures to evaluate interest and ability, and highlighted several of the survey’s methodological flaws.⁴³ They provided three reasons why multiple measures were important:

1. Research showed that an individual’s disposition and willingness to express personal interest in athletics was influenced by social norms, culture, gender, race, and ethnicity.⁴⁴ For example, they said boys and men were apt to express interest in sports and identify as athletes because these interests were traditionally associated with appropriately “masculine” behavior and identity.⁴⁵
2. Any failure to express interest likely reflected a lack of prior exposure, which in turn was the result of discriminatory limitations on women’s opportunities. As a result, surveys could not measure the extent to which women would show interest and ability if non-discriminatory opportunities were made available to them.⁴⁶
3. Any survey of athletic interests was based on the problematic theoretical assumption that surveys of interest could be used to predict athletic behavior.⁴⁷ They said behavioral scientists have long observed the discrepancy between attitudes and behavior.⁴⁸

For these reasons, they said, the U.S. Department of Education’s longstanding prior policies, including its 1996 Clarification, made clear that a survey of students was only one of many

³⁸ Ibid., p. iii.

³⁹ Ibid., p. iv.

⁴⁰ Ibid., p. iv.

⁴¹ Ibid., p. iv.

⁴² Don Sabo and Christine H. Grant, (June 2005), “Limitations of the Department of Education’s Online Survey Method for Measuring Athletic Interest and Ability on U.S.A. Campuses,” (Buffalo, NY: Center for Research on Physical Activity, Sport & Health, D’Youville College), p. 1. Don Sabo, “Re: Comment on OCR online survey,” e-mail to Christopher Byrnes, U.S. Commission on Civil Rights, May 29, 2007, 9:03 a.m.

⁴³ Ibid., p. 1.

⁴⁴ Ibid., p. 2.

⁴⁵ Ibid., p. 2.

⁴⁶ Ibid., p. 2.

⁴⁷ Ibid., p. 2.

⁴⁸ Ibid., p. 2.

methods schools could use to evaluate whether they were meeting the interests and abilities of their female students fully.⁴⁹

Don Sabo and Christine Grant then discussed four methodological flaws of the survey:

1. Online surveys often result in low response rates and most campuses have failed to attain full responses to such surveys, thus increasing the likelihood that few students would participate in the Model Survey.⁵⁰ Exacerbating the problem was the survey design's failure to consider variation in student access to or use of e-mail, and the fast-growing trend among youth who rely on text messaging for interpersonal communication.⁵¹ Students who lack access to computers or rely mostly on text messaging would likely not be included in campus-based online surveys.⁵² Institutions employing the survey would risk drawing conclusions based on inadequate sample sizes, they said.⁵³ The 2005 Additional Clarification, they added, provided no guidance on when a sufficient sampling had been achieved for the Model Survey.⁵⁴
2. The User's Guide for the Model Survey recommended that institutions conduct a census of the student population.⁵⁵ They said the Department of Education was aware that student completion of an on-line survey was unlikely, based on previously mentioned reasons, and thus treated the methodology as a census, where all students were simply contacted and asked to go to a Web site to complete a questionnaire.⁵⁶ Further, they said the 2005 Clarification specifically permitted schools to count a nonrespondent as someone who indicated no interest in athletics.⁵⁷ By equating nonresponses to a lack of athletic interest, they said, the survey's methodological

⁴⁹ Ibid., p. 2.

⁵⁰ Ibid., p. 4.

⁵¹ Ibid., p. 4.

⁵² Ibid., p. 4.

⁵³ Ibid., p. 4.

⁵⁴ Ibid., p. 4.

⁵⁵ An example would be blocking a student's registration until he/she completed the survey. Don Sabo and Christine Grant said that even if the online survey was made mandatory, students who did not want to participate irrespective of their interest or participation in athletics could protest the requirement by providing inaccurate information, such as indicating "no interest/experience" on the survey. They claimed that this would be particularly likely since the survey would likely take more time to complete than was stated in the 2005 Additional Clarification. The difficulty, they pointed out, was that analysts would not know the extent of the inaccuracy. Mr. Sabo and Ms. Grant continued that even if students were screened at the point of registration through verification of a campus identification, it could not be determined that the individual completing the registration was the targeted student, as it was not uncommon for students to have other persons register for them. On many campuses, they said, some students share their campus identifications and passwords even if it violated university policy. *See* Don Sabo and Christine Grant, "Limitations of the Department of Education's Online Survey Method for Measuring Athletic Interest and Ability on U.S.A. Campuses," June 2005, p. 5, footnote 9.

⁵⁶ Ibid., p. 5.

⁵⁷ Ibid., p. 5.

procedures did not meet basic scientific criteria for establishing reliable and valid survey results.⁵⁸

3. The Model Survey in reality relied on a sampling methodology, but the 2005 Additional Clarification did not ensure that the sample of students on a campus that responded to the online survey would be representative of the student population.⁵⁹ Respondents, they said, would be different from nonrespondents in ways that were unknown or not measured, and the resulting sample would be compromised and the findings rendered suspect.⁶⁰ A related methodological issue, they said, was self-selection on the part of the respondents, which would result in inferences of limited value.⁶¹
4. Some students may misinterpret the purpose of the survey.⁶² They remarked that because it was titled “Assessment of Students’ Athletic Interests & Abilities” and those terms were undefined, some students may think it is an assessment of their interest in participating in *intercollegiate* sports, rather than in real and potential recreational, intramural, club, or junior varsity activities.⁶³ They claimed that to the extent that these latter athletic activities were historically marginalized or comparatively under-funded on a campus, students’ personal interest in participating in them could be dampened.⁶⁴ In their view, the surveys were therefore unlikely to capture the full range of athletic interests that institutions should consider in structuring each level of their sports programs.⁶⁵

Sabo and Grant concluded by encouraging policymakers, government officials, educators, and researchers to evaluate fully the department’s online survey method to further elucidate these and other methodological concerns.⁶⁶

Dolores Halls, Anne-Marie Mallon, Marjorie Mead, Valerie McNay, Nancy Mion, and Virginia Ralston

Halls, Mallon, Mead, McNay, Mion and Ralston said they joined with the American Association of University Women in urging the U.S. Commission on Civil Rights to reconsider the U.S. Department of Education’s 2005 Additional Clarification.⁶⁷ In their view,

⁵⁸ *Ibid.*, p. 5.

⁵⁹ *Ibid.*, p. 5.

⁶⁰ *Ibid.*, p. 5.

⁶¹ *Ibid.*, pp. 5–6.

⁶² *Ibid.*, p. 6.

⁶³ *Ibid.*, p. 6.

⁶⁴ *Ibid.*, p. 6.

⁶⁵ *Ibid.*, p. 6.

⁶⁶ *Ibid.*, p. 6.

⁶⁷ Dolores Halls, “Re: Changes to Title IX Regulations,” e-mail to Christopher Byrnes, U.S. Commission on Civil Rights, May 23, 2007, 1:30 p.m.; Anne-Marie Mallon, “Re: Title IX and equal opportunity,” e-mail to Christopher Byrnes, U.S. Commission on Civil Rights, May 28, 2007, 12:35 p.m.; Valerie McNay, “Re: Dept. of Ed. needs to enforce not weaken Title IX,” e-mail to Christopher Byrnes, U.S. Commission on Civil Rights, May 24, 2007, 10:07 a.m.; Marjorie Mead, “Re: Title IX—‘Let’s Play Fair!’” e-mail to Christopher Byrnes, U.S. Commission on Civil Rights, May 28, 2007, 12:13 a.m.; Nancy Mion, “Re: Title IX Athletics: Error in

it undermined Title IX because e-mail surveys alone could not ascertain students' interest in athletic participation accurately.⁶⁸ Ms. Mion added that use of multiple methods yields a truer measure.⁶⁹ McNay, Mead, Mion, and Ralston also said the 2005 Additional Clarification's treatment of nonresponse as an indication of a lack of interest would likely understate its extent.⁷⁰ Five of the six individuals said 35 years after the enactment of Title IX, female athletes continued to be shortchanged in recruiting, operating, and scholarship dollars, and playing sports.⁷¹

using e-mail only to survey women's interest in athletics," e-mail to Christopher Byrnes, U.S. Commission on Civil Rights, May 28, 2007, 5:57 p.m.; Virginia Ralston, "Re: Do NOT weaken Title IX," e-mail to Christopher Byrnes, U.S. Commission on Civil Rights, May 23, 2007, 12:24 p.m.

⁶⁸ Ibid.

⁶⁹ Nancy Mion e-mail to Christopher Byrnes, U.S. Commission on Civil Rights, May 28, 2007, 5:57 p.m.

⁷⁰ McNay e-mail, May 24, 2007; Mead e-mail, May 28, 2007; Mion e-mail, May 28, 2007; Ralston e-mail, May 23, 2007.

⁷¹ Halls e-mail, May 23, 2007; Mallon e-mail, May 28, 2007; McNay e-mail, May 24, 2007; Mead e-mail, May 28, 2007; Ralston e-mail, May 23, 2007.

Commissioner Statements

Title IX Athletics Statement of Vice Chair Abigail Thernstrom

Much of the debate which occurred during our briefing on Title IX Athletics focused on the use of the Model Survey method of assessing student interest in athletics versus strict proportional representation of women and men in collegiate sports. The latter has for many years been the "legal safe harbor" for proving compliance with Title IX. A school that shows proportional representation of men's and women's sports teams is guaranteed freedom from lawsuits and intrusive government interventions.

The Model Survey, introduced by the Department of Education in 2005, for the first time promised a more nuanced, manageable, and cost effective approach to demonstrating a school's compliance with the law. When administered properly, the Model Survey accurately assesses the interest and ability of the "underrepresented" sex in participating in collegiate sports.

However, entrenched special interests including, surprisingly, the NCAA, strongly opposed the use of the Model Survey. Their opposition seems to be premised on the condescending assumption that women are incapable of articulating their interest in participating in collegiate sports.

One witness summed up the argument in favor of the less intrusive, less burdensome Model Survey as follows: "It's strength -- perhaps its only strength -- is that for the first time in a decade it reintroduces the notion that government should view women as thinking, discerning individuals capable of expressing and acting on their interests when judging an institution under Title IX".¹

As a civil rights enforcement tool, proportional representation based on gender in the 21st century is every bit as anachronistic as such policies based upon race and ethnicity. Collectively, these policies may have had their place 40 or 50 years ago but today we are privileged to live in a society where men and women of all colors and origins are free as never before to pursue equal opportunities and to enjoy the rewards of society based upon their efforts and abilities. It has been illegal in the United States to discriminate on the basis of race, gender, ethnicity, or national origin for over 40 years.

As I stated during our briefing, the status of women and how they think of themselves has undergone decades of transformative change, and Title IX was but one of many factors

¹ Prepared statement of witness Jessica Gavora, Vice President of the College Sports Council, in her prepared statement at Draft Briefing Report page 48.

contributing to an enormous increase in women participating in athletics today.² Witnesses Jocelyn Samuels, Vice President for Education and Employment for the National Women's Law Center, and Judith Sweet, Consultant, National Collegiate Athletic Association, both of whom advocate for continuing the archaic proportional representation standard, presented an image of women that belongs more in the 1950s, when women had a need for Title IX to confirm their potential as athletes.³ My point was then, and remains now, that the need has passed for the heavy-handed imposition of policies that protect women from exclusion. By now, women have the power to make their own determination of their interest in collegiate athletics as well as virtually all other areas of endeavor in our society.

Damage Caused by Title IX Proportional Representation:

I am also greatly concerned about testimony we received concerning the negative impact of Title IX upon men's collegiate athletics. It was reported that in the year preceding this briefing hundreds of male athletes at six colleges had their prospects for participating in collegiate athletics taken away due in significant part to Title IX.⁴

The case of James Madison University in particular stood out. In the fall of 2006 James Madison had a female enrollment of 61 percent. When two women's club teams requested varsity status, the school, with limited budget resources, was forced to achieve statistical proportionality by cutting ten men's teams.⁵

During their testimony, the College Sports Council proposed an eminently sensible remedy to this absurd situation. The Council proposed that in order to return Title IX to its original, anti-discrimination purpose the implementing regulation governing Prong Three be modified to require that the interests of both sexes be accommodated instead of just the "underrepresented" sex. By way of example, they said that if the Model Survey revealed that 40 percent of its students who are interested in athletics are women it would apportion 40 percent of its opportunities to women. As Ms. Gavora put it: "In this way, students who shouldn't be considered in a disparate impact determination of discrimination -- [such as] older students, students with families, students who simply lack the interest and ability to compete in sports -- would rightly be excluded."⁶ I strongly agree with this proposal and endorse the Civil Rights Commission's formal recommendation on this point.

Impact on Historically Black Colleges and Universities:

I am deeply troubled by the impact that Title IX has had upon male athletes at Historically Black Colleges and Universities. HBCUs are an educational treasure and they graduate a large percentage of black degree holders in the Science, Technology, Engineering and Math fields. In

² Briefing transcript at p. 151.

³ Briefing transcript at p. 173.

⁴ Jessica Gavora at transcript p. 39.

⁵ Ibid, p. 41. and New York Times 10/07/2006 at <http://www.nytimes.com/2006/10/07/sports/othersports/07madison.html>

⁶ Ibid., pp. 41-42. Also, Gavora's prepared statement, p. 51.

the context of Title IX, a major problem at HBCUs is that female students outnumber male students by almost 2 to 1. The addition of sports teams would be one logical way to attract more male students. But HBCUs are facing what has been described as a "virtual roadblock" to that effort because of Title IX.⁷

Howard University is a well known HBCU located in Washington, DC. In a published article, former Howard University wrestling coach Wade Hughes noted that seven years ago Howard was forced to cut men's wrestling and baseball and added women's bowling in an attempt to avoid running afoul of Title IX. Five years after that, in 2007, Howard still had not achieved proportional representation and in order to do so would have had to drop 82 more male athletes from their programs which would have represented 40 percent of all male athletes at the school.⁸

In February 2008 the College Sports Council examined U.S. Department of Education enrollment data at HBCUs and found that virtually all HBCUs are out of compliance with Title IX.⁹ Among other things, the Council found:

- 73% of the nation's 75 HBCUs that are co-educational and have athletic programs were out of compliance with the strict proportionality standard.
- 30 of the schools out of compliance would have received an "F" from the Women's Sports Foundation in their latest report card on gender equity in college athletics.
- 43 schools, though they didn't get an "F", are still vulnerable to lengthy and expensive litigation.

Thus, among its other flaws, Title IX's proportional representation provision represents a serious impediment to HBCU's efforts to enroll more minority males.

As Howard's former coach Wade Hughes wrote:

"In 2005 a model survey option was offered in the U.S. Department of Education's clarification for Title IX compliance. Unfortunately, to date, the NCAA is actively discouraging universities from using surveys to measure the interest of their students.

"I believe that if Howard and other HBCUs want to increase their male enrollment, thereby increasing or at the least maintaining the opportunities available for African American male students to participate in college athletics, they should be afforded the latitude that the survey option offers."¹⁰

⁷ Wade Hughes. "Where's Title IX for Black Men?", March 12, 2008, in "The Root" at <http://www.theroot.com/views/wheres-title-ix-black-men>

⁸ Ibid.

⁹ College Sports Council, Feb 27, 2008 press release, available at http://savingsports.org/newsroom/display_releases.cfm?ID=22

¹⁰ Wade Hughes, op. cit.

Disaster in the Wings: Expansion of Title IX into Science, Technology, Engineering and Math

Historically, Title IX has been applied to collegiate athletics. However, the act broadly prohibits sex discrimination in all federally assisted education programs and activities. The Obama Administration has given early signals that it intends to greatly expand the application of Title IX into the study of science, technology, engineering and math (STEM). Additionally, a bill was introduced in the U.S. House of Representatives on Feb. 24, 2009 that would direct federal grantmakers to show year to year progress toward proportional representation of females among research and educational institutions receiving such grants.¹¹

In October 2008 then Senator Obama stated "The United States must aggressively pursue the innovative capacity of all people. In a globalized world, our prosperity and national security depend on our ability to lead the world in innovation. Other nations are now challenging that leadership, and in responding we must call upon talent and creativity of all of our people. We will need to significantly increase our STEM workforce, and to do that we will need to engage not just women and minorities but also persons with disabilities, English language learners, and students from low income families."¹²

The President's statement is fine, up to the point at which he pointedly excluded non-minority men from his otherwise exhaustive list of racial, gender and ethnic groups we need to engage in this quest.

Later in the same set of responses, Obama signaled his intention to use Title IX to enforce gender quotas upon our STEM students and workforce. In extolling the success of Title IX in increasing female participation in sports, he said: "If pursued with the necessary attention and enforcement, Title IX has the potential to make similar, striking advances in the opportunities that girls have in the STEM disciplines."¹³

Obama's analogy between the alleged impact of Title IX on women's sports and Title IX's potential impact on women in the STEM disciplines is seriously flawed. Gender quotas or enforced proportional representation of women in collegiate sports has, by definition, resulted in a cap on men's participation. We received compelling testimony regarding colleges having had to cut men's teams in order to achieve proportional representation of women.¹⁴

Surely we do not want to advance policies which will almost certainly result in reducing men's participation in the STEM disciplines for the dubious goal of achieving proportional representation of women and other non-majority groups--especially since there is compelling

¹¹ H.R. 1144 "Fulfilling the Potential of Women in Academic Science and Engineering Act", 111th Congress 1st Session.

¹² Senator Obama's responses to questions from the Association for Women in Science and The Society of Women Engineers, Oct. 2008, LINK:

<https://www.3750.sslldomain.com/awis/documents/AWISandSWEQuestionnaireObamaResponses-2.pdf>

¹³ Ibid.

¹⁴ Briefing Transcript: Gavora at p. 90, Gavora at p. 104, Sweet at p. 153, Kirsanow at p. 169.

evidence that women are doing quite well without preferences in science fields in which men are actually underrepresented.¹⁵

The key to producing more scientists in our society is not an insistence on the "proportional representation" of "underrepresented" groups. Rather, the key lies in making sure those who have talent and ability in the STEM fields are able freely to pursue their interests. Let men, women, minorities, and other groups contribute to our nation's preeminence in the STEM disciplines in proportion to their interest and ability.

Preeminence in science and technology, regardless of race, gender, or ethnicity, has proven to be one of our country's greatest strengths. Let us celebrate the abilities and ambitions of our college students without regard to their race, gender, ethnicity or national origin. Therein lies the true strength of the United States.

¹⁵ Sommers, Christina Hoff, "A Threat in Title IX," Washington Post, Tuesday, April 14, 2009, Page A17. On the internet at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/13/AR2009041302119.html> QUOTE: "Title IX could make "similar striking advances" for women in science and engineering. Indeed it could -- but at what cost to science? The idea of imposing Title IX on the sciences began gaining momentum around 2002. Then, women were already earning nearly 60 percent of all bachelor's degrees and at least half of the PhDs in the humanities, social sciences, life sciences and education."

**Rebuttal Statement of Commissioners Michael Yaki and Arlan Melendez
Regarding United States Commission on Civil Rights Briefing Report
Title IX: Accommodating Interests and Abilities
November 12, 2009**

SUMMARY

Title IX of the Education Amendments of 1972, renamed in 2002 the **Patsy T. Mink Equal Opportunity in Education Act** in honor of its principal author, was enacted on June 23, 1972. The law states, in relevant part: "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...." Title IX opened doors and created new opportunities for women to become lawyers, doctors, and athletes. It is the latter category that, to this day, has been under attack under a misguided belief that men's athletics have suffered due to the expansion of programs for women. And as the research amply shows, this is not only not true, but substantial disparities still exist which disfavor women.

Because of this, we respectfully and strongly disagree with the recommendations of the Commission's conservative majority in the briefing report entitled *Title IX: Accommodating Interests and Abilities*. As we have unfortunately come to expect with recent Commission briefing reports, and as we have articulated in prior statements, because the process was biased, faulty, and inadequate, it was inevitable that the outcome is misleading.¹⁶

Further, we respectfully disagree with and rebut Vice-Chair Thernstrom's Statement highlighting the purported appropriateness of the Model Survey and the supposedly-disparate, negative impact of Title IX upon the opportunities of male students to participate in intercollegiate athletics.

The central philosophical debate between the majority and the minority boils down to the question of whether Title IX's applications to athletics should exist. This is consistent with the majority's position on other landmark civil rights legislation that, in their opinion, has served its purpose and should be scaled back, if not eliminated. This is certainly the opinion of the majority on the issues of school desegregation,¹⁷ Section 5 of the Voting Rights Act,¹⁸ racial and ethnic categories on the Census,¹⁹ and affirmative action in contracting²⁰ and law schools.²¹ And the hobgoblins of

¹⁶ United States Commission on Civil Rights, Briefing and Meeting Transcript, May 11, 2007, pp. 22 – 24.

¹⁷ United States Commission on Civil Rights, *Becoming Less Separate? School Desegregation, Justice Department Enforcement, and the Pursuit of Unitary Status*, September, 2007.

¹⁸ United States Commission on Civil Rights, *Reauthorization of the Temporary Voting Rights Act: An Examination of the Act's Section 5 Preclearance Provision*, Briefing Report, April, 2006.

¹⁹ United States Commission on Civil Rights, *Racial Categorization in the 2010 Census*, Briefing Report, March, 2009.

²⁰ United States Commission on Civil Rights, *Federal Procurement After Adarand*, September, 2005.

²¹ U.S. Commission on Civil Rights, *Affirmative Action in American Law Schools*, Briefing, April, 2007.

consistency remain in place in the majority's report on this issue as well.²²

DISCUSSION

The current controversy, and one in which we believe the new Administration should involve itself, concerns the Department of Education's 2005 Title IX policy guidance, "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three," which is attached hereto as Appendix B. This so-called "guidance" issued by the Bush-era Department of Education late on a Friday afternoon in March, 2005, seriously weakens the enforcement of Title IX's protections previously set forth in the Department's 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, which is attached hereto as Appendix C. It thereby threatens to undermine the significant advances made by women and girls under the rules of this landmark legislation. Such dilution of the statutory protection is based upon, and ostensibly justified by, the notion that the problem of discrimination against women in the area of athletics is a thing of the past, and that, therefore, female students are no longer in need of protections considered by some to be unduly burdensome.²³

We recognize that, despite the great strides against such discrimination facilitated by both Title IX and general cultural evolution, anti-female bias in access to participation in sports at educational institutions remains a real wrong to be righted through the most vigorous possible enforcement of Title IX. We also recognize that the issue at hand is not only access to athletic opportunities themselves, but also access to college scholarships, admissions to highly competitive schools, and the physical, emotional, and scholastic benefits that come from athletic team participation. The 2005 clarification threatens all of this.²⁴

²² It is worth noting that USCCR Chair Gerald Reynolds voted with the majority to endorse the report's recommendations. Six years ago, Chair Reynolds evinced quite a different view during his tenure in the Department of Education. On July 11, 2003, while serving as Assistant Secretary in the Department of Education's Office for Civil Rights, Reynolds released a letter affirming the appropriateness of the three-part test discussed herein and the validity of its prongs. See Department of Education Office for Civil Rights, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance, July 11, 2003, attached hereto as Appendix A. In that letter, Reynolds stated that "OCR believes that the three-prong test has provided, and will continue to provide, schools with the flexibility to provide greater athletic opportunities for students of both sexes."

²³ In her October, 2009 Statement regarding the underlying Briefing Report at issue, Vice-Chair Thernstrom stated: "As I stated during our briefing, the status of women and how they think of themselves has undergone decades of transformative change, and Title IX was but one of many factors contributing to an enormous increase in women participating in athletics today. [footnote deleted]. Witnesses Jocelyn Samuels, Vice President for Education and Employment for the National Women's Law Center, and Judith Sweet, Consultant, National Collegiate Athletic Association, both of whom support continued use of the proportional representation standard, presented an image of women that belongs more in the 1950s, when women had a need for Title IX to confirm their potential as athletes. [footnote deleted]. My point was then, and remains now, that the need has passed for the heavy-handed imposition of policies that protect women from exclusion. By now, women have the power to make their own determination of their interest in collegiate athletics as well as virtually all other areas of endeavor in our society." (emphasis added). Statement, Vice-Chair Thernstrom, October, 2009.

²⁴ As Commissioner Yaki stated at the conclusion of witness testimony in May, 2007, regarding watered-down enforcement mechanisms, "I support something that is much more proactive, much more affirmative in nature,

The majority makes four recommendations for further action regarding Title IX. If implemented, each would subvert the good role and power of the law and waste opportunities to right the wrongs which continue to be done to young Americans with athletic talent. That Title IX has been extremely successful in gradually bridging the gap between the athletic opportunities for women and men is undisputed, but an inappropriate differential still exists. The mission of Title IX is not yet complete, and returning the law to its full strength through reinvigorating its enforcement capabilities is both necessary and appropriate.

In this Statement, we analyze each of the majority's recommendations and offer recommendations geared toward resuscitation and reinforcement of Title IX's integrity and strength, to ensure that equality of opportunity in athletics is afforded to young women in this country.

Majority Recommendation #1:

“The Commission commends the 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.”

Minority Recommendation #1:

Contrary to the majority, we strongly recommend that the Department of Education *rescind* the 2005 Clarification and its incorporated Model Survey. We recommend that the Department make clear that the governing standards for part three of the three-prong test are as detailed in the January 16, 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test. Further, we recommend that the Department and its Office on Civil Rights issue appropriate guidelines further clarifying how schools can implement renewed use of the multiple factors enumerated in the 1996 Clarification as a means of ensuring that the athletic interests and abilities of the underrepresented sex are fully and effectively accommodated as required by law.

Rationale:

Contrary to the majority's belief, the Model Survey is not a means for ensuring compliance with Title IX. Rather, it is a means for diminishing the power of the

statute.²⁵

By encouraging reliance upon the flawed Model Survey, the 2005 Clarification threatens to justify reversal of the enormous progress women and girls have made in sports since the enactment of Title IX and to perpetuate further discrimination against them. It weakens the longstanding Title IX compliance standards governing schools at both the interscholastic and intercollegiate levels and allows schools to evade their obligations to provide equal participation opportunities to their male and female students.

The Model Survey is inherently flawed, both in structure and methodology.

That the 2005 Model Survey is incapable of meeting the stated goals for its use is beyond serious dispute. It is far from rigorous and suffers from many substantive and methodological flaws.²⁶ For example, in substance, the survey breaches a fundamental guideline for questionnaire construction when it uses double-barreled items.²⁷ Further, at its very outset, the survey advises respondents that they can avoid completing the survey by indicating a lack of interest. Students who do not want to complete the survey, notwithstanding their interest and/or ability, are likely to respond to this prompt and exit the survey. This response pattern will erode representativeness, the overall response rate, and the accuracy of results.

Not only is the survey methodology authorized under the 2005 Clarification flawed, it is inconsistent with the requirements of prior Department policy. Specifically, under the 2005 policy, schools may e-mail the survey to all female students and interpret a lack of response as a lack of interest. Given the notoriously low response rates to surveys in general, let alone to anything sent via email, this authorization will allow schools to avoid adding new opportunities for women even where interest does in fact

²⁵ As Commissioner Yaki asked at the May, 2007 briefing, “Why is the administration putting into place clarification and procedures that would make it easier on institutions they [sic] say to comply with Title IX, which advocates believe would result in a weakening of the program?” United States Commission on Civil Rights, Briefing and Meeting Transcript, May 11, 2207, p. 115, line 21.

²⁶ See generally Sabo, Don and Grant, Christine H. , “Limitations of the Department of Education’s Online Survey Method for Measuring Athletic Interest and Ability on U.S.A. Campuses,” (Buffalo, NY: Center for Research on Physical Activity, Sport & Health, D’Youville College, June 2005, which is attached hereto as Appendix D. Drs. Sabo and Grant submitted this written analysis and critique of the Model Survey during the public comment period following the Commission’s briefing hearing, and the Commission report discusses such statement at pp. 74 – 76.

²⁷ A double-barreled item is one which asks the respondent if he or she agrees or disagrees with a statement which references multiple potential beliefs or opinions. For example, the statement, “I love cats and dogs” is double-barreled. If someone “strongly agrees” with the statement, it is unclear whether he/she loves dogs, cats, or both dogs and cats. In the model survey language, there is a potential blurring or lack of clear distinction between “have no experience,” “current participation,” or “interests in future participation.” Further, the survey uses the word “or” (rather than “and”) to instruct respondents. Therefore, at least some respondents may opt to “click to complete survey” if they had “no experience” or “have no” current participation or “no interest in future participation.” The “either-or” framing of the instruction, therefore, makes it possible that a student with no experience in sport but who is actually interested in playing a sport at the varsity level might choose to click and complete the survey because they fit the “no experience” category. Drafting problems of this nature continue throughout the model survey.

exist on campus. Further, schools may presume that young women's self-assessment of lack of ability to compete at the varsity level reflects an actual lack of ability. Young women who have played sports at the club level, or who have played sports other than the particular ones being considered for varsity status, may well have the ability to compete at a varsity level in the sport at issue. Tennis players, for example, may also be able to play squash, and many female athletes can become expert rowers. Nonetheless, under the 2005 Clarification, and contrary to the Department's prior policies, schools are relieved of any obligation to seek the opinions of coaches or other experts on this issue.

The Department of Education's own 2005 Clarification illustrates additional flaws inherent in the Model Survey when it states that "a student's experience in a particular sport... does not necessarily reflect the student's ability to compete on a team at the higher level required of intercollegiate athletes" and that "the Model Survey does not capture information on the level of performance... of... a particular student."²⁸ We ask that, if the model survey does not seek to capture a respondent's performance, then why are questions regarding respondents' performance being asked? The next paragraph only compounds the flaws by indicating that a student's self-assessment of lack of ability on the model survey *is* accurate, stating that "OCR will presume that a student's self-assessment of lack of ability... is evidence of actual lack of ability." Essentially, this section suggests that if a student indicates lack of ability, that response will be considered accurate, but if a student indicates some ability, that response could be considered inaccurate. This logical inconsistency is extremely problematic and demonstrates that this is not a valid measure of student ability.

The 2005 Guidance overemphasizes the usefulness of data collected (or not collected) by administration of the Model Survey.

Not only is the survey flawed, but the 2005 Clarification allows too much weight to rest upon its shaky shoulders by eviscerating part three of Title IX's three-part participation test, which allows schools to demonstrate compliance if they can show that they are fully and effectively accommodating the interests and abilities of the underrepresented sex.

First, the 2005 Clarification allows schools to use surveys alone to demonstrate Title IX compliance. To the contrary, according to the Department's 1996 Clarification of Intercollegiate Athletics Policy Guidance, a survey of student interest is only one of many factors that a school must evaluate to show that it is fully meeting women's interests under part three of the three-part test. Additional factors that schools must consider include: 1) requests by students to add a particular sport; 2) requests that an existing club sport be elevated to intercollegiate team status; 3) participation rates in club or intramural sports; 4) participation rates in sports in high schools, amateur athletic associations, and community sports leagues in areas from which the school draws its students; 5) interviews with students, coaches, and administrators regarding

²⁸ United States Department of Education, Office for Civil Rights, Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three, March, 2008, p. 10.

interest in particular sports; and 6) participation in interscholastic sports by admitted students.²⁹ The 2005 Clarification eliminates the obligation to consider these important criteria and gives too much power to survey results.

Second, surveys are likely only to provide a measure of the discrimination that has limited, and continues to limit, sports opportunities for women and girls. Courts have recognized that interest cannot be measured apart from opportunity,³⁰ that women's interests in sports have been artificially limited by the discrimination to which they have been subjected, and that women's interests have grown as Title IX has opened new sports participation opportunities for them. As a result, basing women's future opportunities on their responses to surveys that measure their prior lack of exposure will only perpetuate the cycle of discrimination. Data reported as recently as October, 2008 underscores the fact that primary- and secondary-school girls living in rural and urban areas are less involved in sports than same-aged boys. Further, a full 84% of urban female students in eleventh and twelfth grades surveyed stated that they were not participating in any physical education classes.³¹ This underscores the importance of both increasing pre-collegiate opportunities for female students and of reaching into the factors beyond a mere survey for collection of information.

Third, the 2005 Clarification conflicts with and undermines key purposes of Title IX, the encouragement of women's interest in sports and the elimination of stereotypes that discourage women from participating.³² Specifically, it allows schools to restrict their surveys to enrolled and admitted students, thereby permitting schools to evade their legal obligation to measure interest broadly. The 2005 Clarification ignores the reality that students interested in a sport not offered by a school are unlikely to attend that school. By failing to require schools to evaluate interest that exists beyond their own campuses, be it in high school, community, and recreational programs in the areas from which a school typically draws its students, current policy allows schools to evade their legal obligation to look broadly for interest in certain sports by women. Schools are rewarded with compliance findings for restricting their sports offerings and then claiming that they are satisfying the interests of those who are content with those restricted offerings. In this way, the 2005 Clarification is particularly damaging for female high school students, who are likely to have had few or no sports opportunities that would inform their responses to an interest survey, and who should be encouraged to try many different sports rather than having future opportunities prematurely limited.

Fourth, the 2005 Clarification shifts the burden to female students to show that they are entitled to equal opportunity. Where schools are not providing equal participation opportunities for women under parts one or two of the three-part test, long-standing Department of Education policies make clear that schools have the burden of

²⁹ Ibid.

³⁰ *Cohen v. Brown University*, 101 F.3d 155, 179-80 (1st Cir. 1996).

³¹ Sabo, Don, PhD, and Veliz, Phil, M.A., Women's Sports Foundation, *Go Out and Play: Youth Sports in America, Executive Summary*, Oct. 2008, p. 4. The full Executive Summary is attached hereto as Appendix E.

³² *Neal v. Board of Trustees of the California State Universities*, 198 F.3d 763 (9th Cir. 1999).

showing, and the Office for Civil Rights has the burden of rigorously evaluating, that they are nevertheless fully meeting the interests and abilities of their female students. The 2005 Clarification instead forces women to prove that their schools are not satisfying their interests and that they are entitled to additional opportunities.

Contrary to the majority's recommendation, Title IX does not require compliance with the proportionality prong of the three-part participation test.

The Department of Education's 1979 Policy Interpretation³³ establishes a three-part test for determining compliance with the regulatory requirement that "the selection of sports and levels of competition effectively accommodate the interest and abilities of members of both sexes."³⁴ The test provides schools with three options for complying with Title IX's requirement to provide equal participation opportunities. The first prong, called the proportionality prong, allows a school to comply by showing that the percentages of male and female athletes mirror the percentages of male and female students enrolled.³⁵ However, this is not the only way schools can demonstrate compliance with Department policies. The second prong of the test allows a school to comply by showing a history and continuing practice of program expansion for members of the underrepresented sex, even if equality of opportunities is not yet provided.³⁶ The third prong allows a school to comply by showing that its current program fully and effectively accommodates the underrepresented sex, even if the school is not providing opportunities to that sex in proportion to its representation in the student body.

Thus, under the three-part test, while schools may, and some do, provide athletic opportunities to male and female athletes in proportion to their representation in the student body, the third part of the test explicitly states that they need not do so, or even try to do so, if they are otherwise fully accommodating the interests of their female athletes. As the First Circuit stated, the proportionality test is merely a safe harbor for institutions that can satisfy it.³⁷

³³ United States Department of Health, Education and Welfare, Office for Civil Rights, Title IX of the Education Amendments of 1972: a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (December 11, 1979).

³⁴ 34 C.F.R. Sec. 106.41(c)(1).

³⁵ The proportionality prong of the three-part test does not favor either men or women. Rather, its analysis is tied to the availability of opportunities for the underrepresented sex. While because of the unfortunate prevalence of sex discrimination against women in intercollegiate athletics, it is most often women who are underrepresented, the protection applies to men as well if they are underrepresented. Accordingly, the test is neutral and specifically designed to avoid existing discriminatory preferences for the overrepresented sex. See Cohen I, 991 F.2d at 901 n.17 (noting that Title IX does not benefit only women, but rather protects the underrepresented sex, which could be men or women depending on the circumstances).

³⁶ Prong two is an atypically generous and flexible standard for civil rights compliance. In no other civil rights remedial scheme that comes to mind are institutions considered to be in compliance with a nondiscrimination mandate by demonstrating only incremental progress towards nondiscrimination and equity, such as that allowed in this prong.

³⁷ See Cohen v. Brown University, 991 F.2d at 897-98 (1st Cir. 1993); Neal v. Board of Trustees of The California State Universities, 198 F.3d 763, 771 n.7 (9th Cir. 1999) ([T]he OCR's three-part [participation] test gives universities two avenues other than substantial proportionality for bringing themselves into Title IX compliance. Cohen v. Brown University, 101 F.3d 155 (1st Cir. 1996) ("No aspect of the Title IX regime at

Moreover, the three-part test, in operation, has underscored the vitality of each of the three prongs. Between 1994 and 1998, of the seventy-four OCR cases involving Title IX's participation requirements, only twenty-one schools, or less than one-third, were found in compliance under the proportionality prong. Over two-thirds of the schools were found by OCR to be in compliance under part two or part three of the test.³⁸ To radically modify enforcement of Title IX to satisfy the concerns of the minority who consistently fail to meet its requirements, whether by deliberation or neglect, is to turn the concept of enforcement on its head.

Appropriate Enforcement of Title IX has not reduced intercollegiate athletic opportunities for men.

The majority falls prey to the imagined strength of a popular myth: that vigorous enforcement of Title IX results in expanded athletic opportunities for female students at the cost of diminished numbers of teams and opportunities for men. This myth has been repudiated time and again, yet the majority somehow manages to play a game of twister with the facts. It is well-settled fact that men's opportunities have increased simultaneously with Title IX's facilitation of great increase in access to collegiate athletic opportunities for women. But in a time of diminishing budgets and financial pressures across all educational institutions, Title IX serves as a popular scapegoat for any cuts in men's collegiate sports opportunities.

Perhaps due in part to fiscal concerns, and perhaps in part due to weakened enforcement, the rate of women's ongoing progress toward parity of opportunity slowed greatly after the late 1990s into the early 2000s. Specifically, only fifteen percent of the 26,000-athlete increase in women's participation in a 1995 – 2005 longitudinal study of 738 NCAA schools came between 2001 and 2005.³⁹ The Government Accountability Office has found that the number of men's teams increased from 1981-82 to 1998-99.⁴⁰ The same study showed that of 948 schools that added one or more women's teams between 1992 and 2000, 72% did so without discontinuing any other men's or women's teams.⁴¹ The Government Accountability Office further reports that while women's teams now outnumber men's teams, the

issue in this case inclusive of the statute, the relevant regulation, and the pertinent agency document B mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals. Kelley v. Board of Trustees, University of Illinois, 35 F.3d 265, 271 (7th Cir. 1994) ([T]he [Title IX] policy interpretation does not ... mandate statistical balancing. Rather the policy interpretation merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance. Even if substantial proportionality has not been achieved, a school may establish it is in compliance by demonstrating either that it has a continuing practice of increasing the athletic opportunities of the underrepresented sex or that its existing programs effectively accommodate the interests of that sex.

³⁸ United States General Accounting Office (GAO Report No. 01-128, Gender Equity: Men's and Women's Participation in Higher Education, (2000), at 40. The full report is attached hereto as Appendix F.

³⁹ Women's Sports Foundation, *Who's Playing College Sports? Trends in Participation*, June, 2007, p. 3. The full report, which also details a shorter-term, 2001 – 2005 NCAA study with similar findings, is attached hereto as Appendix G.

⁴⁰ United States General Accounting Office, No. 01-297, Intercollegiate Athletics; Four-Year Colleges' Experiences Adding and Discontinuing Teams (2001) at 13. The full report is attached hereto as Appendix H.

⁴¹ Id. at 14.

number of male athletes compared to female athletes still exceeds the differential expected simply from proportional enrollment.⁴² Further, the GAO has found that the most often-cited reason for ending a male team opportunity was the lack of student interest in the sport in question.⁴³ Thus, while the rate of increase for women has been greater, given the low point from which it began, the studies show that men's athletic opportunities have increased both in terms of the absolute number of male athletes and the number of men's teams, and any decrease is not attributable to Title IX's prescriptions.

Some of the most recent statistical evidence continues to support the fact that men's sports participation opportunities have not declined as a result of Title IX implementation. NCAA male sports participation has increased from 169,800 in 1981-1982 to 240,261 in 2007-2008.⁴⁴ From 1988-1989 to 2006-2007, NCAA member institutions added 2,678 men's sports while dropping 2,484 during that same period, showing a net gain of 194.⁴⁵ During the same period, NCAA member institutions added 3,978 women's sports programs and dropped 1,690—for a net gain of 2,288.⁴⁶ Counterintuitively, despite the fact that women comprise 57 percent of the college student population,⁴⁷ they received just 43 percent of the opportunities to play intercollegiate sports.⁴⁸ Another fact that would seem to undermine the contentions of the majority: between 2006-2007 and 2007-2008, the participation of female college athletes at NCAA institutions increased by 3,550 students, while men's participation increased by 6,431 participants.⁴⁹

Further, significant growth in certain men's sports has far outpaced relatively minor decreases in a small number of certain opportunities. During the NCAA's ten-year study ending in 2005, tennis and wrestling were the only men's sports that lost more than eighty participants each. During the same period, four men's sports showed sharp increases. Men's opportunities to participate in collegiate football alone increased by over 4,000.⁵⁰

⁴² *Cohen*, 101 F.3d at 180-81.

⁴³ Government Accountability Office. (March 2001). *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams*, 01- 297, 4.

⁴⁴ National Collegiate Athletic Association, *1982-81 – 2007-08 NCAA Sports Sponsorship and Rates Report*, 2008, p. 12.

⁴⁵ Women's Sports Foundation, *Women's Sports and Fitness Facts and Statistics*, 2009, p. 34.

⁴⁶ *Id.*

⁴⁷ National Center for Education Statistics, *Total undergraduate fall enrollment in degree-granting institutions, by attendance status, sex of student, and control of institution: 1947 through 2007*, 2007, Table 188.

⁴⁸ Women's Sports Foundation, *2008 Statistics - Gender Equity in High School and College Athletics: Most Recent Participation & Budget Statistics*, 2008.

⁴⁹ National Collegiate Athletic Association, *1982-81—2007-08 NCAA Sports Sponsorship and Rates Report*, 2008, pp. 61 – 64.

⁵⁰ Women's Sports Foundation, *Who's Playing College Sports? Trends in Participation*, p. 4.

Funds for athletic programming are still not distributed equitably between the sexes.

Financial allocations are an integral part of any analysis of Title IX, as they obviously create the athletic opportunities at issue. Those in favor of diminished enforcement standards claim that the increases in women's programs have an obvious impact on by diminishing funds for men's programs. Again, the facts do not bear out these allegations. Historically, expenditures for men's programs have been higher than for women's programs. And despite the 35-plus years of Title IX's existence, and despite its many and storied successes of Title IX, this fact remains true: dollar allocations for women's programs have yet to achieve parity with men's programs. In the 2004-05 school year, women's college athletic expenditures were on average only about 55 cents for every dollar of men's college athletic expenditures.⁵¹ Although this represents exponential growth from 1972, when women's collegiate athletic programs were accorded only 2% of available budgets,⁵² parity is still elusive.

Further underscoring this point, according to the *2005-2006 NCAA Gender Equity Report*, women's teams receive 33 percent of recruiting dollars (or \$50 million less than men's teams), 36 percent of athletic operating dollars (or \$1.55 billion less), and 45 percent of college athletic scholarship dollars (or \$166 million less).⁵³ The 2005-2006 NCAA Gender Equity Report found that recruiting expenses for women's teams is \$115,900 per institution while men's teams receive \$247,300 per institution.⁵⁴

It is important to note that defending Title IX is not inconsistent with concerns about the elimination of any men's teams or programs, just as we would be concerned about the elimination of any women's teams or programs. Elimination of men's teams, when it does occur, is often the result of allocation decisions made regarding the dollars available to men's teams and not due to allocation of dollars away from men's programs toward women's programs. Schools are free to structure their sports teams' funding as they see fit. Many schools choose to spend the bulk of their sports budgets for high-profile men's football and basketball teams, despite the fact that those teams are rarely economically self-sustaining and cost schools out-of-pocket dollars. Further, such programs are not necessarily run in a financially prudent manner and costs are not contained as tightly as they could be. Other men's sports, such as wrestling, are therefore at risk of being underfunded because of schools' voluntary priorities and not due to Title IX requirements.⁵⁵ Notwithstanding the point that it is not ours to judge the priorities of spending within men's or women's programs, there is obviously more to decisions affecting allocations than whether a college can "afford" a program because of Title IX concerns, as the majority would have its

⁵¹ Women's Sports Foundation, *Who's Playing College Sports: Money, Race and Gender*, Sept., 2008, p. 15.

⁵² National Women's Law Center, *Equal Opportunity for Women in Athletics: A Promise Yet to be Fulfilled, A Report to the Commission on Opportunity in Athletics*, 2002, p. 2.

⁵³ Women's Sports Foundation, *2008 Statistics - Gender Equity in High School and College Athletics: Most Recent Participation & Budget Statistics*, 2008.

⁵⁴ NCAA, *2005-06 NCAA Gender Equity Report*, 2008, p. 22.

⁵⁵ National Women's Law Center, *Title IX and Men's "Minor" Sports: A False Conflict*, July, 2008, attached hereto as Appendix I.

readers believe.

Majority Recommendation #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.”

Minority Recommendation #2:

The Department of Education should take seriously the longitudinal, highly-principled work of advocates on this issue. Further, the Department should incorporate the data and perspectives of credible advocates into consideration for preparing for the withdrawal of the 2005 Clarification that we recommend.

Rationale:

We agree with the majority that female students are fully capable of expressing their interests or lack thereof. However, we cannot accept that such interest is accurately expressed through the flawed vehicle that is the Model Survey. Reliance upon this interest assessment tool gives the majority a distorted and minimized view of the unmet level of women's interest in collegiate sports participation.

As the Courts have consistently stated, interest cannot be measured apart from opportunity, particularly where women's interests in athletics have been limited by the discrimination to which they have been – and continue to be – subjected. As a result, surveys cannot measure the extent to which women would express interest if non-discriminatory opportunities were made available to them. And allowing schools to rely solely, as the 2005 Clarification does, means, by its very nature, that women's lack of opportunities will continue. The Model Survey becomes a self-fulfilling prophecy.

Further, research experts have found that girls may be less likely to express interest in sports due to social norms and cultural factors, yet they will often participate enthusiastically if offered the chance to play and encouraged to do so. Females overall do not share males' long-standing association with self-identification as athletes in a cultural role. This truism further erodes the reliability of surveys as a means of collecting accurate data on the questions at hand.⁵⁶

⁵⁶ See generally Sabo and Grant, previously noted herein as Appendix D, The authors find that females may under-report self-perceived “athlete” status as compared to males due to cultural pressures, assumptions, and norms. In Latina-American culture specifically, the concept of “Maraianisma” still operates to discourage girls and women from aiming for roles other than housewife and motherhood. On this point, see Melnick, M., Sabo, D. & Vanfossen, B. (1992), Educational Effects of Interscholastic Athletic Participation on African-American and Hispanic Youth, *Journal of Adolescence*, 27(106):295-308; Melnick, M., Sabo, D. & Vanfossen, B. (1992), Effects of Interscholastic Athletic Participation On the Social, Educational, and Career Mobility of Hispanic Boys and Girls, *International Review of Sport Sociology*, 17(1):57-75; Sabo, D., Melnick M. & Vanfossen, B.

Another flaw of the Model Survey is that, as noted above, it only assesses the interest of admitted or enrolled students. This also narrows the universe of interest and has the impact of perpetuating limited sports opportunities.⁵⁷ Or, put another way, students with interests in programs that a school refuses to offer self-select away from that school.

What the majority really seems to want is for advocates for full enforcement of Title IX to meekly accept Model Survey data as correct and weighty, and to ignore the multidimensional flaws in the survey as discussed at length above. The majority wants its own perspective of the credibility of information garnered via the Model Survey to be viewed in perfect focus, and the facts gathered by others seen through a weakened lens.

It is ironic that the majority sees fit to implicitly accuse advocates of devaluing and dismissing the perspectives of those who stand to benefit from full enforcement of Title IX when it is the majority itself that congratulates the Department of Education's actions toward that same end. The advocates whom the majority chastises voice truths inconvenient for the majority and other defenders of the 2005 guidance.

Our view is that the advocates to whom the majority is speaking do, in fact, value and embrace the perspectives of those whom Title IX is designed to help. The difference is that, unlike the majority, the advocates receive their information from credible research and sources and not from a fatally-flawed survey. The Department would do well to listen to them.

(1993), The Influence of High School Athletic Participation on Post-Secondary Educational and Occupational Mobility: A Focus on Race and Gender, *Sociology of Sport Journal* (Winter, 1993).

Additionally, due to the constraints of traditional definitions of "femininity," American females overall may set a higher internal standard for themselves than do males before considering, and therefore reporting, themselves to be athletes. Sabo and Grant here cite sources including: The President's Council on Physical Fitness and Sports Report (1997), Physical Activity & Sport in the Lives of Girls: Physical and Mental Health Dimensions from an Interdisciplinary Approach, Washington, D.C.: Department of Health and Human Services; Sabo, D., Miller, K.E., Melnick, M.J. & Heywood, L. (2004), Her Life Depends On It: Sport, Physical Activity, and the Health and Well-Being of American Girls, East Meadow, N.Y.: Women's Sports Foundation. The logical outcome of this cultural pressure is a diminished interest in athletics absent specific encouragement and opportunity. Once opportunities and social validation are offered, many women who would have declined to express interest in sports develop the desire to participate. Sabo and Grant cite sources including Connell, R. W. (2000), The Men and the Boys, Berkeley, CA: University of California Press; Messner, M. A. (2002), Taking the Field: Women, Men, and Sports, Minneapolis, MN: University of Minnesota Press; Pollack, W. (1998), Real Boys: Rescuing Our Sons from the Myths of Boyhood, New York: Henry Holt and Company; Senay, E. & Waters, R. (2004), From Boys to Men: A Woman's Guide to the Health of Husbands, Partners, Sons, Fathers, and Brothers, New York: Scribner.

⁵⁷ "This approach ignores the reality that students interested in a sport not offered by a school are unlikely to attend that school. By failing to require schools to look beyond their own campuses to, for example, the high schools from which they typically draw students, the clarification rewards schools with a presumption of compliance, that OCR will not look behind for in effect wearing blinders -- that is, for restricting their sports offerings and then claiming that they are satisfying the interests of those who attend the school and are therefore content with those restricted sports offerings." Testimony of Jocelyn Samuels, Transcript, pp. 45-6.

Majority Recommendation #3:

“Prong Three regulations should be revised to take explicitly into account the interest of both sexes rather than just the interest of the underrepresented sex. This would help restore Title IX to its original goal of providing equal opportunity for individuals of both sexes. Accordingly, the Model Survey method should be tailored to represent the interests of both sexes.”

Minority Recommendation #3:

The Department of Education should withdraw the Model Survey and the full 2005 Guidance, as we have stated in Minority Recommendation #1 above.

Rationale:

Rather than trying to fix the broken wheel that is the Model Survey, the Department should junk the car that is the 2005 Guidance.

The majority recommendation to revise Prong Three regulations does not account for the fact that the regulations and policies already require equal participation opportunities for both sexes. This requirement is encapsulated in the three-part participation test set forth in the 1979 Policy Interpretation as described above. Part three of that test allows an institution to comply by showing that its current program fully and effectively accommodates the underrepresented sex, even if the school is not providing opportunities to that sex in proportion to its representation in the student body and cannot demonstrate that it is making steady progress under part two. The underrepresented sex is determined by reference to part one. Although the unfortunate prevalence of sex discrimination against women in athletics often dictates that is most often women and girls who are under-represented, the protection applies to men and boys as well if and when they are underrepresented. Accordingly, the test is gender-neutral and specifically designed to avoid existing discriminatory preferences for the overrepresented sex.⁵⁸

Thus, what the majority is really advocating (and which is also evident in Vice-Chair Thernstrom’s statement), is that the regulations be revised to require accommodation of the interests and abilities of female students based only on the relative levels of those interests as expressed in comparison to those of men. However, this “relative interests” argument ignores the fact that a school relying on part three to comply with the three-part test is, by definition, failing to offer female students equal opportunity compared to their male peers. The relative interests argument is also premised on the inaccurate and impermissible stereotype that women are inherently less interested in participating in athletics than their male counterparts. Opponents of the three-part test have repeatedly made this argument over the years, and the courts have unanimously rejected it. As the First Circuit has stated, “the argument contravenes the purpose of

⁵⁸ See Cohen, 991 F.2d at 901 n.17 (noting that Title IX does not benefit only women, but rather protects the underrepresented sex, which could be men or women depending on the circumstances).

the statute and the regulation because it does not permit an institution or a district court to remedy a gender-based disparity in athletics participation opportunities. Instead, this approach freezes such disparity by law and thereby further disadvantages the underrepresented gender. Had Congress intended to entrench, rather than change, the status quo of historical emphasis on men's participation opportunities to the detriment of women's opportunities, it need not have gone to the trouble of enacting Title IX."⁵⁹

Majority Recommendation #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.”

Minority Recommendation #4:

To the contrary, we believe that the NCAA should continue its challenging, focused work on behalf of all students who stand to benefit from full, nonpartisan enforcement of Title IX. The NCAA is free to form and alter its own professional opinion of the Model Survey based on continually-evolving sociological data. The NCAA remains free to advise its members according to the best of its ability and according to its best professional judgment.

Rationale:

The NCAA does not enforce Title IX compliance, and the United States Commission on Civil Rights does not set policy for the NCAA. The NCAA does not retaliate against institutions that make decisions about how they will comply with federal civil rights law. Member schools are free to act as they believe appropriate within the bounds of the law. The NCAA has encouraged institutions to consider the use of student surveys as one of many tools for evaluation of interests and abilities to compete in varsity sports in keeping with the January 16, 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.

We believe that the majority is correct in stating that, as adults, college students are capable of assessing their own interests in athletic programs and participation. However, students can only express their self-assessed interests accurately to the extent that they are given a worthwhile and trustworthy tool for voicing that assessment. As we have discussed at length above, the Model Survey is not that tool.

⁵⁹*Cohen*, 101 F.3d at 180-181.

Conclusion

Title IX has been one of the most effective tools in creating equal opportunities for girls and women in our society. Today, young women and men have a plethora of role models of both sexes to look up to in academia, in business, and in athletics. Title IX's existence is partly the reason and one of the contributing factors to this wholesale change in our culture and society.

Yet, there still remain critics, whose voices found favor in the previous Administration, who believe that any government action, any pro-active legislation, any attempt to remedy the sexism of the past, any push to raise and break the glass ceilings that created real barriers to equality, are, in their opinion, unwarranted and unnecessary and, sometimes, unconstitutional. These critics simply ignore the stark facts before them: that Title IX has not diminished any real and tangible athletic opportunities for men; that the number of men participating in athletics has increased, and not diminished, under Title IX; and that the funding advantage that men's athletics have traditionally maintained over women's athletics continues to this day. Far from overturning men's programs, Title IX has managed to accomplish exactly what Congress intended through its passage: the expansion of programs and opportunities for young women. And that is, quite simply, a good thing.

We strongly encourage the new Administration to withdraw the 2005 Guidance and remove the Model Survey and restore the 1996 Clarification as the threshold standard. We cannot countenance backsliding or condone the reversal of the important gains made over the past three decades. To do so would be a disservice to the thousands of girls and women who have found joy, inspiration, role models, increased self-confidence and self-esteem and for some, a career in athletics.

Speaker Biographies

Daniel A. Cohen

Daniel A. Cohen is an attorney with the law firm of Kasowitz, Benson, Torres & Friedman LLP in Atlanta. Since 2005, he has studied the legal implications of the OCR's 2005 Additional Clarification and its Model Survey. The article he co-authored regarding compliance with Prong Three of Title IX was published in the *Vanderbilt Journal of Entertainment and Technology Law*: "Navigating Into the New 'Safe Harbor'—Model Interest Surveys as a New Tool for Title IX Compliance Programs," 8 Vand. J. Ent. & Tech. L. 1 (2005).

His work in the area of Title IX has been cited in *USA Today*, the *NCAA News*, the *Chronicle of Higher Education*, and elsewhere. He received his undergraduate degree from Duke University and his law degree from the Vanderbilt University School of Law.

In addition to Title IX, Mr. Cohen's practice focuses on litigation and trial practice, including the areas of labor and employment, school and university law, professional malpractice, and business and commercial litigation.

Jessica L. Gavora

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

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

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

Jocelyn F. Samuels

Jocelyn Samuels is Vice President for Education and Employment at the National Women's Law Center, where she supervises an active litigation docket of Title IX cases. She spearheads the Center's efforts to preserve Title IX athletics policies and other regulations to ensure that young women are treated fairly in career education programs; to challenge policies and practices that block women's access to non-traditional courses, such as math and science; and to pursue gender equity in all aspects of education.

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

Judith M. Sweet

In 1975, Ms. Sweet served as Director of Athletics at the University of California, San Diego (UCSD), becoming one of the first women in the nation selected to direct a combined men's and women's intercollegiate athletics program. In 1999, she joined the faculty of the Social Science department at UCSD. In 2001, Ms. Sweet became the Vice President for Championships and Senior Woman Administrator at the National Collegiate Athletic Association (NCAA), where in 2003, she was promoted to Senior Vice President for Championships and Education Services. Ms. Sweet returned to San Diego in 2006, where she is presently consulting and serving as an independent contractor for the NCAA.

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

Judy was elected to a two-year term as membership President of the NCAA in 1991 and was Secretary-Treasurer of the NCAA from 1989 to 1991, becoming the first woman to serve in each of those positions. Her other NCAA Committee service is extensive, including the Subcommittee to Review Minority Opportunities in Intercollegiate Athletics, NCAA Foundation, and Gender Equity Task Force. She has served on various local, state, and national committees including the Board of Directors of the National Association of College Women Athletics Administrators (serving as president 2000-2001), the Board of Directors of the National Association of College Directors of Athletics and the Board of Trustees for The United States Sports Academy.

David F. Black

At the time of this briefing, Mr. Black served as the Deputy Assistant Secretary for Enforcement in the U.S. Department of Education's Office for Civil Rights (OCR). In this capacity, he was the principal advisor to the Assistant Secretary on civil rights enforcement to further the mission of OCR. That mission is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights. Specifically, Mr. Black worked with the Assistant Secretary to oversee the resolution of about 5,000 civil rights cases filed annually in 12 enforcement offices. The Office for Civil Rights enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the U.S. Department of Education.

Prior to this appointment, Mr. Black worked as an attorney in the area of civil rights, labor and employment law and litigation. He has experience representing both employees and employers in all aspects of labor and employment law before state and federal agencies and courts. He also served as a member of the U.S. Army Judge Advocate General's Corps where he counseled management on all facets of employment law, and worked in the areas of administrative and civil law, physical disability, and criminal law.

In 1996, Mr. Black received a *juris doctor, cum laude*, from the University of Minnesota Law School where he was Note and Comment Editor of the *Minnesota Journal of Global Trade*. He received a Bachelor of Arts in Political Science, *summa cum laude*, from the University of North Dakota in 1990.

Appendix A

Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance

UNITED STATES DEPARTMENT OF
EDUCATION
OFFICE FOR CIVIL RIGHTS
400 MARYLAND AVE., S.W.
WASHINGTON, D.C. 20202-1100

THE ASSISTANT SECRETARY

July 11, 2003

Dear Colleague:

It is my pleasure to provide you with this Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.

Since its enactment in 1972, Title IX has produced significant advancement in athletic opportunities for women and girls across the nation. Recognizing that more remains to be done, the Bush Administration is firmly committed to building on this legacy and continuing the progress that Title IX has brought toward true equality of opportunity for male and female student-athletes in America.

In response to numerous requests for additional guidance on the Department of Education's (Department) enforcement standards since its last written guidance on Title IX in 1996, the Department's Office for Civil Rights (OCR) began looking into whether additional guidance on Title IX requirements regarding intercollegiate athletics was needed. On June 27, 2002, Secretary of Education Rod Paige created the Secretary's Commission on Opportunities in Athletics to investigate this matter further, and to report back with recommendations on how to improve the application of the current standards for measuring equal opportunity to participate in athletics under Title IX. On February 26, 2003, the Commission presented Secretary Paige with its final report, "Open to All: Title IX at Thirty," and in addition, individual members expressed their views.

After eight months of discussion and an extensive and inclusive fact-finding process, the Commission found very broad support throughout the country for the goals and spirit of Title IX. With that in mind, OCR today issues this Further Clarification in order to strengthen Title IX's promise of non-discrimination in the athletic programs of our nation's schools.

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

In its 1979 Policy Interpretation, the Department established a three-prong test for compliance with Title IX, which it later amplified and clarified in its 1996 Clarification. The test provides that an institution is in compliance if 1) the intercollegiate-level participation opportunities for male and female students at the institution are "substantially proportionate" to their respective full-time undergraduate enrollments, 2) the institution has a "history and continuing practice of program expansion" for the underrepresented sex, or 3) the institution is "fully and effectively" accommodating the interests and abilities of the underrepresented sex.

First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. All three prongs have been used successfully by schools to comply with Title IX, and the test offers three separate ways of assessing whether schools are providing equal opportunities to their male and female students to participate in athletics. If a school does not satisfy the "substantial proportionality" prong, it would still satisfy the three-prong test if it maintains a history and continuing practice of program expansion for the underrepresented sex, or if "the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program." Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.

The transmittal letter accompanying the 1996 Clarification issued by the Department described only one of these three separate prongs - substantial proportionality - as a "safe harbor" for Title IX compliance. This led many schools to believe, erroneously, that they must take measures to ensure strict proportionality between the sexes. In fact, each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. The Department will continue to make clear, as it did in its 1996 Clarification, that [i]nstitutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas.

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law, to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.

In the 1996 Clarification, the Department provided schools with a broad range of specific factors, as well as illustrative examples, to help schools understand the flexibility of the three-prong test. OCR reincorporates those factors, as well as those illustrative examples, into this Further Clarification, and OCR will continue to assist schools on a case-by-case basis and address any questions they have about Title IX compliance. Indeed, OCR encourages schools to request individualized assistance from OCR as they consider ways to meet the requirements of Title IX. As OCR works with schools on Title IX compliance, OCR will share information on successful approaches with the broader scholastic community.

Second, OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams.

Therefore, in negotiating compliance agreements, OCR's policy will be to seek remedies that do not involve the elimination of teams.

Third, OCR hereby advises schools that it will aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. At the same time, OCR will also work with schools to assist them in avoiding such sanctions by achieving Title IX compliance.

Fourth, private sponsorship of athletic teams will continue to be allowed. Of course, private sponsorship does not in any way change or diminish a school's obligations under Title IX.

Finally, OCR recognizes that schools will benefit from clear and consistent implementation of Title IX. Accordingly, OCR will ensure that its enforcement practices do not vary from region to region.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a challenge for many academic institutions. But OCR believes that the three-prong test has provided, and will continue to provide, schools with the flexibility to provide greater athletic opportunities for students of both sexes.

OCR is strongly reaffirming today its commitment to equal opportunity for girls and boys, women and men. To that end, OCR is committed to continuing to work in partnership with educational institutions to ensure that the promise of Title IX becomes a reality for all students.

Thank you for your continuing interest in this subject.

Sincerely,

Gerald Reynolds
Assistant Secretary for Civil Rights

Appendix B

Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test, Part Three

March 17, 2005

Dear Colleague:

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

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

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

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

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

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

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

the Model Survey shows insufficient interest to field a varsity team, OCR will not exercise its discretion to conduct a compliance review of that institution's implementation of the three-part test.

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

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

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

Thank you for your continuing interest in this subject.

Sincerely,

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

Appendix C

Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test

January 16, 1996

Dear Colleague:

It is my pleasure to send you the enclosed Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the Clarification).

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979--both of which followed publication for notice and the receipt, review and consideration of extensive comments--specifically address intercollegiate athletics. Since becoming Assistant Secretary, I have recognized the need to provide additional clarification regarding what is commonly referred to as the "three-part test," a test used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics. The three-part test is described in the Department's 1979 Policy Interpretation.

Accordingly, on September 20, 1995, OCR circulated to over 4500 interested parties a draft of the proposed Clarification, soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX. As indicated when circulating the draft of the Clarification, the objective of the Clarification is to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics. Further, the Clarification is limited to an elaboration of the "three-part test." This test, which has generated the majority of the questions that have been raised about Title IX compliance, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation.

OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

The draft has been revised to incorporate suggestions that OCR received regarding how to make the document more useful and clearer. For instance, the Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term "developing interests" under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities and why Title IX does not require an institution, under part three of the test, to accommodate the interests and abilities of potential students.

OCR also received requests for clarification that relate primarily to fact- or institution-specific situations that only apply to a small number of athletes or institutions. These comments are more appropriately handled on an individual basis and, accordingly, OCR will follow-up on these comments and questions in the context of OCR's ongoing technical assistance efforts.

It is important to outline several points about the final document.

The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes. The first part of the test--substantial proportionality--focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The second part--history and continuing practice--is an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part--fully and effectively accommodating interests and abilities of the underrepresented sex--centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways to comply. Opponents of the test assert, therefore, that the test improperly establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title IX because it measures gender discrimination by underrepresentation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

First, it is clear from the Clarification that there are three different avenues of compliance. Institutions have flexibility in providing nondiscriminatory participation opportunities to

their students, and OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated. The fact that each part of the three-part test considers participation rates does not mean, as some opponents of the test have suggested, that the three parts do not provide different ways to comply with Title IX.

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting institutions--notwithstanding the long history of discrimination based on sex in athletics programs--to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.)

OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

What is clear then--because, for example, part three of the three-part test permits evidence that underrepresentation is caused not by discrimination but by lack of interest--is that underrepresentation alone is not the measure of discrimination. Substantial proportionality merely provides institutions with a safe harbor. Even if this were not the case and proportional opportunities were the only test, the "quota" criticism would be misplaced. Quotas are impermissible where opportunities are required to be created without regard to sex. However, schools are permitted to create athletic participation opportunities based on sex. Where they do so unequally, that is a legitimate measure of unequal opportunity under Title IX. OCR has chosen to make substantial proportionality only one of three alternative measures.

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR

considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.

OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex. Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.

Finally, several parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however, that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a significant challenge that many institutions face today, especially in the face of increasing budget constraints. It has been OCR's experience, however, that institutions committed to maintaining their men's program have been able to do so--and comply with Title IX--notwithstanding limited athletic budgets. In many cases, OCR and these institutions have worked together to find creative solutions that ensured equal opportunities in intercollegiate athletics. OCR is similarly prepared to join with other institutions in assisting them to address their own situations.

OCR is committed to continuing to work in partnership with colleges and universities to ensure that the promise of Title IX becomes a reality for all students. Thank you for your continuing interest in this subject.

Sincerely,

/signed/

Norma V. Cant

Assistant Secretary
for Civil Rights

Enclosure

Jan 16, 1996

Clarification Of Intercollegiate Athletics Policy Guidance: The Three-Part Test

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (Title IX), which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, at 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 *Fed. Reg.* 71413 *et seq.* (1979)).¹

The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

The 1979 Policy Interpretation provides that as part of this determination OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

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

44 *Fed. Reg.* at 71418.

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

In addition, when an "overall determination of compliance" is made by OCR, 44 *Fed. Reg.* 71417, 71418, OCR examines the institution's program as a whole. Thus OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

This Clarification provides specific factors that guide an analysis of each part of the three-part test. In addition, it provides examples to demonstrate, in concrete terms, how these factors will be considered. These examples are intended to be illustrative, and the conclusions drawn in each example are based solely on the facts included in the example.

THREE-PART TEST -- Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program. The Policy Interpretation defines participants as those athletes:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport, or
- d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

44 *Fed. Reg.* at 71415.

OCR uses this definition of participant to determine the number of participation opportunities provided by an institution for purposes of the three-part test.

Under this definition, OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates.

In determining participation opportunities, OCR includes, among others, those athletes who do not receive scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete. OCR's investigations reveal that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team. Because these are significant benefits, and because receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

OCR's analysis next determines whether athletic opportunities are substantially proportionate. The Title IX regulation allows institutions to operate separate athletic programs for men and women. Accordingly, the regulation allows an institution to control the respective number of participation opportunities offered to men and women. Thus, it could be argued that to satisfy part one there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment.

However, because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality--for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality--the Policy Interpretation examines whether participation opportunities are "substantially" proportionate to enrollment rates. Because this determination depends on the institution's specific circumstances and the size of its athletic program, OCR makes this determination on a case-by-case basis, rather than through use of a statistical test.

As an example of a determination under part one: If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's

admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.

As another example, over the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal--i.e., 50 percent of the participants in its athletic program are female--its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy part one.

OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.

As another example, at Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

THREE-PART TEST -- Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under part two of the three-part test (part two), an institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.²

OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities.

Developing interests include interests that already exist at the institution.³ There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.

OCR will consider the following factors, among others, as evidence that may indicate a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

OCR will consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion. It is only necessary to examine part two if one sex is overrepresented in the athletic program. Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part

two if, overall, it can show a history and continuing practice of program expansion for that sex.

In addition, OCR will not find that an institution satisfies part two where it established teams for the underrepresented sex only at the initiation of its program for the underrepresented sex or where it merely promises to expand its program for the underrepresented sex at some time in the future.

The following examples are intended to illustrate the principles discussed above.

At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.

By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and 1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the

context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

THREE-PART TEST -- Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex -- including students who are admitted to the institution though not yet enrolled. Title IX provides that at recipient must provide equal athletic opportunity to its students. Accordingly, the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students.⁴

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

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

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

a) Is there sufficient unmet interest to support an intercollegiate team?

OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

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

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).⁵ For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. *See 44 Fed. Reg.* at 71417. These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

b) Is there sufficient ability to sustain an intercollegiate team?

Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:

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

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

c) Is there a reasonable expectation of competition for the team?

Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

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

Under the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.

CONCLUSION

This discussion clarifies that institutions have three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities. The three-part test gives institutions flexibility and control over their athletics programs. For instance, the test allows institutions to respond to different levels of interest by its male and female students. Moreover, nothing in the three-part test requires an institution to eliminate participation opportunities for men.

At the same time, this flexibility must be used by institutions consistent with Title IX's requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing nondiscriminatory participation opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.

1. The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation. See 44 Fed. Reg. 71413.
2. Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX.
3. However, under this part of the test an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex. Moreover, under part two an institution has flexibility in choosing which teams it adds for the underrepresented sex, as long as it can show overall a history and continuing practice of program expansion for members of that sex.
4. However, OCR does examine an institution's recruitment practices under another part of the Policy Interpretation. See 44 Fed. Reg. 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit potential student athletes.
5. While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.

Appendix D

**LIMITATIONS OF THE DEPARTMENT OF
EDUCATION'S
ONLINE SURVEY METHOD FOR MEASURING
ATHLETIC INTEREST AND ABILITY ON U.S.A. CAMPUSES**

Don Sabo, Ph.D. and Christine H.B. Grant, Ph.D.

June 2005

**LIMITATIONS OF THE DEPARTMENT OF EDUCATION'S
ONLINE SURVEY METHOD FOR MEASURING ATHLETIC
INTEREST AND ABILITY ON U.S.A. CAMPUSES¹**

Don Sabo, Ph.D. and Christine H.B. Grant, Ph. D.²

The Department of Education has endorsed using an online survey method as the sole means of assessing student interest in additional athletic participation opportunities. The March 17, 2005 *Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test—Part Three* would allow colleges and universities to use a “Model Survey” alone to claim compliance with Title IX’s mandate that schools provide equal participation opportunities to male and female students. In particular, the results of the Department’s survey could be used to determine institutional compliance with the third prong of Title IX’s three-part participation test.³ Under this prong, an institution may comply if it can show that its athletics program fully and effectively accommodates the interests and abilities of the underrepresented sex.

Until it issued its new Clarification, the Department had interpreted the third prong of the test to require a systematic evaluation of a host of factors, beyond surveys, to assess whether institutions had fully met the interests and abilities of their female students. See *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (January 1996). The Department’s new “Additional” Clarification would eviscerate that interpretation and allow educational institutions to rely exclusively on a survey to measure unmet interest. But it would be methodologically misguided for institutions to utilize the Department’s on-line survey method as the sole measure of compliance with Prong 3. Instead, sound methodological guidelines dictate that multiple approaches to assessing the athletic interests and abilities of students be deployed. Moreover, the online survey authorized by the new Clarification suffers from serious methodological flaws.

¹ Preferred citation: Sabo, D. & Grant, C.H.B. (June, 2005). *Limitations of the Department of Education's Online Survey Method for Measuring Athletic Interest and Ability on U.S.A. Campuses*. Buffalo, NY: Center for Research on Physical Activity, Sport & Health, D'Youville College.

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³ Under Prong 1 of the three-part test, a school will be in compliance if its representation of male and female athletes is substantially proportionate to its male and female enrollment. For example, if females comprise 54% of the student body, the school will comply with Prong 1 if about 54% of its athletes are female. Under Prong 2, a school will be in compliance if it demonstrates a history and continuing practice of expanding opportunities for the underrepresented gender. Adding teams for women in order to balance team offerings for men, for example, would support compliance. Prong 3 requires a demonstration that the interests and abilities of the underrepresented sex have been fully and effectively accommodated by the school's existing program.

Sound Methodology Requires the Use of Multiple Measures to Evaluate Interest and Ability and Shows the Limitations of a Survey

Basic methodological principles, as well as substantial research, demonstrate that exclusive reliance on a survey to evaluate women's interests and ability to participate in sports is not likely to fairly reveal the true extent of those interests and abilities. This is so for several reasons:

1. Research shows that an individual's disposition and willingness to express personal interest in athletics is influenced by social norms, culture, gender, race, and ethnicity. For example:
 - a. Boys and men are apt to express interest in sports and identify as athletes because these interests are traditionally associated with appropriately "masculine" behavior and identity.⁴
 - b. Girls and women often have a higher set of behavioral standards for what it means to be an "athlete." Researcher and author Catherine McKinnon, for example, practiced the martial arts for five years, two hours per night, and five nights a week before she began to consider herself an "athlete."⁵ For many young women, increased involvement with sports entails rethinking traditional cultural notions about femininity.⁶
 - c. The pervasiveness of "Marianism" in some Latina/Hispanic cultures (which emphasizes conformity to housewife-motherhood and discourages nontraditional roles for girls and women) can lead some Latinas to downplay interest and involvement in athletics.⁷

⁴ See Connell, R. W. (2000), *The Men and the Boys*, Berkeley, CA: University of California Press; Messner, M. A. (2002), *Taking the Field: Women, Men, and Sports*, Minneapolis, MN: University of Minnesota Press; Pollack, W. (1998), *Real Boys: Rescuing Our Sons from the Myths of Boyhood*, New York: Henry Holt and Company; Senay, E. & Waters, R. (2004), *From Boys to Men: A Woman's Guide to the Health of Husbands, Partners, Sons, Fathers, and Brothers*, New York: Scribner.

⁵ Stimpson, C. R. (2004), *The Atalanta syndrome: Women, sports, and cultural values*, Inaugural Helen Pond McIntyre Lecture, *Scholar & Feminist Online*, October 20.

⁶ See The President's Council on Physical Fitness and Sports Report (1997), *Physical Activity & Sport in the Lives of Girls: Physical and Mental Health Dimensions from an Interdisciplinary Approach*, Washington, D.C.: Department of Health and Human Services; Sabo, D., Miller, K.E., Melnick, M.J. & Heywood, L. (2004), *Her Life Depends On It: Sport, Physical Activity, and the Health and Well-Being of American Girls*, East Meadow, N.Y.: Women's Sports Foundation.

⁷ Melnick, M., Sabo, D. & Vanfossen, B. (1992), *Educational effects of interscholastic athletic participation on African-American and Hispanic youth*, *Journal of Adolescence*, 27(106):295-308; Melnick, M., Sabo, D. & Vanfossen, B. (1992), *Effects of interscholastic athletic participation on the social, educational, and career mobility of Hispanic boys and girls*, *International Review of Sport Sociology*, 17(1):57-75; Sabo, D., Melnick M. & Vanfossen, B. (1993), *The influence of high school*

2. Any failure to express interest likely reflects a lack of prior exposure, which in turn is the result of discriminatory limitations on women's opportunities. Interest cannot be measured apart from opportunity, particularly in the context of sports, where women's interest in athletics has been limited by the discrimination to which they have been – and continue to be – subjected. As a result, surveys cannot measure the extent to which women would show interest and ability if non-discriminatory opportunities were made available to them.
3. As a related matter, any survey of athletic interests is based on the problematic theoretical assumption that surveys of interest can be used to predict athletic behavior. Behavioral scientists have long observed the discrepancy between attitude and behavior. For example, millions of Americans who profess a keen interest in quitting smoking or losing weight continue to smoke and overeat. Particularly in the context of athletics, where women's opportunities have historically been limited, the converse is also true: individuals who fail to express interest in participating in sports will often embrace the chance to play if offered the opportunity. Many girls who would have expressed no interest in sports, for example, become enthusiastic participants after joining a team because a friend did so, because they were actively recruited by an enthusiastic coach, or because they were taken to tryouts by a pro-sport parent.

For all of these reasons, the Department's long-standing prior policies, including its 1996 Clarification, make clear that a survey of students is only one of many factors that schools must consider in evaluating whether they are fully meeting the interests and abilities of their female students. The 1996 Clarification also requires schools to consider requests by students to add a sport; participation rates in club or intramural sports; participation rates in sports in high schools, amateur athletic associations and community sports leagues in areas from which the school draws its students; and interviews with students, coaches, teachers and administrators.

The use of multiple measures, as set forth in the Department's 1996 Clarification, is methodologically sound and enhances the likelihood that schools will accurately assess the extent of their students' interest in additional sports opportunities. Moreover, this approach has worked as a practical matter. According to the Additional Clarification, between 1992 and 2002, approximately two-thirds of schools complied with Title IX's athletic participation requirements under the third prong of the three-part test.⁸ The evidence thus supports the overall efficacy of the Department's long-standing policies, and their reliance on a multiple-measure approach, for promoting athletic opportunity and assessing compliance with Title IX for both sexes.

athletic participation on post-secondary educational and occupational mobility: A focus on race and gender, *Sociology of Sport Journal* (Winter, 1993).

⁸ Additional Clarification at 2.

The Department's Survey Suffers from Methodological Flaws

Although the Department's Additional Clarification was issued with 177 pages of policy and text, the methodological procedures it authorizes and the rationales for those procedures need systematic review and assessment. Even a preliminary review of the Clarification, however, reveals serious concerns about the methodological efficacy of the Department's proposed survey.

1. *The Department's Survey is Likely to Generate Low Response Rates.* Online surveys often result in low response rates, thereby creating the risk of drawing conclusions based on inadequate sample sizes. Many campuses experience difficulty generating full responses to online surveys, which makes it likely that relatively few students would participate in the Department's online survey.

The problem of low response rates is exacerbated because the Department's survey does not take into account variation in student access to or use of e-mail. The Department's design deploys erroneous sampling logic by assuming that use of campus-based e-mail services is either supplied or utilized uniformly across student populations. But student access to and use of university and college e-mail services is varied and uneven. Some students frequently use college-based online services for e-mail; others do not use it at all. At institutions where frequent disruptions or periodic shutdowns of e-mail services occur, students may seek and secure commercial e-mail suppliers. Students who work full-time or part-time jobs may spend less time online and/or check e-mail less frequently. Poor students may not own a computer or be able to pay for convenient e-mail services. And numerous students may ignore campus e-mail systems in order to avoid real or perceived encounters with what they regard as bureaucratic or commercially invasive spam.

Some (but not all) campuses maintain policies requiring students to check email at certain intervals--for example, once a week or once a day. But even on campuses that do have policies that require students to check email regularly, one cannot guarantee that students actually conform to such policies, or that the institution maintains current (and reliably accurate) directories of e-mail.

Moreover, the Department's survey methodology does not take into account the accelerating diversity in telecommunication preferences among college students. The campus-based online survey design ignores both national and international trends among young and tech-savvy consumers to increasingly rely on text messaging through cell phones as a vehicle for interpersonal communication. Those students who are opting for these regional, "off-campus" communication vehicles would likely not be included in campus-based online surveys.

For all of these reasons, the Department's survey is likely to yield a low response rate. Additionally, nothing in the new Clarification makes clear how policymakers will determine when a large enough sample has been generated by a particular administration of the Department's survey.

2. *The Department's Methodological Procedure to Count Nonrespondents is Misguided.* The User's Guide for the Department's survey recommends that institutions conduct a "census" of the student population. Under a census methodology, there is no attempt to draw a sample from the student population. Rather, a census involves polling all students. But unless completing the online survey is somehow made mandatory (e.g., student registration is blocked until the survey is completed),⁹ it is highly unlikely that all students will complete it, based on the reasons set forth above, among others.

Recognizing this reality, the Department's survey guidelines treat the survey methodology as a "census" if all students are simply contacted and asked to go to a website and complete the questionnaire. If a student does not respond to the request, the Clarification specifically states that schools may interpret the nonresponse as evidence of lack of interest—in other words, that student is still "counted" as a respondent and, furthermore, operationally defined as someone with no interest in athletics. By equating nonresponses to a lack of athletic interest (past, present, and future), the Office for Civil Rights' methodological procedures do not meet basic scientific criteria for establishing reliable and valid survey results and interpretations.

Furthermore, even if students are screened at the point of registration using a campus ID, one cannot be certain that the person completing the registration is the student who is being targeted; e.g., it is not uncommon for students to have other people register for them. On many campuses, some students, faculty, and staff share their campus IDs and passwords, even though doing so is against University policy.

3. *The Department's Survey is Properly Understood to Embody a Sampling Methodology, but is Unlikely to Generate a Representative Sample.* Based on the foregoing analysis, what the Department's survey really relies on is a sampling methodology. But unfortunately, there is nothing in the new Clarification that ensures that the sample that responds to the on-line survey will be representative of the student population. One major problem is referred to as the "coverage error," which occurs, for example, when a researcher assumes that those who did not respond to the survey are similar in all other respects to those who did respond. In many instances, however, the respondents may be very different from the nonrespondents in ways that remain hidden or are not measured. When this occurs, the sample is compromised and the empirical results become suspect.

In addition, the Department's survey suffers from blind recruitment of respondents. A methodological bias often inherent in an online survey method is that participants are blind-recruited online, and thus, respondents self-select for participation rather than being randomly or strategically pre-selected from an existing population roster and individually

⁹ Even if the online survey is made mandatory, students who do not want to participate (irrespective of their interest or participation in athletics) may "protest" the requirement by providing inaccurate information (e.g., indicating "no interest/experience" at the beginning). This may be particularly likely since the survey will probably take many students more time to complete than is stated in the Clarification. The difficulty is that analysts would not know the extent of the inaccuracy.

targeted for recruitment by researchers. Much on-line survey research is done by posting a link to a survey on web pages visited by the target demographic--e.g., a link to the National Basketball Association website, a website for cat or dog lovers, or CNN.com. Analysis and inferences based on resulting data are limited in value because the respondents are entirely self-selected, compared to research designs in which respondents are contacted directly by phone, e-mail, or face-to-face and then enlisted in a study.

4. *Some Students May Misinterpret the Purpose of the Department's Survey.* The Department of Education survey is called "Assessment of Students' Athletic Interests & Abilities." Because those terms are undefined, some students may misinterpret the goal of the survey as an assessment of their interest in participating in intercollegiate sports rather than the broad spectrum of real and potential recreational, intramural, club, or junior varsity activities that might be part of campus life. But schools have an obligation to ensure gender equity in all athletic offerings, not just intercollegiate teams. Moreover, to the extent that these latter athletic activities are historically marginalized or comparatively under-funded within a specific campus community, students could fail to see them as viable or realistic choices in comparison with the notoriety and institutional centrality of the major intercollegiate sports. Personal interest in participating in a wide array of athletic activities could be skewed or dampened by a realistic assessment of the institutional inequalities that actually exist on campus. As a result, surveys are unlikely to capture the full range of athletic interests that institutions should consider in structuring each level of their sports programs.

Conclusion

The above deficits of the Department's online survey method call into question its empirical efficacy. As a result, it would be methodologically misguided for institutions to utilize the Department's online survey method as a sole measure of compliance with Prong 3. Moreover, the Clarification states that the Department "is not requiring that individual schools conduct elaborate scientific validation" of the procedures and results of the online survey.¹⁰ But the procedures and results are suspect unless they are validated based on established scientific and methodological criteria.

We encourage policymakers, government officials, educators, and researchers to fully evaluate the Department's proposed use of the online survey method to further elucidate these and other methodological concerns.

¹⁰ See <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf>

Appendix E

Go Out and Play

Youth Sports in America

Executive Summary

October 2008

Women's Sports Foundation

Executive Summary

This study measures the nationwide participation rates of girls and boys in exercise and organized team sports. The central focus is on how the intersections among families, schools and communities are related to children's involvement and interest in athletics and physical activity. Some of the personal and social benefits associated with children's athletic participation are also identified and discussed. The athletic interests and involvements of girls and boys are examined from childhood through late adolescence, including entry into sport as well as drop-out patterns.

American families display a wide array of cultural, economic, racial and ethnic characteristics. Despite this diversity, all families have two things in common. First, they nurture children from infancy through young adulthood. Second, parents do not raise their children in isolation. Family life unfolds within an institutional web that includes schools, churches, community organizations, after-school programs, government, economic forces and—central to this study—sports. It is within this wider social matrix that children's athletic ability and interest in physical activity take shape and either blossom or dwindle.

The findings and conclusions in this report are based on two nationwide surveys. The Women's Sports Foundation commissioned Harris Interactive to complete a school-based survey of youth drawn from a random selection of approximately 100,000 public, private and parochial schools in the United States. The school-based survey method yields highly reliable results. The nationwide sample consists of 2,185 third- through 12th-grade girls and boys. In addition, phone interviews were conducted with a national cross-section of 863 randomly selected parents of children in grades 3 through 12. Parents were asked how they think and feel about their children's interest and involvement in sports and physical activity. African-American and Hispanic parents were over-sampled in order to deepen understanding of the needs and experiences of underserved girls, boys and their families.

This report confirms that sports are a resource for U.S. children as well as their families. Children's athletic participation was associated with higher levels of family satisfaction. Sports and physical activity were also linked with improved physical and emotional health, academic achievement and quality of life for children.

A complex picture of gender differences in athletic opportunities and physical activity emerges from this study. There is a nationwide gender gap in physical activity and sports involvement between girls and boys. The size of the gender gap, however, does not stretch uniformly across the country and all age brackets. In many communities, girls show similar levels of athletic participation and interest as boys. In other communities, however, access to sport and physical activity for girls appears to be thwarted by economic disadvantages and inadequate school resources. Young urban girls, especially, have a narrower window of opportunity

for becoming involved with sports than their male counterparts and girls from suburban and rural communities. One in four ninth- to 12th-grade girls has never participated in organized or team sports in urban schools, compared to about one in six urban boys. In short, progress on the gender front in U.S. sports has been made, but it remains uneven, and it is often poor and mainly urban girls who are being left behind.

Some of the major findings documented by this study are summarized below within four main themes.

Participation In Sports And Physical Activity: The Gender Gap

1. A Gender Gap Exists in Sports and Physical Activity—But It Is Uneven

Girls generally are not as involved with sports and physical activity as boys. However, the gender gap is wide in some areas and narrow in others. Whereas similar rates of sports participation between girls and boys exist in suburban communities, urban and rural girls are less involved than their male peers. Variations in the gender gap in athletic participation often appear to be driven by economic disparities, race and ethnicity, and family characteristics. These variations strongly suggest that the girls' and boys' participation in sports and exercise is primarily shaped by access and opportunity.

2. Interest in Sports and Exercise Among Girls and Boys Is About Opportunity and Encouragement, Not Biology

Girls' and boys' interest in sports and exercise varies by grade level, school location and income level. In some communities boys and girls show similar levels of interest in sport, while in other communities, boys' interest levels are higher than those of girls. Parents very often feel that their daughters and sons have similar interest in sports, especially when their children are younger (third through eighth grades). In short, interest in sports can often vary more within genders than it does across genders. And finally, boys tend to overestimate their interest in sports, while girls lean toward underestimating their athletic interests. For example, 42% of third- to eighth-grade boys who are non-athletes said that "sports are a big part of who they are," compared to 16% of non-athletic girls. Female athletes, moreover, are often involved with several clubs and organizations outside sport, whereas male athletes focus more singly on sports.

3. The Gender Gap in Physical Education

Urban girls are the "have-nots" of physical education in the United States, with 84% report having no PE classes at all in the 11th and 12th grades. Rural girls in the same grades are not far behind with 68% reporting no PE classes. Across the country, young low-income children—both girls and boys—are underserved with regard to school-based physical education. Generally, more boys attend PE classes than girls, especially in urban and rural schools.

4. Girls Now Take Part in a Wider Array of Sports and Exercise Activities than Boys

Girls explore a wider array of sports and exercise activities than boys do, including traditional, recreational and newly emerging sports such as cheerleading, dance, double Dutch and volleyball. Boys focus more on traditional sports and exercise activities, which, most often, take the form of organized school and community sports.

5. Girls Have a Narrower Window of Opportunity in Sports

Girls enter sports at a later age than boys (7.4 years old, compared to 6.8 years old). The widest gap between the age girls and boys enter sport appears in urban communities (7.8 and 6.9 years old, respectively). Girls also drop out sooner and in greater numbers than boys. Girls' late start may set them up for failure in sports during the middle-school years (sixth through eighth grades).

Sports And Family Life

1. Sports Are an Asset for U.S. Families, and Families Are a Resource for Young Athletes

Children's involvement with sports is associated with higher levels of family satisfaction. Youth sports can help build communication and trust between parents and children. Sports help parents and children spend more time together. These positive connections are particularly evident in dual-parent families, but they also resonate in single-parent families.

2. Many Parents Say Their Daughters Are Being Shortchanged

While a majority of parents say they want similar levels of athletic opportunity for their daughters and sons, many believe that their schools and communities are failing to deliver the goods. Many parents are aware that girls are getting fewer opportunities in sports and physical activity than boys are. More African-American and Hispanic parents feel schools and communities are failing their daughters.

3. More Dads Need to "Step Up to the Plate" to Mentor Young Female Athletes

Non-family members are the top two people girls mentioned as their mentors in exercise and sports—coaches and physical education teachers. For boys, in contrast, dads and coaches top the list of main mentors. Forty-six percent of boys and 28% of girls credit their father for teaching them "the most" about sports and exercise. While mothers and fathers provide similar levels of encouragement and support for both their daughters and sons, many girls may be shortchanged by dads who channel more energy into mentoring sons than daughters.

Children's Well-Being and Development

1. Sports Help Create Healthy, Well-Adjusted Children

Sports are a health and educational asset for U.S. girls and boys. Organized sports are associated with children's general health and body esteem, healthy weight, popularity, quality of life and educational achievement. Female athletes often derive greater benefits from athletic participation than their male peers.

2. Participating in Organized or Team Sports Helps Enhance Girls' Quality of Life

Girls who do not currently participate in a team sport are less content with their lives than girls involved with sports. Sports involvement enhances the quality of life for girls.

3. The Benefits of Athletic Participation Unfold Long Before High School

Many of the social, educational and health benefits linked to sports participation begin during the elementary school years. The positive contributions of athletic involvement to youth development are especially visible among sixth- to eighth-grade girls and boys.

Diverse and Unrecognized Populations

1. Sports are Racially and Ethnically Diverse, but Inequities Are Very Real

Youth sports are racially and ethnically diverse. Fifteen percent of all girls and 16% of all boys who participate in sports are African-American. Seventeen percent of female athletes and 15% of male athletes are Hispanic, while Asian girls and boys comprise 8% and 12%, respectively, of children who play sports. And yet, proportionally fewer girls of color are involved with sports than white girls. Girls of color are also much more likely than their male counterparts to be non-athletes. The same discrepancies across racial and ethnic groups do not exist among boys. Girls of color are doubly hit by both gender and race discrimination in sport.

2. Children with Disabilities

About nine out of every 100 U.S. families have a child who has a disability that can interfere with sports and exercise. Most sports and physical activity programs are currently designed to meet the interests and needs of children without disabilities. Some sport leaders and educators assume that children with some kind of disability are not capable of being physically active or just not interested in sports. The findings in this study, however, show that children with special needs are interested in sports and exercise, and many of their parents want to see more programs offered in schools and communities. A gender gap in sports and exercise activity does exist among children with disabilities, and it is the boys who are less physically active than the girls. Finally, the exercise frequency of both girls and boys with disabilities declines more sharply than their counterparts without disabilities from the elementary through middle school and high school years.

3. Boys in Immigrant Families Are More Likely than Girls to Play Sports

This is the first study to gather some basic facts about athletic participation among children in immigrant families. Nearly a quarter (23%) of children have at least one parent born outside the United States. Compared to boys, girls in immigrant families report lower rates of athletic participation. Many immigrant parents also hold more traditional attitudes toward girls' and boys' interest in sports.

Policy Recommendations

This research report is designed to foster public discussion and policy debate over the state of girls' sports and physical activity in the United States. In order to fulfill its strategic research initiative, the Women's Sports Foundation seeks to unite and educate local and national nonprofit organizations, government agencies, schools and sport organizations that serve the interest of girls' health and empowerment through physical activity. A National Policy Advisory Board was created to review the findings of this study and to identify key policy recommendations. The members are recognized leaders from academic research, education, health and sport. See Appendix A of the full report for a list of their names and affiliations.

The findings in this study form an evidence-based foundation to help policymakers assess the current state of U.S. girls' and boys' physical activity and sports. The Center for Research on Physical Activity, Sport & Health has worked with the Women's Sports Foundation to develop nine clusters of policy recommendations to advance the health and well-being of both girls and boys through sports and physical activity. See the final section of the complete report.

Appendix F

GAO Report to the Ranking Minority Member, Subcommittee
on Criminal Justice, Drug Policy and Human Resources, Committee
on Government Reform, House of Representatives

GENDER EQUITY

Men's and Women's Participation in Higher Education

December 2000

Result in Brief¹

Since Title IX's enactment in 1972, women's participation in higher education academic programs has increased significantly, whether measured by the proportion of students enrolled in higher education who are women, numbers of women enrolled in higher education, or the proportion of women who have received degrees in certain fields of study in which men were the predominant degree recipients.² In 1950, about one-quarter of undergraduate students were women. Women's share of undergraduate enrollment increased to 43 percent in 1971 and 56 percent in 1997. Women's participation in a number of predominantly male fields such as business, law, and medicine has also increased greatly although changes in other male fields, such as engineering and physical science, have been smaller. In some predominantly female fields, including elementary education and nursing, there have been increases in the proportion of men receiving degrees. In late 1995-96, first-year college men and women were about as likely to receive financial aid and received about the same average amounts of grant and loan aid. Men continue to outnumber women on faculties in predominantly male fields at colleges and universities.

Women's participation in intercollegiate sports at 4-year colleges and universities has increased while men's participation has dropped slightly, although they still participate at a higher rate than do women. From Title IX's enactment to the 1997-98 school year, the number of women in intercollegiate sports grew from an estimated 30,000 (1.7 percent of full time enrolled undergraduate women) to 157,000 (5.5 percent of full-time undergraduate women). Over the same period, the number of men participating fell from about 248,000 (9.5 percent of full-time undergraduate men). On average, in the 1998-99 school year, NCAA member schools spent more per male intercollegiate sports participant than female participant in recruiting, coaches' salaries, and operations. However, they spent more on athletic scholarships for women than for men. Men continue to hold the majority of athletic director positions in intercollegiate athletics.

Because various factors such as other civil rights laws and changing societal attitudes have also contributed to changes in women's roles, it is difficult to isolate Title IX's specific

¹ Summary was extracted from the entitled GAO report, pp 4-5. Report accessed at <http://www.gao.gov/new.items/d01128.pdf>.

² We defined predominantly male field of study as those in which, in school year 1971-72, (1) women earned fewer than 25 percent of the degrees awarded and (2) at least 50,000 bachelor or 1,000 first professional degrees were awarded. The 25 percent figure is based on the Department of Labor's definition of nontraditional occupations.

effects. We found widespread agreement, however, among representatives from the higher education community and Title IX observers, regardless of their perspective on current Title IX policy, that Title IX has contributed to increased opportunities and participation for women in the classroom and on the playing field. There was no agreement, however, on whether the law has contributed to the decline in the number of men involved in intercollegiate sports. Although Education has not terminated its funding for any postsecondary institution for a violation of Title IX, federal enforcement has had an effect through other means. Education's Office for Civil Rights (OCR), which has the lead enforcement responsibility for most Title IX issues, has instead enforced Title IX through a variety of methods, including complaint investigations, compliance reviews, and the issuance of policy guidance. OCR's approach to enforcement emphasizes collaboration and negotiation, consistent with statutory requirements to attempt to secure compliance by voluntary means. In addition, private lawsuits have played an important role in Title IX enforcement.

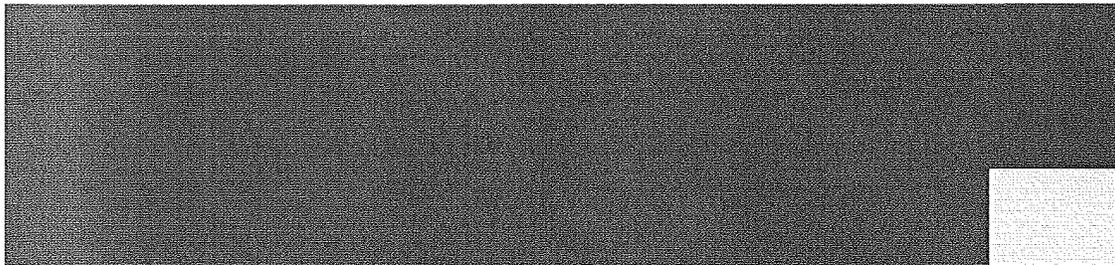
Appendix G



Who's Playing College Sports?

Trends in Participation

June 5, 2007



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This report is the first in a series of three gender equity reports. The second report will examine which factors influence intercollegiate participation changes, with a special focus on Title IX, spending on men's basketball and football, and changing preferences for less prominent men's sports. It is scheduled for release in January 2008. The third report will examine how the racial and ethnic composition of intercollegiate athletes has changed over time. It is scheduled for release in June 2008.

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Who’s Playing College Sports? Trends in Participation

Table of Contents

About the Women's Sports Foundation	2
Acknowledgments	2
Executive Summary	3
Major Findings	3
Policy Implications	4
How Are Colleges and Universities Doing? Grading Participation, Documenting Expansion	4
Introduction	6
Findings	7
Women's Participation	7
Men's Participation	9
Female Share of Athletes	11
Compliance with Title IX	11
Distribution of Institutions Across Athletic Organization Affiliations and Divisions	13
Participation Levels by Affiliation and Division	13
Title IX Compliance by Affiliation and Division	16
What Explains These Participation Trends	17
Policy Implications	18
How Are Colleges and Universities Doing? Grading Participation, Documenting Expansion	19
Appendix A: Comparison with Alternative Reports	21
College Sports Council Longitudinal Study of NCAA Participation Data (College Sports Council, 2007)	21
Intercollegiate Athletics: Comparison of Selected Characteristics of Men's and Women's Programs (General Accounting Office, 1999)	22
Appendix B: Sample Overview and Data Corrections	24
Sample Overview	24
Data Corrections	24
Appendix C: Cross Country and Track and Field	26
Appendix D: Title IX and Athletics	27
References	29

Executive Summary

The 35th anniversary of Title IX is an excellent time to consider men's and women's participation in intercollegiate athletics. This study provides the most accurate and comprehensive examination of participation trends to date. We analyze data from almost every higher education institution in the country and utilize data and methods that are free of the shortcomings present in previous research on this subject. A 10-year NCAA sample containing 738 NCAA colleges and universities is examined over the 1995-96 to 2004-05 period. In addition, a complete four-year sample containing 1,895 higher education institutions is examined over the 2001-02 to 2004-05 period.

The results demonstrate that women continue to be significantly underrepresented among college athletes. At the average higher education institution, the female share of undergraduates is 55.8% while the female share of athletes is 41.7%. Women did enjoy a substantial increase in participation opportunities in the late 1990s, but this progress slowed considerably in the early 2000s. In fact, the increase in women's participation levels was roughly equal to the increase in men's participation levels between 2001-02 and 2004-05. Progress towards more equitable participation numbers for men and women has stalled.

Debates over Title IX have focused more on maintaining the numerous athletic opportunities that men have historically enjoyed rather than ensuring that women gain access to the opportunities they have been historically denied. In other words, the significant underrepresentation of women among college athletes often receives relatively little attention. Instead, the debate focuses on whether or not men have maintained their high participation levels, and many claim that men's athletic participation has seriously declined over time. The results of this study clearly refute this claim and instead indicate small overall increases in men's participation in intercollegiate athletics. Men's participation levels grew slightly between 1995-96 and 2001-02, a period containing the *Cohen vs. Brown* decision that encouraged colleges and universities to take Title IX more seriously. Furthermore, men's participation levels continued to increase between 2001-02 and 2004-05, a moment of tough financial times for many higher education institutions.

This report demonstrates the importance of providing a complete portrait of participation trends. Examination of specific sports or sets of institutions can produce misleading results. For example, participation in men's wrestling and tennis declined substantially over time, but other men's sports (football, baseball, lacrosse and soccer) experienced much larger gains. While it is true that men's participation levels fell slightly among Division I-A institutions, no other set of institutions experienced declines and many saw their men's participation levels increase.

Major Findings

1. Women's athletic participation levels substantially increased during the late 1990s, but this growth slowed considerably in the early 2000s.
 - ◆ For the 10-year/738 NCAA institutions sample, female participation grew by almost 26,000 athletes between 1995-96 and 2004-05, but only 15% of this increase came during the 2001-02 to 2004-05 period.
 - ◆ For the complete four-year/1,895 institutions sample, female participation grew by 11,000 athletes between 2001-02 and 2004-05, an increase similar to that experienced by men.
2. Women's participation still lags far behind men's participation levels.
 - ◆ For the average higher education institution in the complete four-year/1,895 institutions sample, the female share of undergraduate enrollment in 2004-05 was 55.8% while the female share of athletes was only 41.7%.
 - ◆ For the complete four-year/1,895 institutions sample, the reported number of men's participants in 2004-05 was 291,797, while the corresponding number for women was 205,492. In combination, these figures demonstrate that as of 2004-05, only 41% of athletic participants were women and 151,149 female athletes would need to have been added (assuming no reduction in male participants) to reach a share of 55%, the female share of full-time undergraduates in the fall of 2004.

3. Men's overall athletic participation levels increased over time.
 - ◆ For the 10-year/738 NCAA institutions sample, male participation grew by around 7,000 athletes between 1995-96 and 2004-05, an average of almost 10 athletes per institution.
 - ◆ For the complete four-year/1,895 institutions sample, male participation grew by almost 10,000 athletes between 2001-02 and 2004-05, an average of slightly over five athletes per institution.
4. While a few men's sports suffered substantial declines, a larger number of men's sports enjoyed increases that far outnumbered those losses.
 - ◆ For the 10-year/738 NCAA institutions sample, only tennis (-678) and wrestling (-488) experienced declines of more than 80 athletes between 1995-96 and 2004-05. In contrast, four men's sports grew by much larger amounts: football grew by more than 4,000 participants while baseball (+1,561), lacrosse (+1,091) and soccer (+758) also rose sharply.
 - ◆ For the complete four-year/1,895 institutions sample, only two men's sports (tennis and volleyball) experienced declines of more than 60 athletes between 2001-02 and 2004-05, while 12 men's sports had increases of at least that amount. Men's football, baseball, lacrosse and soccer again enjoyed the largest increases.
 - ◆ For some of the growing men's sports (especially football), the participation increases were primarily due to growth in the average roster size. As a result, the total number of men's teams essentially remained the same over the period of study.
5. The only subset of higher education institutions that experienced declines in men's participation levels was NCAA Division I-A schools, the institutions that spend the most on intercollegiate athletics.
 - ◆ For the 10-year/738 NCAA institutions sample between 1995-96 and 2004-05, men's participation grew in Divisions II and III, remained mostly the same in Divisions I-AA and I-AAA, and fell only in Division I-A.
 - ◆ For the complete four-year/1,895 institutions sample between 2001-02 and 2004-05, all six of the major intercollegiate athletic organizations (NCAA, NAIA, NCCAA, NJCAA, COA, NWAAC) experienced overall increases in men's participation levels.

Policy Implications

Many of the arguments against Title IX in intercollegiate sports are not supported by the data presented in this comprehensive report. The findings in this study have implications for the ways that policymakers think about how Title IX has shaped the lives and opportunities of female and male athletes on American campuses.

1. Further weakening of Title IX, as represented by the March 2005 policy clarification, is unjustified.
2. Title IX does not need to be reformed to stop large overall decreases in men's athletic participation because such decreases have not occurred.
3. The debate over Title IX should not be based on the experience of a few individual sports.
4. Efforts to analyze and stem reductions in men's sports should focus on Division I-A institutions, the only set of institutions that experienced declines. Future attempts to explain the declines of men's athletic participation at Division I-A institutions should consider institutional policies and practices associated with the "arms race" in athletic spending.

How Are Colleges and Universities Doing? Grading Participation, Documenting Expansion

This report contains an online component (available at www.WomensSportsFoundation.org) that enables readers to evaluate and compare each higher education institution's performance in relation to its peers. We present the female share of undergraduates and the female share of athletes for each institution to examine whether the gender composition of an institution's athletes is similar to the gender composition of its student body. To help highlight colleges and universities that perform well in this regard, we assign grades. To identify higher education institutions that recently expanded the number of opportunities for female athletes, we also list the change in women's participation levels over recent years. Please see page 19 for additional details and a description of the grading criteria.

Introduction

The year 2007 marks the 35th anniversary of the passage of Title IX, which prohibits discrimination by gender in any federally funded educational institution. Although Title IX applies broadly to all aspects of education, the focus of this report is its application to intercollegiate athletic participation. Since the passage of Title IX in 1972, athletic opportunities for female undergraduates have expanded considerably.

To what extent has women's athletic participation continued to increase over the last 10 years? Have recent gains addressed the historical gender inequities within intercollegiate athletics? Such questions are important but sometimes missing within the Title IX debate. In contrast, much attention focuses on whether male athletes continue to enjoy their high participation levels. Some assert that men's athletics have been severely reduced, but these claims are rarely based on definitive statistical evidence. When sound data and analyses are utilized, how have men's participation levels changed over time?

In the past, these questions were difficult to answer due to a scarcity of data on intercollegiate athletics participation levels, which has prevented researchers from conducting substantial longitudinal analyses. As a result, estimates of participation trends can only be drawn from a limited number of reports, which contain contradictory findings in terms of men's participation levels and often possess serious shortcomings. A previous Women's Sports Foundation report (Sabo, 1997) and a 2001 Government Accounting Office (GAO) report found that men's sports have increased over time, yet a recent College Sports Council (CSC) study and a 1999 GAO report produced contradictory results. Appendix A discusses these reports further, and in an effort to generate consensus, demonstrates that past findings that differ from those presented in this report are primarily the result of shortcomings in the data and methodology these studies employ.

As a result of the limited research, great confusion exists regarding how athletic participation levels in higher education have changed over time. The hearings of the Secretary's Commission on Opportunity in Higher Education (2002-03) focused extensively on changes in athletic participation for men and women over time. The commission members brought in several experts to discuss the existing reports with "the hope . . . that there would be some clarity and unanimity regarding some of these numbers," but the hearings ended with little consensus on how participation opportunities have changed over time.

The passage of the Equity in Athletics Disclosure Act (EADA) in 1994 created the opportunity for the clarity and unanimity that the commission members desired. This act requires colleges and universities to report detailed data on their athletic program to the general public. While some of the reported data are flawed, most notably the financial data, the participation data contain relatively few errors, and researchers can identify and adjust for these errors.

This report utilizes available EADA data to provide the most accurate and comprehensive analysis of how intercollegiate athletic participation levels have changed over time. This report differs from earlier studies in a number of important ways. The sample contains almost all institutions of higher education, while previous studies used only a subset of schools. As demonstrated in Appendices B and C, we expended great effort to ensure data validity, steps that were not taken in many previous reports. And finally, this report uses data that are publicly available, so unlike previous analyses of participation trends, the validity of the findings presented here can be scrutinized by the greater research community.

Due to changes in the reporting requirements of the EADA over time, we use two samples of higher education institutions throughout this study. Our "10-year/738 NCAA institution sample" includes the 738 NCAA institutions that reported data for the 1995-96, 2001-02, and 2004-05 academic years. Our "complete four-year/1,895 institutions sample" contains the 1,895 higher education institutions that reported data for 2001-02 and 2004-05, a nearly complete roster of all postsecondary institutions that offer athletic departments. As discussed in Appendix B, we use a smaller sample for the 10-year period, because the EADA did not require institutions to report participation data to the Office of Postsecondary Education (OPE) until 2000-01. As a result, a more limited amount of data is available for 1995-96.

Findings

Women's Participation

As demonstrated by Table 1, female participation in intercollegiate athletics increased by approximately 25,000 athletes over the 1995-96 to 2004-05 period for the 10-year/738 NCAA institutions sample. These gains were concentrated in the early years of the period as progress towards gender equity slowed considerably during the last three years of the period. Almost 85% of the increases in women's participation occurred between 1995-96 and 2001-02.

Participation trends varied significantly across sports. Soccer grew by more than 4,000 participants, while rowing (+2,779), softball (+2,203), swimming (+1,630) and lacrosse (+1,550) also experienced substantial gains. Our estimates also demonstrate similarly sized increases for cross country, indoor track and field, and outdoor track and field (see Appendix C for a discussion of these sports). In contrast, a number of sports (squash, tennis, skiing, rifle, sailing, gymnastics and fencing) experienced relatively little or no growth for women.

The results in Table 2 demonstrate that participation levels for women increased by more than 11,000 athletes between 2001-02 and 2004-05 for the complete four-year/1,895 institutions sample. The trends across sports did not differ from those reported for the 2001-02 to 2004-05 period in Table 1. The number of participants in squash, gymnastics and tennis fell, while the largest increases occurred in soccer, track and field, cross country, softball, swimming, volleyball and golf.

The number of women's teams also grew substantially in the late 1990s, but this growth slowed in the early 2000s. (See Table 3.) For the 10-year/738 NCAA institutions sample, 876 teams were added between 1995-96 and 2004-05, an increase of more than one team per school. For the complete four-year/1,895 institutions sample, the increase was 394 between 2001-02 and 2004-05, suggesting that only a minority of institutions added women's teams during this period. The differences by sports were similar to those reported for participation levels, except that one sport, golf, became more noticeable as a growth sport. An additional golf team does not create as many extra participants as other sports do because the average roster size for golf is relatively small (7.2).

Table 1: Women's Participation by Sport, 10-Year/738 NCAA Institutions Sample

Sport	1995-96	2001-02	2004-05	Change: 95-04
Soccer	10,752	14,902	15,632	4,880
Rowing	3,184	5,759	5,963	2,779
Softball	9,706	11,553	11,909	2,203
Swimming	7,088	8,436	8,718	1,630
Lacrosse	3,038	4,432	4,588	1,550
Golf	1,795	2,749	2,956	1,161
Ice Hockey	377	1,222	1,348	971
Water Polo	221	850	950	729
Equestrian	331	848	1,041	710
Volleyball	9,191	9,669	9,896	705
Field Hockey	3,953	4,307	4,356	403
Basketball	10,316	10,721	10,626	310
Other Sports*	279	590	573	294
Bowling	29	224	289	260
Fencing	506	590	622	116
Gymnastics	1,208	1,285	1,310	102
Sailing	361	428	461	100
Rifle	110	123	135	25
Skating	373	368	389	16
Tennis	6,244	6,355	6,256	12
Squash	324	327	311	-13
Subtotal	69,386	85,738	88,329	18,943
Cross Country**	(Estimated increase of 1,426 participants)			
Indoor Track & Field**	(Estimated increase of 3,478 participants)			
Outdoor Track & Field**	(Estimated increase of 1,998 participants)			
Total	(Estimated increase of 25,845 participants)			

* Other Sports include archery, badminton, ice skating, judo, lightweight rowing, pistol, polo, rodeo, rugby, synchronized swimming, track & skeet shooting, water skiing, and wrestling. None of these sports have more than 10 teams in any year.

** See Appendix C for further discussion of cross country and track and field estimates.

Sport	2001-02	2004-05	Change
Soccer	26,312	28,576	2,264
Softball	25,118	25,897	779
Swimming	10,731	11,371	640
Volleyball	20,781	21,409	628
Golf	4,237	4,783	546
Lacrosse	5,385	5,791	406
Equestrian	1,467	1,751	284
Rodeo	337	554	217
Ice Hockey	1,427	1,638	211
Rowing	6,580	6,780	200
Basketball	24,219	24,381	162
Bowling	428	589	161
Water Polo	1,618	1,768	150
Field Hockey	5,176	5,308	132
Sailing	510	595	85
Fencing	616	661	45
Rifle	173	198	25
Skating	503	523	20
Badminton	144	153	9
Squash	338	322	-16
Gymnastics	1,483	1,424	-59
Other Sports*	1,142	1,021	-121
Tennis	10,212	10,023	-189
Subtotal	148,937	155,516	6,579
Cross Country**	(Estimated increase of 837 participants)		
Indoor Track & Field**	(Estimated increase of 1,815 participants)		
Outdoor Track & Field**	(Estimated increase of 1,813 participants)		
Total	(Estimated increase of 11,043 participants)		

* Other Sports include archery, ice skating, judo, lightweight rowing, pistol, polo, rodeo, rugby, synchronized swimming, table tennis, team handball, water skiing, weight lifting, and wrestling. None of these sports have more than 10 teams in any year.

** See Appendix C for further discussion of cross country and track and field estimates.

Sport	1995-2004*	2001-2004*
Soccer	162	86
Golf	141	68
Softball	92	33
Track and Field, Indoor**	71	48
Lacrosse	72	22
Track and Field, Outdoor**	46	18
Swimming	40	15
Cross Country**	34	18
Bowling	30	17
Water Polo	37	7
Ice Hockey	38	6
Rowing	43	2
Volleyball	18	18
Basketball	10	25
Field Hockey	20	7
Equestrian	17	8
Rodeo	1	19
Other Sports	7	11
Sailing	2	4
Rifle	1	-1
Squash	0	-1
Fencing	-1	-1
Skating	-2	1
Gymnastics	-5	-6
Tennis	2	-30
Total	876	394

* The first column of results contains the number of teams added, on net, between the 1995-96 to 2004-05 period for the 10-year/738 NCAA institutions sample. The second column contains the same information for the complete four-year/1,968 institutions sample for the 2001-02 to 2004-05 period.

** See Appendix C for further discussion of cross country and track and field estimates.

Men's Participation

Male participation in intercollegiate athletics increased by approximately 7,000 athletes over the 1995-96 to 2004-05 period for the 10-year/1,865 NCAA sample. (See Table 4.) This increase was steady over the period, occurring during good economic times for colleges and universities (the late 1990s) as well as relatively bad economic times (the early 2000s). The gain in men's overall participation masked differences across individual sports; increases in the growing sports were substantially larger than the declines in the remaining sports. Four sports accounted for almost all of the increase in men's participants: football grew by more than 4,000 participants, while baseball (+1,561), lacrosse (+1,091) and soccer (+758) also rose sharply. Meanwhile, only two sports declined by more than 80 athletes, and these declines were relatively small at -680 (for tennis) and -488 (for wrestling). In general, the trends by sport were similar for men and women in that the sports experiencing no growth for women were those that had declines for men.

Although small in terms of total athletes, the reductions in some of the individual men's sports were relatively large in percentage terms.

For example, rifle fell by only 41 athletes, but that was a 20% decline from 1995-96 levels. To demonstrate how important scale is, consider the following: in 2004-05, the combined number of participants for men's water polo, volleyball, skiing, rifle, fencing, squash, sailing and gymnastics was 3,693. In contrast, the number of football participants grew by 4,063 between 1995-96 and 2004-05. In other words, if the 4,063 increase in participants occurred in these eight sports rather than football, each of these sports would be more than twice as large in 2004-05.

As indicated by Table 5, the growth in men's sports between 2001-02 and 2004-05 was even larger when one considers all higher education institutions (i.e. the complete four-year/1,895 institutions sample). During this period, men's participation levels increased by close to 10,000 for the 1,895 institutions reporting data for both years. This increase is very similar to the 11,000 participant increase reported for women in Table 2 for the same set of institutions. Almost two-thirds (16 of 25) of men's sports experienced gains between 2001-02 and 2004-05. Table 5 shows that the declines in individual men's sports were very slight in relation to the gains in other sports. Only two men's sports experienced declines of more than 60 athletes, while 12 men's sports had increases of at least that amount. As in Table 4, the men's sports that experienced the largest gains were football, baseball, soccer and lacrosse, whose gains dwarfed the losses experienced by volleyball and tennis, the two sports with the largest declines.

Table 4: Men's Participation by Sport, 10-Year/738 NCAA Institutions Sample

Sport	1995-96	2001-02	2004-05	Change: 95-04
Football	43,814	46,716	47,870	4,056
Baseball	19,482	20,506	21,043	1,561
Lacrosse	4,482	5,148	5,573	1,091
Soccer	13,492	13,847	14,250	758
Swimming	6,146	6,136	6,274	128
Other Sports*	536	454	626	90
Water Polo	602	651	684	82
Volleyball	719	845	768	49
Rowing	2,388	2,396	2,436	48
Basketball	11,828	11,842	11,868	40
Skiing	417	402	405	-12
Ice Hockey	3,027	3,057	3,003	-24
Rifle	210	210	169	-41
Fencing	628	542	586	-42
Squash	418	374	368	-50
Sailing	509	403	436	-73
Golf	6,008	6,001	5,932	-76
Gymnastics	354	280	277	-77
Wrestling	5,089	4,787	4,601	-488
Tennis	6,252	5,780	5,572	-680
Subtotal	126,401	130,377	132,741	6,340
Cross Country**	(Estimated increase of 48 participants)			
Indoor Track & Field**	(Estimated increase of 915 participants)			
Outdoor Track & Field**	(Estimated decrease of 202 participants)			
Total	(Estimated increase of 7,101 participants)			

* Other Sports include archery, bowling, cricket, equestrian, judo, sprint football, lightweight rowing, pistol, polo, rodeo, rugby, track & skeet shooting, and water skiing. None of these sports have more than 10 teams in any year.

** See Appendix C for further discussion of cross country and track and field estimates.

Sport	2001-02	2004-05	Change
Football	73,714	76,639	2,925
Baseball	44,367	46,511	2,144
Soccer	28,542	29,903	1,361
Lacrosse	6,964	7,730	766
Swimming	7,917	8,349	432
Basketball	28,235	28,589	354
Other Sports*	786	1,064	278
Golf	11,129	11,374	245
Sailing	498	581	83
Water Polo	1,384	1,461	77
Bowling	232	302	70
Rodeo	1,058	1,125	67
Fencing	568	620	52
Squash	385	380	-5
Wrestling	7,483	7,478	-5
Skating	578	562	-16
Ice Hockey	4,043	4,026	-17
Rowing	2,899	2,876	-23
Rifle	263	232	-31
Gymnastics	353	295	-58
Volleyball	1,752	1,624	-128
Tennis	9,391	9,052	-339
Subtotal	232,541	240,773	8,232
Cross Country**	(Estimated increase of 84 participants)		
Indoor Track & Field**	(Estimated increase of 759 participants)		
Outdoor Track & Field**	(Estimated increase of 890 participants)		
Total	(Estimated increase of 9,965 participants)		

* Other Sports include archery, cricket, judo, sprint football, lightweight rowing, pistol, polo, rodeo, rugby, table tennis, team handball, and water skiing. None of these sports have more than 10 teams in any year.

** See Appendix C for further discussion of cross country and track and field estimates.

Sport	1995-2004*	2001-2004*
Track & Field, Indoor**	34	37
Lacrosse	20	9
Baseball	3	15
Soccer	2	15
Other Sports	4	12
Cross Country**	10	5
Track and Field, Outdoor**	7	8
Golf	8	3
Rodeo	1	10
Basketball	2	8
Football	3	1
Sailing	2	2
Ice Hockey	2	0
Water Polo	5	-3
Skating	0	-3
Squash	-2	-1
Rifle	-1	-3
Rowing	0	-7
Fencing	-5	-2
Swimming	-7	-3
Volleyball	0	-19
Gymnastics	-10	-5
Wrestling	-32	-8
Tennis	-44	-48
Total	2	23

* The first column of results contains the number of teams added, on net, between the 1995/96 to 2004/05 period for the 10-year/738 NCAA institutions sample. The second column contains the same information for the complete four-year/1,968 institutions sample for the 2001/02 to 2004/05 period.

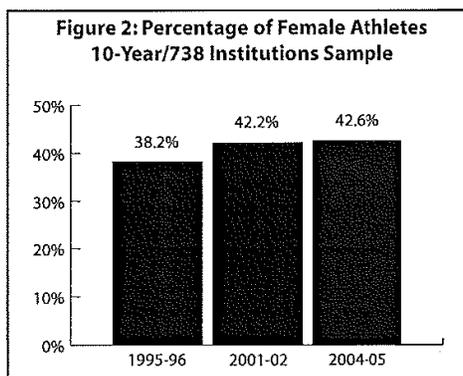
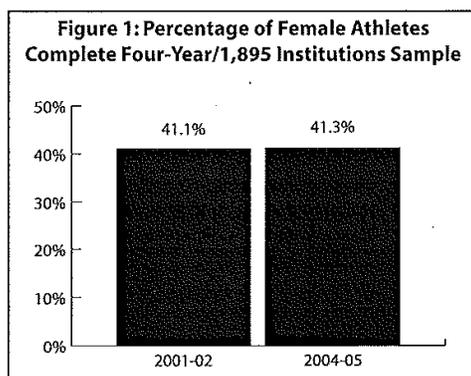
** See Appendix C for further discussion of cross country and track and field estimates.

This overall growth in participation, however, did not translate into growth in the number of men's teams. As indicated in Table 6, the overall number of men's teams experienced almost no change over time. The number of teams for some individual sports, however, did increase or decrease over the period of study. There are two reasons why the overall number of men's participants increased but the overall number of men's teams did not. First, the average roster size increased between 1995-96 and 2004-05 for several men's sports, most notably football (+7.0), baseball (+2.3), lacrosse (+3.4) and soccer (+1.2). Second, the sport experiencing the largest decline was tennis, which had teams with an average roster size of 9.4 in 2004-05. Meanwhile, the average roster sizes in 2004-05 were quite large for growing sports such as lacrosse (32.9), baseball (30.0) and soccer (24.6).

Female Share of Athletes

While women's participation increased more than men's participation, females still comprise a minority of athletes. For the complete four-year sample of 1,895 institutions, the reported number of men's participants in 2004-05 was 291,797 while the corresponding number for women was 205,492. In combination, these figures demonstrate that as of 2004-05, only 41% of athletic participants were women, and 151,149 female athletes would need to have been added (assuming no reduction in male participants) to reach a share of 55%, the female share of full-time undergraduates in the fall of 2004 (NCES, 2005).

As demonstrated in Figure 1, the female participation share changed little (from 41.1% to 41.3%) between 2001-02 and 2004-05 for our complete four-year/1,895 institutions sample. Figure 2 shows similar findings over this period for the 10-year/738 NCAA institutions sample, but it also depicts substantial improvement during the late 1990s. Between 1995-96 and 2001-02, the female share of athletes increased from 38.2% to 42.2%. The female share only increased four-tenths of a percentage point between 2001-02 and 2004-05 (from 42.2% to 42.6%).



The much higher participation levels for men do not imply that a larger number of men's teams were offered. Among our complete four-year/1,895 institutions sample, the average institution offered 6.3 men's teams and 6.7 women's teams in 2004-05. The contrast between the participation and team numbers mainly reflects the large average roster size for football, which was 93 for the 823 institutions offering the sport in 2004-05.

Compliance with Title IX

To demonstrate compliance with Title IX, higher education institutions must meet requirements in three areas: participation, athletic financial assistance and other program areas. For a complete description of these standards, please see Appendix D. To determine whether colleges and universities are providing equitable participation opportunities to female athletes, the Office for Civil Rights (OCR) has developed the following three-prong test.

Prong One: Substantial Proportionality. This part of the test is satisfied when participation opportunities for men and women are "substantially proportionate" to their respective undergraduate enrollments.

Prong Two: History and Continuing Practice. This part of the test is satisfied when an institution has a history and continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex (typically female).

Prong Three: Effectively Accommodating Interests and Abilities. This part of the test is satisfied when an institution is meeting the interests and abilities of its female students even where there are disproportionately fewer females than males participating in sports (U.S. Department of Education, 1997).

An institution fulfills the participation requirement if it adheres to any or just one of the three tests listed above. The Equity in Athletics Disclosure Act (EADA) data allow one to make several broad-brush inferences with regard to compliance with the first two prongs of the Title IX athletic participation standards.

Table 7 contains detailed information on the extent to which participation opportunities were “substantially proportionate” to undergraduate enrollments. For the complete four-year/1,985 institutions sample in 2004-05, the female share of undergraduate enrollments was 55.8%, while

the female share of athletes was 41.7%. In combination, these figures mean that the average institution had a proportionality gap of 14.1 percentage points and was far from compliance with the first prong of the test. The figures were only slightly better for the 10-year/738 NCAA institutions sample, which had an average female share of athletes of 42.7% and an average proportionality gap of 12.5 percentage points.

In a 1996 policy clarification, the Office for Civil Rights (OCR) stated that they would:

consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team (Office for Civil Rights, 1996).

Depending on the size of the institution's athletic department, an institution would need a proportionality gap between one and three percentage points to meet this standard. As Table 7 indicates, the large majority of institutions (somewhere above 86.9% or 1,620 institutions) did not achieve substantial proportionality in 2004-05 because their female share of athletes was below their female share of undergraduates. Furthermore, many institutions were far from compliance with the first prong; for example, 46% of the complete four-year/1,895 institutions sample had a proportionality gap greater than 15 percentage points.

Table 7 also demonstrates that approximately a quarter of institutions added a female sport on net between 2001-02 and 2004-05; that is, around 25 percent of institutions increased the number of women's teams they offer. Some of these institutions, however, may not be in compliance with Prong Two (a history and continuing practice of program expansion), because the 1996 OCR Policy Clarification suggests that a more thorough examination is required. The results in Table 7 indicate that a much larger share of institutions (66%) added a female sport on net between 1995-96 and 2001-02. However, no OCR guidelines suggest that increases in such an historical time frame without additional expansion would demonstrate a history and continuing practice of program expansion.

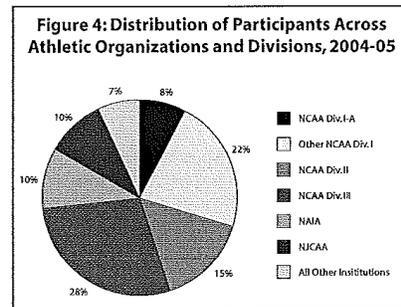
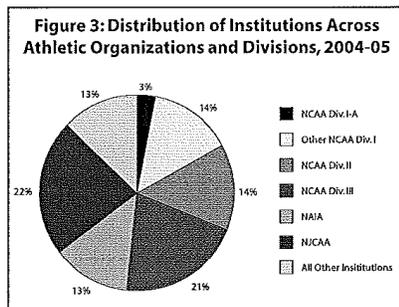
In combination, the figures in Table 7 clearly indicate that the majority of institutions would not meet either of the first two prongs of the three-prong test. More than 86 percent of institutions would not meet the substantial proportionality standard, and 75 percent did not increase their number of women's teams in the early 2000s. A reliable estimate of Prong Three compliance cannot be conducted using EADA data and is therefore beyond the scope of this report.

Table 7: 2004-05 Substantial Proportionality and Program Expansion Estimates

Variable	10-Yr NCAA Sample	Complete 4-Yr Sample
% Undergraduates, Female	55.3%	55.8%
% Athletes, Female	42.7%	41.7%
Average Proportionality Gap (Prop Gap)	12.5	14.1
Percent of Institutions:		
with Prop Gap > 3	85.2%	86.9%
with Prop Gap > 5	76.8%	80.7%
with Prop Gap > 10	58.3%	65.8%
with Prop Gap > 15	39.3%	46.3%
with Prop Gap > 20	23.3%	28.6%
with Prop Gap > 25	10.2%	14.4%
with Prop Gap > 30	2.6%	6.3%
Percent of Institutions Adding Women's Teams on Net:		
Between 2001-02 and 2004-05	24.4%	26.0%
Between 1995-96 and 2001-02	65.9%	n/a

Distribution of Institutions Across Athletic Organization Affiliations and Divisions

To this point, we have discussed colleges and universities in the aggregate. The following two sections examine how participation trends and compliance levels vary by an institution's organizational affiliation and the division within the organization in which it competes. It is helpful to first provide some perspective regarding the location of most intercollegiate athletes, because the vast majority of these athletes compete outside the limelight of the national media. The casual observer may believe that intercollegiate athletics primarily takes place within large athletic departments that offer football and compete in Bowl Championship Series (BCS) athletic conferences (Big-10, Pac-10, Big 12, SEC, ACC, Big East). But as Figures 3 and 4 demonstrate, BCS institutions comprise only 3% of the higher education institutions that offer athletics and account for only 8% of intercollegiate athletes.



Nearly half of the colleges and universities that offer athletics are not in the NCAA (around 48%), although the smaller size of athletic programs at non-NCAA institutions cause them to contain only 27% of the total athletes. These schools mostly reside in the National Association of Intercollegiate Athletics (NAIA) and the National Junior College Athletic Association (NJCAA). The other 49% of athletic departments reside at institutions that are in the NCAA but in other conferences within Division I or in Divisions II or III. Unlike Divisions I and II, Division III institutions do not offer athletic scholarships; also, schools in Division II face limits on the number of athletic scholarships allowed that are different from those in Division I.

Participation Levels by Affiliation and Division

Table 8 describes changes in participation levels by NCAA division and subdivision between 1995-96 and 2004-05 for the 10-year/738 NCAA institutions sample. The results indicate that the average institution in the 10-year NCAA sample added 35 female athletes, with steady growth throughout the NCAA, as each division increased its number of female participants by at least 20 percent. The largest gains, in terms of number of participants, occurred in Divisions I-A and I-AA. The results presented earlier in Table 1 demonstrate that most of the gains (about 85%) took place during the first six years of the period.

The evidence in Table 9 (which contains information for the complete four-year/1,895 institutions sample) also suggests that the gains for female athletes slowed between 2001-02 and 2004-05. The average NCAA institution added about seven to eight female athletes over the period of study, with the largest increase occurring among non-BCS Division I-A institutions. Outside of the NCAA, NAIA schools experienced the largest growth (eight female athletes per institution), while two-year institutions in the NJCAA and the Northwest Athletic Association of Community Colleges (NWACC) lagged behind.

Tables 8 and 9 (on the following pages) also report information on how changes in men's athletic participation varied across organizations and divisions. The figures in Table 8 demonstrate that the overall gains for men

	# Inst.	Total Participants			Participants per Institution		
		1995-96	2004-05	Change	1995-96	2004-05	Change
Women							
All NCAA Institutions	738	101,570	127,415	25,845	137.6	172.6	35.0
Division I	269	46,346	58,739	12,393	172.3	218.4	46.1
Div. I-A (BCS)	60	13,636	17,335	3,699	227.3	288.9	61.7
Div. I-A (Non-BCS)	39	6,278	8,471	2,193	161.0	217.2	56.2
Div. I-AA	88	15,823	19,718	3,895	179.8	224.1	44.3
Div. I-AAA	60	7,334	9,008	1,674	122.2	150.1	27.9
Division II	180	16,574	21,571	4,997	92.1	119.8	27.8
Division III	264	35,866	43,449	7,583	135.9	164.6	28.7
Men							
All NCAA Institutions	738	163,998	171,099	7,101	222.2	231.8	9.6
Division I	269	74,513	72,736	-1,777	277.0	270.4	-6.6
Div. I-A (BCS)	60	22,395	21,918	-477	373.3	365.3	-7.9
Div. I-A (Non-BCS)	39	11,685	10,766	-919	299.6	276.1	-23.6
Div. I-AA	88	26,363	26,312	-51	299.6	299.0	-0.6
Div. I-AAA	60	8,933	8,953	20	148.9	149.2	0.3
Division II	180	28,769	31,886	3,117	159.8	177.1	17.3
Division III	264	55,988	61,210	5,222	212.1	231.9	19.8

* An institution is only reported in a division and subdivision if they are in that classification for 1995-96, 2001-02, and 2004-05.

reported in Table 4 (on page 9) were driven by substantial gains for male athletes in Divisions II and III. The average institution in these divisions increased the number of male participants by about 17-20 over this period. In contrast, NCAA Division I institutions reported declines in men's participation levels. Furthermore, these declines were concentrated within the upper levels of Division I. Division I-AAA schools (which don't offer football) and Division I-AA schools (which have a lower football scholarship limit of 63) saw little change in men's participation levels over time. The declines solely occurred for Division I-A institutions (which can offer up to 85 football scholarships). Within Division I-A, the largest reductions occurred for schools located outside of the BCS conferences; they saw a drop of 24 participants per institution, much higher than the eight-participant drop for BCS schools.

The evidence tells a similar story when one examines all intercollegiate athletic organizations. (See Table 9, next page.) Between 2001-02 and 2004-05 for the complete four-year/1,895 institutions sample, the only decreases for men's participation occurred among non-BCS Division I-A institutions and among institutions switching affiliations within Division I over the period. The reductions in the latter group (which are not listed separately in Table 9) primarily came from the seven Division I institutions that dropped football over the period of study and moved into Division I-AAA. Only one Division I institution added football. The largest gains for men occurred within the NAIA, where the average institution added 15 athletes over the period of study.

	# Inst.	Total Participants			Participants per Institution		
		2001-02	2004-05	Change	2001-02	2004-05	Change
Women							
All Institutions	1895	198,623	209,666	11,043	104.8	110.6	5.8
NCAA	964	149,472	156,687	7,215	155.1	162.5	7.5
Div. I	321	65,537	67,753	2,216	204.2	211.1	6.9
Div. I-A (BCS)	63	18,031	18,373	342	300.5	306.2	5.7
Div. I-A (Non-BCS)	50	10,337	11,082	745	195.0	209.1	14.1
Div. I-AA	113	23,026	23,788	762	203.8	210.5	6.7
Div. I-AAA	83	12,228	12,700	472	147.3	153.0	5.7
Div. II	261	28,626	30,615	1,989	109.7	117.3	7.6
Div. III	375	54,403	57,408	3,005	145.1	153.1	8.0
NAIA	239	17,622	19,627	2,005	73.7	82.1	8.4
Div. I	104	6,484	7,009	525	62.3	67.4	5.0
Div. II	127	10,332	11,803	1,471	81.4	92.9	11.6
NCCAA	41	985	1,132	147	24.0	27.6	3.6
NJCAA	431	17,747	18,397	650	41.2	42.7	1.5
Div. I	220	8,767	9,065	298	39.9	41.2	1.4
Div. II	86	3,783	3,905	122	44.0	45.4	1.4
Div. III	92	3,828	4,035	207	41.6	43.9	2.2
COA	95	7,305	7,713	408	76.9	81.2	4.3
NWAAC	32	1,537	1,511	-26	48.0	47.2	-0.8
Men							
All Institutions	1895	285,215	295,180	9,965	150.5	155.8	5.3
NCAA	964	206,355	210,961	4,606	214.1	218.8	4.8
Div. I	321	83,959	83,036	-923	261.6	258.7	-2.9
Div. I-A (BCS)	63	22,583	22,611	28	358.5	358.9	0.4
Div. I-A (Non-BCS)	50	13,631	13,268	-364	272.6	265.4	-7.3
Div. I-AA	113	32,205	32,323	118	285.0	286.0	1.0
Div. I-AAA	83	12,460	12,594	134	150.1	151.7	1.6
Div. II	261	43,177	44,856	1,679	165.4	171.9	6.4
Div. III	375	77,510	81,543	4,033	206.7	217.4	10.8
NAIA	239	26,264	29,858	3,594	109.9	124.9	15.0
Div. I	104	9,960	11,091	1,131	95.8	106.6	10.9
Div. II	127	15,005	17,531	2,526	118.1	138.0	19.9
NCCAA	41	1,393	1,503	110	34.0	36.7	2.7
NJCAA	431	29,475	29,958	483	68.4	69.5	1.1
Div. I	220	14,461	14,502	41	65.7	65.9	0.2
Div. II	86	5,776	5,985	209	67.2	69.6	2.4
Div. III	92	6,990	7,148	158	76.0	77.7	1.7
COA	95	13,709	14,390	681	144.3	151.5	7.2
NWAAC	32	1,811	1,872	61	56.6	58.5	1.9
* An institution is only reported in a division and subdivision if they are in that classification for 2001-02 and 2004-05.							
** NCAA refers to the National Collegiate Athletic Association; NAIA refers to the National Association of Intercollegiate Athletics; NCCAA refers to the National Christian College Athletic Association; NJCAA refers to the National Junior College Athletic Association; COA refers to the California Community College Commission on Athletics; NWAAC refers to the Northwest Athletic Association of Community Colleges.							

Title IX Compliance by Affiliation and Division

As indicated in Table 10, some variation existed across the 10-year/738 NCAA institutions sample in terms of our very rough estimates of compliance with Prongs One and Two of the participation requirement of Title IX. In 2004-05, institutions in Division I-A BCS conferences had the smallest average proportionality gap, but that was not because they had the highest share of women among their athletes. Although these institutions had a relatively high share of female athletes (44%), the primary reason why they had the lowest average proportionality gap was their relatively low female share of undergraduates (50%). In contrast, Division I-AAA schools had a substantially higher female share of athletes (50%) but an even higher female share of undergraduates (58.5%). Similarly, Division I-A schools that were not in BCS conferences had a similar female share of athletes (45%) as their BCS counterparts, but had a higher average proportionality gap because 53% of their undergraduates were female. Divisions II, III and I-AA had the lowest female share of athletes and the highest proportionality gaps among all NCAA classifications.

	All NCAA	Div I	Div II	Div III	Div I-A (BCS)	Div I-A (non-BCS)	Div I-AA	Div I-AAA
Average:								
Proportionality Gap	12.5	9.2	16.5	13.3	6.2	8.6	12.5	8.3
Percent Undergraduates, Female	55.3%	54.3%	57.4%	55.0%	50.1%	53.2%	54.3%	58.5%
Percent Athletes, Female	42.7%	45.0%	40.9%	41.7%	44.0%	44.6%	41.8%	50.2%
% with Proportionality Gap > 3	85.2%	78.1%	92.2%	89.0%	73.3%	69.2%	85.2%	78.3%
% with Proportionality Gap > 5	76.8%	62.1%	87.2%	85.2%	51.7%	59.0%	73.9%	56.7%
% with Proportionality Gap > 10	58.3%	40.9%	72.2%	67.0%	26.7%	38.5%	56.8%	35.0%
% adding women's teams: 01-04	24.4%	18.6%	31.7%	25.4%	13.3%	25.6%	15.9%	23.3%
% adding women's teams: 95-01	65.9%	72.1%	61.1%	61.4%	75.0%	74.4%	79.5%	53.3%
# of Institutions	738	269	180	264	60	39	88	60

* An institution is only reported in a division and subdivision if they are in that classification for 1995-96, 2001-02, and 2004-05.

In terms of program expansion for females, Division II boasted the largest share of institutions that added women's teams between 2001-02 and 2004-05, while Divisions I-A (BCS) and I-AA had the lowest shares. In contrast, Divisions I-A and I-AA had the highest share of institutions that added women's teams over the 1995-96 to 2001-02 period, while Division I-AAA had the lowest share.

As indicated by Table 11, athletic organizations in the complete four-year/1,895 sample differed substantially in meetings Prongs One or Two of Title IX's three-prong test. Among the largest organizations, NAIA and NJCAA schools had slightly higher average

Measure	All	NCAA	NAIA	NCCAA	NJCAA	COA	NWAAC
Average:							
Proportionality Gap	14.1	13.0	15.9	6.9	16.3	19.4	9.5
Percent Undergraduates, Female	55.8%	55.8%	57.6%	49.3%	56.1%	55.4%	54.8%
Percent Athletes, Female	41.7%	42.8%	41.6%	42.4%	39.8%	36.0%	45.3%
% with Proportionality Gap > 3	86.9%	86.2%	89.1%	75.6%	90.7%	94.7%	84.4%
% with Proportionality Gap > 5	80.7%	78.8%	84.9%	63.4%	86.1%	88.4%	78.1%
% with Proportionality Gap > 10	65.8%	61.2%	78.7%	31.7%	71.2%	85.3%	43.8%
% adding women's teams: 01-04	26.0%	25.9%	36.0%	34.1%	19.7%	17.9%	12.5%
# of Institutions	1895	964	239	41	431	95	32

* An institution is only reported in a division and subdivision if they are in that classification for 2001-02 and 2004-05.
 ** NCAA refers to the National Collegiate Athletic Association; NAIA refers to the National Association of Intercollegiate Athletics; NCCAA refers to the National Christian College Athletic Association; NJCAA refers to the National Junior College Athletic Association; COA refers to the California Community College Commission on Athletics; NWAAC refers to the Northwest Athletic Association of Community Colleges.

proportionality gaps than those in the NCAA. Note that relative to the NCAA, the female share of undergraduates was higher at NAIA institutions, while the female share of athletes was lower at NJCAA schools. Among the smaller organizations, the NWAAC and the National Christian College Athletic Association (NCCAA) had relatively low average proportionality gaps, while the California Community College Commission on Athletics (COA) had a very high gap. These figures resulted from a relatively low female share of undergraduates at NCCAA institutions (49.3%), a relatively high female share of athletes at NWAAC colleges (45.3%), and a low female share of athletes at COA colleges (36%).

In terms of expanding women's athletics, the three organizations representing four-year institutions did considerably better than the three representing community colleges. Slightly more than one-third of institutions within the NAIA and NCCAA, and about one-quarter of NCAA schools, added at least one female team on net between 2001-02 and 2004-05. The analogous figures for NJCAA, COA and NWAAC ranged between 13% and 20%.

What Explains These Participation Trends?

This report provides the most accurate and comprehensive description to date of how men's and women's participation in intercollegiate athletics have changed over time. An upcoming Women's Sports Foundation report (January 2008) will examine the extent to which Title IX, spending on prominent men's sports, high school participation levels and other factors contribute to the participation trends observed. Although a thorough examination must be left to that report, the findings in this report provide some meaningful insights.

After substantial growth during the second half of the 1990s, gains in female participation nearly leveled off between 2001-02 and 2004-05. While the fiscal challenges experienced by colleges and universities during the early 2000s may account for some of the slow growth in overall female participation, they do not explain why male and female participation levels increased by similar amounts even though female athletes still only comprise 41% of athletes. Given that the rapid gain in women's participation levels coincided with the Clinton administration, while the much slower growth occurred during the Bush administration, any changes in support of Title IX across these two different administrations could provide an additional explanation.

The steady gains for male participation certainly counter claims that Title IX has led to widespread reductions in men's sports. In fact, men's participation grew between 1995-96 and 2001-02, a period containing the *Cohen v. Brown* decision, which pushed colleges and universities to take Title IX more seriously. In addition, between 2001-02 and 2004-05, many colleges and universities faced extremely difficult financial situations as a result of the general slowdown in the national economy. In such a budgetary environment, institutions would welcome any opportunity to cut costs. Yet, overall participation in men's athletics continued to grow. Thus, the evidence does not support the argument that pressures to comply with Title IX led to overall reductions in men's sports over the 10 years spanning 1995-96 and 2004-05.

We do find reductions in men's participation levels for Division I-A institutions, especially those in non-BCS conferences. Division I-A institutions may face the greatest pressure to comply with Title IX because many female athletes desire the opportunity to participate at the highest level of competition. Such considerations may explain the high growth in women's participation at these institutions over the period of study. But a Division I-A schools face another concern that is much more severe: the pressure to increase spending levels by an amount similar to their competitors, especially in high-profile men's sports.

These pressures have contributed to extremely high expenditures among Division I-A institutions. According to a recent NCAA study (Fulks, 2005), the average Division I-A athletic program has expenditures of \$27.2 million, far above the \$7.5 million spent by Division I-AA programs or the \$2.7 million spent by Division II programs with football. Furthermore, Division I-A institutions devote a much greater share of their dollars to men's football. Among those expenditures allocated to specific sports, 41.6% of Division I-A expenditures go to football, while the corresponding shares are only 26.6% and 29.0% for Division I-AA and Division II (with football), respectively.

The results of this study also demonstrate that participation trends differed across individual men's sports. For example, we find that men's lacrosse and soccer have grown steadily while men's tennis and wrestling have declined. What is the cause of these trends? Neither Title IX nor spending on men's football seems like a good explanation. A variety of sport-specific factors is more likely the culprit and the forthcoming Women's Sports Foundation report will examine some of these alternative explanations.

Policy Implications

For too long, policymakers have been forced to rely upon a set of confusing and contradictory estimates of how intercollegiate athletics participation has changed over time. This report addresses this problem. It produces clear evidence regarding participation trends and, furthermore, it demonstrates that two recent reports on Title IX have yielded erroneous findings due to shortcomings in their data analysis and methodology. (See Appendix A for a systematic critique of these two studies.) The participation trends revealed by this report have several important implications for the ways that policymakers think about Title IX and shifting patterns of female and male athletic participation.

Implication #1: Further weakening of Title IX, as represented by the March 2005 policy clarification, is unjustified.

Women continue to be significantly underrepresented in college athletics and the growth in their participation slowed considerably in the early 2000s. These findings provide no support for weakening Title IX, but the March 2005 policy clarification did exactly that. By allowing institutions to use an online survey to demonstrate compliance with Prong Three of Title IX's participation standard, this clarification substantially reduced the pressure on institutions to ensure gender equity by expanding opportunities for women. Past research and basic methodological principles demonstrate that exclusive reliance on such a survey will not fairly reveal the interests and abilities of female athletes (Sabo & Grant, 2005).

Implication #2: Title IX does not need to be reformed to stop large overall decreases in men's athletic participation because such decreases have not occurred.

Debates over Title IX have focused more on maintaining the numerous athletic opportunities that men have historically enjoyed rather than ensuring that women gain access to the opportunities they have been historically denied. Within these debates, some claim that institutions rely heavily on cuts in men's athletic participation to achieve gender equity. The results of this study clearly refute this claim. Recent improvements in gender equity were driven by increases in female participation rather than decreases in men's participation levels. In fact, overall men's participation has increased. For the 10-year/738 NCAA institutions sample, male participation levels grew by around 7,000 athletes between 1995-96 and 2004-05, an average of almost 10 athletes per institution. For the complete four-year/1,895 institutions complete, male participation levels grew by almost 10,000 athletes between 2001-02 and 2004-05, an average of slightly over five athletes per institution.

Implication #3: The debate over Title IX should not be based on the experience of a few individual sports.

Figures for a few specific sports, such as wrestling or tennis, are often used to support claims that men's sports are in serious decline. But such claims would make little sense if participation trends for growing men's sports, such as lacrosse or soccer, are used instead. The policy debate over Title IX must consider the broader experiences of all men's and women's sports and should never be based on data for a few individual sports.

Implication #4: Efforts to analyze and stem reductions in men's sports should focus on Division I-A institutions, the only set of institutions that experienced declines. Future attempts to explain the declines of men's athletic participation at Division I-A institutions should consider institutional policies and practices associated with the "arms race" in athletic spending

This report demonstrates that a reduction in men's sports occurred solely at Division I-A institutions. Given the scale of expenditures within these athletic programs, sufficient funds exist for additional participation opportunities if costs are controlled. Furthermore, the competitive pressures driving the "arms race" in expenditures is most severe at the highest level of competition, as represented by Division I-A of the NCAA, and will likely absorb any additional dollars generated by alternative reforms.

How Are Colleges and Universities Doing? Grading Participation, Documenting Expansion

This report also includes an online portion (available at www.WomensSportsFoundation.org) that enables readers to evaluate and compare each higher education institution's performance in relation to its peers. This component of the study does not provide a comprehensive analysis of gender equity at each institution nor does it seek to determine whether institutions are currently in compliance with Title IX. But it does report figures that contain substantial insight into an institution's commitment to women's athletics. For all figures, conference-level averages are provided to allow for additional comparisons. We present the female share of undergraduates and the female share of athletes for each institution to examine whether the gender composition of an institution's athletes is similar to the gender composition of its student body. To identify institutions of higher education that recently expanded their women's athletic program, we also list the change in the number of women's participants for each institution between 2001-02 and 2004-05. For the 738 institutions in our 10-year NCAA sample, we also report changes in participation for the 1995-96 to 2001-02 period.

To identify those higher education institutions that have a female share of athletes similar to their female share of undergraduates, we report the proportionality gap for each institution. This gap equals the percentage of undergraduates that are female minus the percentage of athletes that are female. To help provide meaning to an institution's proportionality gap, we assign grades. Table 12 outlines the grading criteria, which assigns the lowest grades to those institutions at which female athletes are substantially underrepresented. To recognize their contribution towards alleviating the current underrepresentation of female athletes in the aggregate, institutions are not assigned a low grade when female athletes are overrepresented.

Table 13 presents proportionality gap grades for each athletic organization and NCAA division; it also provides the data used to compute the grade. For example, the average NCAA institution had a female share of

Table 12: Interpreting the Proportionality Gap Report Card

Rank Order	Grade
Proportionality gap* is:	
2 percentage points or less	A
above 2 but no more than 4 percentage points	A-
above 4 but no more than 6 percentage points	B+
above 6 but no more than 8 percentage points	B
above 8 but no more than 10 percentage points	B-
above 10 but no more than 12 percentage points	C+
above 12 but no more than 14 percentage points	C
above 14 but no more than 16 percentage points	C-
above 16 but no more than 18 percentage points	D+
above 18 but no more than 20 percentage points	D
above 20 but no more than 22 percentage points	D-
above 22 percentage points	F

* The proportionality gap equals an institution's female share of undergraduates minus the institution's female share of athletes.

Table 13: Proportionality Gap Grades by Affiliation

Affiliation/Division*	Prop Gap.	Grade	% Und., Fem.	% Ath. Fem.	# Inst.
NCAA	13.0	C	55.8%	42.8%	964
Div. I	9.5	B-	54.4%	44.9%	321
Div. I-A	7.2	B	51.7%	44.5%	113
Div. I-AA	13.2	C	54.6%	41.4%	113
Div. I-AAA	7.9	B	58.0%	50.1%	83
Div. II	16.2	D+	57.4%	41.2%	261
Div. III	13.9	C	56.0%	42.2%	375
NAIA	15.9	C-	57.6%	41.6%	239
NCCAA	6.9	B	49.3%	42.4%	41
NJCAA	16.3	D+	56.1%	39.8%	431
COA	19.4	D	55.4%	36.0%	95
NWAAC	9.5	B-	54.8%	45.3%	32

* NCAA refers to the National Collegiate Athletic Association; NAIA refers to the National Association of Intercollegiate Athletics; NCCAA refers to the National Christian College Athletic Association; NJCAA refers to the National Junior College Athletic Association; COA refers to the California Community College Commission on Athletics; NWAAC refers to the Northwest Athletic Association of Community Colleges.

undergraduates of 55.8% and a female share of athletes of 42.8% in 2004-05, which results in a proportionality gap of 13 percentage points and a grade of C. Among organizations, the NCCAA earned the highest grade, while within the NCAA, Divisions I-A and I-AAA earned the highest grades. In contrast, the NJCAA, COA and NCAA Division II received the worst grades.

The online portion of this report also describes changes in the number of female participants over recent years for each institution of higher education. To provide additional context, we report similar figures for men. Note that changes in cross country and track and field participants are not included in these figures, because participation data for these sports contain substantial error due to changes in the EADA reporting form. As described in Appendix C, however, we were able to obtain much more reliable information on whether or not an institution offers these sports. Consequently, we report changes in the number of cross country and track and field teams to complement the participation numbers for other sports.

Appendix A: Comparison with Alternative Reports

Past research has generated conflicting findings regarding trends in athletic participation levels. A previous Women's Sports Foundation report (Sabo, 1997) and a 2001 Government Accounting Office (GAO) report found similar results to this study. In contrast, a recent College Sports Council (CSC) study and a 1999 GAO report produced contradictory results. Because this report seeks to produce clarity and consensus, it is important to reconcile this report's findings with those of the latter two studies.

The CSC study and the 1999 GAO report are often used to claim that men's participation levels have fallen over time and to suggest that Title IX is the cause of these declines. The analysis below, however, shows that the estimated reductions in men's sports in the CSC study turn into gains once the methodological flaws in the report are corrected. The discussion in this appendix also raises important questions about the quality of the data used by the GAO to report reductions in men's sports.

Furthermore, the findings from these reports suggest that Title IX had little to do with any declines in men's participation levels. In both studies, the one time period in which men's sports appears to have declined is 1984 to 1988, a time during which intercollegiate athletics was exempt from Title IX. In 1984, the Supreme Court ruled (in *Grove City College v. Bell*) that Title IX did not apply to intercollegiate athletics, and it was not until 1988 that Congress passed the Civil Rights Restoration Act, which mandated that intercollegiate athletics be subject to Title IX.

College Sports Council (CSC) Longitudinal Study of NCAA Participation Data (College Sports Council, 2007)

The College Sports Council's (CSC) 2007 study is based on data from the *1981-82 – 2004-05 NCAA Sports Sponsorship and Participation Rates Report*. The CSC report presents estimates showing declines in men's sports, and some commentators have claimed that these declines are somehow related to Title IX. But the CSC study incorrectly adjusts for changes in NCAA membership when reporting participation trends and only reports figures for Division I institutions when reporting trends in the number of teams offered. When the flaws in the CSC report are corrected, as demonstrated below, men's athletic participation increases rather than decreases between 1981 and 2004.

The CSC study correctly notes that the data in the NCAA participation report is not designed to accurately portray participation trends because it does not adjust for growth in the number of NCAA institutions over time. The number of NCAA institutions grew from 752 to 1,045 between 1981-82 and 2004-05, so any comparisons over time may reflect the growth in the number of institutions rather than growth in the number of male athletes at specific institutions. To solve this problem, the CSC study essentially estimates the average number of participants per NCAA institution for each year. These estimates appear in Table 3 of the CSC report.

To demonstrate the CSC's method, consider the first and last years of the period of study. The NCAA participation report indicates that there were 167,055 athletes at 752 NCAA institutions in 1981-82 and 219,744 athletes at the 1,045 NCAA institutions in 2004-05. If you divide the number of athletes by the number of institutions for each year, you find that the number of male athletes per institution fell from 222 to 210, a drop of 5.3%.

For such a comparison to be informative, institutions that joined the NCAA over time must have the same number of athletes as the pre-existing NCAA institutions. Put simply, the CSC's analyses assume that the 293 institutions that joined the NCAA after 1981 are identical in size to the 752 institutions that were already NCAA members in 1981. This assumption is unrealistic. A comparison of 2004-05 participation levels (using EADA data) demonstrates that those institutions that were already NCAA members in 1981 have 57% more male athletes, on average, than those institutions that later joined the NCAA between 1982 and 2004.

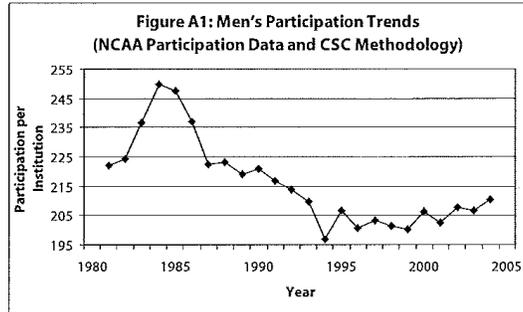
If pre-existing NCAA institutions have 57% more male athletes than those institutions that joined the NCAA between 1982 and 2004, then figures from the NCAA Participation Report indicate that the number of male athletes increased by 5.5% between 1981-82 and 2004-05. Clearly, the CSC's finding that men's participation has

decreased over time reflects the use of an untrue assumption rather than any real reduction in men's sports. The purported losses in men's participation produced by the CSC study turn to gains once more accurate assumptions are used.

The CSC study also reports (in Table 1 of that study) that the number of men's teams decreased by 239 among NCAA Division I schools between 1988-89 and 2004-05. That information is correctly drawn from the NCAA participation report and does not contradict the findings of this Women's Sports Foundation report. But the

CSC study fails to note that the same NCAA participation report indicates a net increase in the number of men's sports, on net, of 44 for Division II institutions and of 265 for Division III institutions. For the NCAA as a whole (including Division I), the number of men's teams increased by 70 teams. Once again, the figures in the CSC study demonstrate overall increases for men's athletics once accurate overall estimates are provided.

Some commentators have used the findings of the CSC study to claim that Title IX has led to substantial reductions in men's sports. However, this claim is inaccurate because men's sports in the aggregate have not decreased over time. Figure A1 (which uses the same methodology as Table 3 of the CSC study) demonstrates another major problem with such a claim. According to the CSC's estimates, men's participation levels declined the most between 1984 and 1987, a period in which intercollegiate athletics was exempt from Title IX. Thus, even if the CSC estimates of declines in men's participation levels were accurate, it would be quite difficult to argue that these reductions were due to Title IX.



Intercollegiate Athletics: Comparison of Selected Characteristics of Men's and Women's Programs (General Accounting Office, 1999)

This General Accounting Office (GAO) report examines changes between the 1985-86 and 1996-97 period for a consistent sample of 725 NCAA institutions. The results indicate a decrease in the total number of men's participants of 21,404 and a decrease in the total number of men's teams of 183. These findings are in direct contrast to the findings presented in this Women's Sports Foundation report.

A close reading of the GAO report presents several explanations for the contrasting findings. The first explanation regards the quality of data used in the GAO study. The GAO only had access to aggregate data for each NCAA division and sport, so it could not identify and correct for potential flaws in the data. (See appendixes B and C for the corrections utilized in this report.) Furthermore, the GAO did not appear to have data on every athlete at each institution, since data on sports with less than 10 participating teams were not included in the report.

A comparison of the GAO report's findings with figures from the *1981-82 NCAA Sports Sponsorship and Participation Rates Report* creates additional concerns about data quality. Most of the 21,404 athlete decrease in men's participation levels was due to decreases in the average roster sizes for almost all men's sports. Table A1 recreates the roster size estimates found in the GAO report for 1985-86 and 1996-97, the only two years of study in the GAO report.

Table A1 (on following page) also contains the average roster size reported by the NCAA Participation Report for 1985-86, 1987-88, and 1996-97 academic years. The changes in roster size between 1985-86 and 1996-97 for the NCAA and GAO reports are almost identical, which is not surprising because the GAO used data provided

by the NCAA. But what is surprising is that almost all of the decrease in average roster sizes in the NCAA participation report occurred during the first two years of the period, 1985-86 to 1987-88. Because these drops in roster size are extremely severe for a two-year period, much of the decrease in men's athletics may reflect changes in reporting requirements rather than a drastic restructuring of men's athletics.

Table A1: Comparison of Findings from the NCAA Participation Report and the 1999 GAO report

	GAO (1999) Report			NCAA Participation Report			
	1985-86	1996-97	Change	1985-86	1987-88	1996-97	Change
Baseball	34.1	29.7	-4.4	33.9	28.9	30.2	-3.7
Basketball	18.3	16.0	-2.3	18.4	15.9	16.0	-2.4
Cross-Country	14.6	13.2	-1.4	14.5	13.4	12.9	-1.6
Football	100.0	91.3	-8.7	99.7	92.6	91.6	-8.1
Golf	12.3	10.8	-1.5	12.2	11.2	10.8	-1.4
Ice Hockey	37.6	28.9	-8.7	37.5	30.7	28.1	-9.4
Lacrosse	36.5	31.6	-4.9	36.2	31.6	31.3	-4.9
Soccer	29.4	25.2	-4.2	29.3	24.9	25.0	-4.3
Swimming	21.8	20.6	-1.2	21.8	20.5	19.7	-2.1
Tennis	12.2	10.5	-1.7	12.1	11.0	10.3	-1.8
Track (indoor)	34.3	31.4	-2.9	34.2	31.7	31.1	-3.1
Track (outdoor)	34.7	31.3	-3.4	34.5	32.1	30.9	-3.6
Volleyball	15.9	14.5	-1.4	16.0	14.9	15.0	-1.0
Wrestling	26.5	25.2	-1.3	26.5	24.3	26.3	-0.2

In the event that the GAO estimates accurately reflect changes in men's participation levels, then most of the reductions in men's sports had little to do with Title IX. Intercollegiate athletics was exempt from Title IX between 1985-86 and 1987-88, the period in which most of the decreases in men's athletics appear to have occurred. Thus, as was the case with the 2007 CSC study, the main findings and conclusions of the 1999 GAO study do not appear to contradict those of this Women's Sports Foundation report.

Appendix B: Sample Overview and Data Corrections

Sample Overview

The data used in this report came from reports filed by institutions of higher education under the Equity in Athletics Disclosure Act (EADA). Passed in 1994, the EADA required institutions to report a variety of information on their athletic program. (See <http://surveys.ope.ed.gov/athletics/> to examine the current EADA reporting form.) Starting in 1995-96, the EADA mandated that institutions must report data to any party that requests it directly from them. In 1995-96, the Women's Sports Foundation requested information from each NCAA institution, and 757 of them returned completed EADA forms. The data from these forms were hand entered into an electronic format, and the original forms were retained and are currently located at the Center for the Study of Higher Education at the University of Arizona. These data can be obtained by contacting the author of the report at cheslock@u.arizona.edu.

Starting in 2000-01, institutions were required to send EADA information to the Office of Postsecondary Education (OPE). Full EADA data from these years can be downloaded from the OPE's EADA Web site: <http://ope.ed.gov/athletics/>. For 2001-02, 1,948 higher education institutions reported data to the OPE. In 2004-05, 1,978 institutions reported data to the OPE.

Two samples were used throughout this report. The "10-year NCAA sample" contains the 738 institutions that reported data in 1995-96, 2001-02 and 2004-05 and were members of the NCAA for all three years. These schools comprised 74% of NCAA institutions in 1995-96 and 71% of NCAA institutions in 2004-05. The four-year complete sample contains the 1,895 schools that reported data to the OPE for 2001-02 and 2004-05.

Data Corrections

Several errors in the EADA data required correction. First, the 2001-02 EADA dataset was missing data for nine of the less prominent women's sports (archery, badminton, beach volleyball, bowling, equestrian, rodeo, sailing, table tennis, weight lifting). Institutions that offered teams for these sports were easily identifiable because the sum of participants on each individual sport did not equal the total number of participants reported. For each of these institutions, we examined later EADA data (which was not missing information) or the relevant athletic department's Web site to identify the missing sport and assigned the extra participants appropriately.

Second, the EADA form allowed an institution to choose among 16 different organizational and division affiliations. Some of the resulting data, however, contained errors or insufficient information. To correct for data entry errors, we examined all institutions that switched affiliations over time to ensure that their movement reflected real changes as opposed to an incorrect entry for one of the years. Because the EADA form does not include a complete list of athletic organizations to choose from, approximately 240 institutions chose a category labeled "Other." Most of these institutions belonged to the COA, NWAAC or other smaller organizations, and we assigned these institutions after some investigation.

The third data correction relates to measuring the percentage of undergraduates that are female. Ideally, one should use data on the total full-time undergraduate enrollments for both genders. Unfortunately, the enrollment figures reported under the EADA are usually incorrect. As a result, we obtained correct figures for each year from the Integrated Postsecondary Education Data System (IPEDS) produced by the National Center for Education Statistics (NCES). These data can be downloaded from NCES's IPEDS Web site (<http://nces.ed.gov/ipeds/>).

The reporting form for the EADA changed over time in two important ways; this required two further corrections to the data. The first change regards reporting standards for cross country, indoor track and field, and outdoor track and field. Appendix C contains a description of the complexity associated with these sports. The other change regards coed teams. The 1995-96 form did not force institutions to report the gender breakdown of participants of coed teams, while the 2001-02 and 2004-05 forms did. To allocate the co-ed team participants for 1995-96, we used the same percentage of males and females for the 1995-96 teams as that in 2001-02 when data

was available for that sport at that institution. If 2001-02 information was not available, we simply assigned 50% of males and 50% of females to the individual sports.

Finally, we took great care to ensure that our results were not unduly influenced by extremely small teams or athletic programs. We only listed an institution as adding a sport if it moved from zero athletes to four or more athletes over time. Likewise, an institution was only counted as dropping a sport when it moved from four or more athletes to zero athletes over time. To ensure that extremely small athletic programs were not driving our compliance estimates, we also estimated all proportionality gap figures using only those institutions with at least 50 athletes within their athletic department. When this alternative sample was used, the results varied little from those reported in this study.

Appendix C: Cross Country and Track and Field

Because the EADA reporting form changed over time for cross country, indoor track and field, and outdoor track and field, a simple comparison of reported figures for these sports over time would produce incorrect findings. Table C1 presents the per-institution participation figures for these three sports. These drastic changes over time were not observed in the 1981-82 NCAA Sports Sponsorship and Participation Rates Report, suggesting that these trends were due to changes in reporting standards rather than any fundamental change in these three sports.

	1995-96	2001-02	2004-05
Men	33.7	51.2	47.9
Women	29.3	50.3	49.4

An inspection of the EADA data entry forms (which changed over time) provided an explanation for these findings. The structure of the 1995-96 form encouraged the data entrant to report the unduplicated number of participants for indoor and outdoor track and field. The unduplicated count of participants (where a multi-sport athlete is only counted once) is likely to be substantially less than the duplicated count (where a multi-sport athlete is counted once for each team for which he/she participates). The 2001-02 form, in contrast, was much more likely to elicit reporting of duplicated counts. Finally in 2004-05, the structure of the form again led to reporting of some unduplicated counts of athletes in cross country and the two track and field sports, although errors were much less prevalent in 2004-05 than in 1995-96.

To ensure accurate findings, we used data from multiple sources in addition to the EADA to produce the best possible estimates of participation trends for these three sports. For most major athletic associations (NCAA, NAIA, NJCAA, COA), we created a list of all institutions that offered each of the three sports using available publications or data provided directly by the organization. For cases outside of these associations, we examined the Web site for each institution's athletic department when needed. In combination with the EADA data, these data lists allowed us to accurately estimate changes in individual sports.

Estimating changes in participation levels was more complicated because roster sizes can vary over time. The change in participation levels was computed by:

- ◆ adding the number of athletes on teams that were added during the period; and
- ◆ subtracting the number of athletes on teams that were dropped during the period; and
- ◆ adding the number of teams offered throughout the period multiplied by the average change in roster size.

A much longer version of Appendix C, which describes the procedure in great detail, is available from the author upon request. In general, the author spent great effort ensuring that this report did not overestimate increases in the number of participants and teams, especially for men. All methods were designed to err on the side of underestimating gains in the number of participants and teams. All findings for cross country and track and field were checked against those reported in the 1981-82 NCAA Sports Sponsorship and Participation Rates Report, and no discrepancies were found. Finally, all analyses presented in this report were also conducted without data from cross country and the two track and field sports. In every instance, the primary findings of this report remained when these sports were not included.

Appendix D: Title IX and Athletics

In order to comply with the athletic requirements of Title IX, educational institutions must meet the requirements of three areas:

1. Participation

The first compliance prong of Title IX deals with overall sport and athletic participation offerings available for men and women. A three-part test for participation opportunities determines if institutions provide female and male students with equal athletic opportunities. In order to comply, institutions must pass one of these three tests:

- a. Prong One: Proportionality-male and females participate in athletics in numbers substantially proportional to their respective enrollments in school, or
- b. Prong Two: History and Continued Practice of Program Expansion-the institution shows a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of members of the underrepresented sex, or
- c. Prong Three: Full Accommodation of Interests and Abilities- the institution demonstrates that the interests and abilities of the underrepresented sex (females) are fully and effectively accommodated by the existing programs.

An institution fulfills the compliance requirement for participant opportunities if it adheres to any (or just one) of the three tests listed above.

2. Athletic Financial Assistance

The second major compliance prong of Title IX encompasses athletic financial assistance. The only monetary requirement of Title IX deals with the area of scholarships. Scholarships must be allocated in proportion to the number of female and male students participating in intercollegiate athletics. Funding for women's and men's programs does not have to be equal, but a significant disparity in funds does suggest that institutions could be found non-compliant in other program areas.

3. Other Program Areas (Treatment of Athletes)

The third compliance prong of Title IX requires equivalence in other athletic benefits and opportunities and includes all other program areas not previously covered (OCR, Policy). Title IX does not require that each men's and women's team receive exactly the same services and supplies, but it looks at the entirety of the treatment the men's and women's programs receive as a whole. The equivalence of overall treatment is measured on the basis of eleven criteria:

- a. Locker Rooms, Practice, and Competitive Facilities looks at the quality, maintenance, and availability of the facilities provided for practice and competitive events, the exclusivity of use of the facilities and the preparation of facilities for games and practices, availability, exclusivity, and quality of locker and team rooms.
- b. Equipment and Supplies is determined in examining the quality, amount, suitability, maintenance and replacement, and availability of equipment and supplies.
- c. Scheduling of Games and Practice Times is based on the number of competitive events offered per sport, the number and length of practice opportunities, the time of day for practice sessions, the number of pre-season and post-season competitive opportunities, and the time of day competitive events are scheduled.
- d. Publicity encompasses the availability and quality of sports information personnel, access to other publicity resources for men's and women's programs, and quantity and quality of publications and other promotional devices featuring men's and women's programs.
- e. Coaching examines the equivalence in the availability of qualified full-time and part-time coaches, assistant coaches, and graduate assistants, assignment of coaches with comparable training, experience, and other professional qualifications, equitable compensation of coaches: rate of compensation,

duration of contract, conditions for contract renewal; (taking into account experience, duties, and working conditions).

- f. Travel and Daily Allowance encompasses modes of transportation, housing furnished during travel, length of stay before and after competitive events, daily allowance provided to the teams, and dining arrangements for the teams.
- g. Academic Tutoring includes the availability of tutoring for the women's and men's programs, qualifications, training and experience of tutors provided, employment conditions of the tutors for the men's and women's programs including compensation, term and length of contracts, and the number of students tutored per session.
- h. Provision of Medical Training Facilities and Services includes the availability of medical personal and assistance including health, accident, and injury insurance coverage, availability and quality of weight training and conditioning facilities, and availability and qualifications of athletic trainers.
- i. Provision of Housing and Dining Facilities and Service pertains to housing provided, and special services, such as laundry facilities, parking spaces, and housekeeping services.
- j. Recruitment of Student Athletes refers to whether coaches and athletic personnel serving female and male athletes are provided with substantially equal opportunities to recruit, whether the financial and other resources made available for recruitment meet the needs of the women's and men's programs, whether the differences in benefits, opportunities, and treatment of prospective women and men athletes affect their recruitment.
- k. Support Services includes the amount of administrative, secretarial, and clerical assistance provided to the women's and men's programs.

For more detailed information of the compliance criteria under Title IX, please read the Women's Sports Foundation guide, *Playing Fair*, at www.WomensSportsFoundation.org.

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Appendix H



Guide to Developing Student Interest Surveys Under Title IX

U.S. Department of Education
Institute of Educational Sciences
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March 2005

U.S. Department of Education

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Table of Contents

Introduction to Title IX	1
The Three-Part Test	1
The Title IX Commission and the Assistant Secretary’s letter.....	2
Background on This User’s Guide	2
The OCR Case Files	3
Findings on institutional differences and similarities	3
Current Survey Practices	5
How to Conduct a Survey of Student Interest	9
Problem formulation	9
Target population.....	10
Census versus sample	10
Periodicity.....	11
Excluding students.....	11
Confidentiality	11
Nonresponse.....	12
The prototype.....	13
List of Screens	
Screen 1: Initial screen of the prototype data collection instrument, containing the purposes of the survey, a confidentiality statement, and an explanation of the structure of the instrument.....	15
Screen 2: Second screen of the prototype data collection instrument, in which respondents provide four items of demographic and student status information. This example shows a respondent who is 20 years old, female, a junior, and a full-time student	16
Screen 3: Third screen of the prototype data collection instrument, on which respondents with no experience, current participation, or interest in future participation can so indicate and complete the process.....	17
Screen 4: Fourth screen of the prototype data collection instrument, which is reached only by respondents who wish to enter information concerning athletic experience, interests, and abilities.....	18
Screen 5: Fifth screen of the prototype data collection instrument, which is reached only by respondents who wish to enter information concerning athletic experience, interests, and abilities. Here, respondents select the sports for which they wish to provide information. The list is illustrative,	

consisting of the 23 sports in which the NCAA conducts championships and 7 “emerging sports.” The respondent illustrated here has chosen basketball, lacrosse, and volleyball, which appear in screen 6.	19
Screen 6: Sixth screen of the prototype instrument, on which respondents enter information concerning experience, current participation, interest in future participation, and ability only for those sports selected on screen 5	20
Screen 7: Seventh and potentially final screen of the prototype data collection instrument, which offers respondents the opportunity to provide comments or other feedback, or to request being contacted by the athletic department. Only respondents who check the box are taken to screen 8	21
Screen 8: Eighth and final screen of the data collection instrument, reached only by respondents who expressed interest and ability in specific sports, to ask whether they wish to be contacted by the athletic department and if so, to provide contact information.....	22
Technical Details	23
Additional Steps	24

USER'S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX

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

Introduction to Title IX

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

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

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

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

The Three-Part Test

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

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

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

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

The Title IX Commission and the Assistant Secretary's letter

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

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

Background on This User's Guide

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

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

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

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

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

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

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

The OCR Case Files

Findings on institutional differences and similarities

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

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

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

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

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

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

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

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

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

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

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

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

Current Survey Practices

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

The 52 instruments were classified along 20 categorical dimensions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How to Conduct a Survey of Student Interest

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

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

Problem formulation

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

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

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

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

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

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

Target population

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

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

Census versus sample

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

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

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

Periodicity

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

Excluding students

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

Confidentiality

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

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

Nonresponse

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

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

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

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

The prototype

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

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

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

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

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

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

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

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

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

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

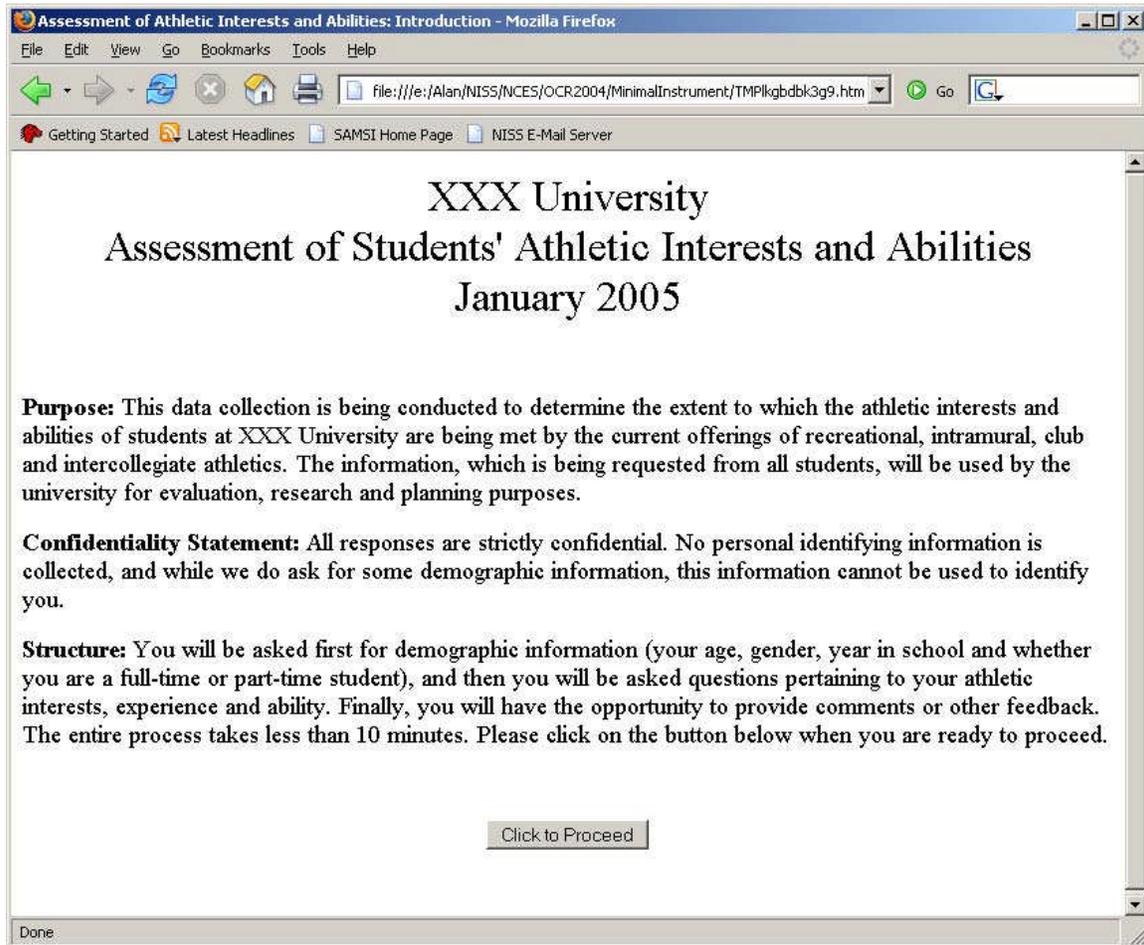
Screen 7 offers respondents the opportunity for comments or other feedback, asks them to click a button to record their responses, and thanks them for participating.

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

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

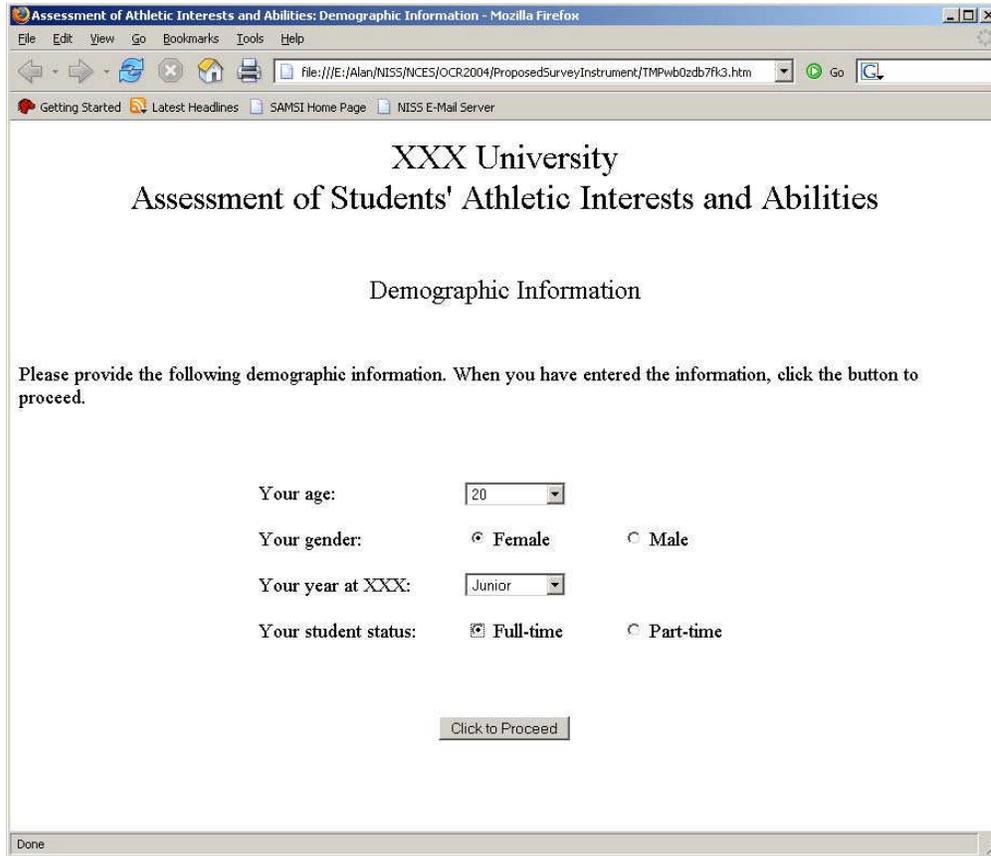
- Simplicity;
- Explicit explanation of reasons for the data collection;
- Explicit confidentiality statement;
- Opportunity for global “no interest or ability” response;
- Opportunity to filter sports for which detail is provided;
- Nonprejudicial wording of items;
- Inclusion of all of experience,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

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



SOURCE: NISS-produced prototype.

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



The screenshot shows a Mozilla Firefox browser window titled "Assessment of Athletic Interests and Abilities: Demographic Information". The address bar shows a file path: "file:///E:/Alan/NISS/NCES/OCR2004/ProposedSurveyInstrument/TMPwb0zdb7fR3.htm". The browser's bookmark bar includes "Getting Started", "Latest Headlines", "SAMSI Home Page", and "NISS E-Mail Server".

The main content area of the browser displays the following text:

XXX University
Assessment of Students' Athletic Interests and Abilities

Demographic Information

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

Your age:

Your gender: Female Male

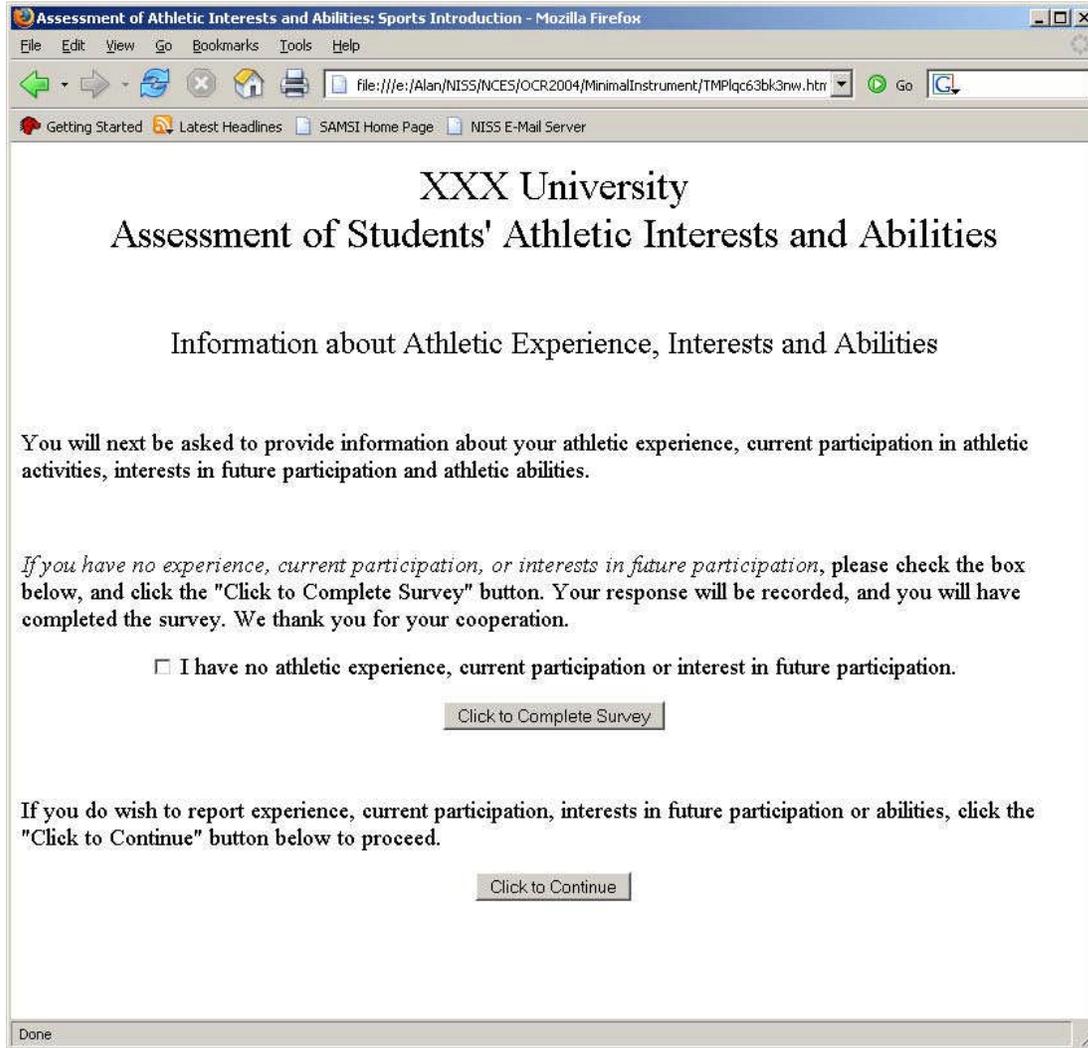
Your year at XXXX:

Your student status: Full-time Part-time

The browser's status bar at the bottom left shows "Done".

SOURCE: NISS-produced prototype.

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



The screenshot shows a Mozilla Firefox browser window with the title "Assessment of Athletic Interests and Abilities: Sports Introduction - Mozilla Firefox". The address bar shows a file path: "file:///e:/Alan/NISS/NCES/OCR2004/MinimalInstrument/TMPlqc63bk3nw.htm". The browser's toolbar includes "File", "Edit", "View", "Go", "Bookmarks", "Tools", and "Help". Below the toolbar, there are several bookmarks: "Getting Started", "Latest Headlines", "SAMSI Home Page", and "NISS E-Mail Server".

The main content of the page is centered and reads:

XXX University

Assessment of Students' Athletic Interests and Abilities

Information about Athletic Experience, Interests and Abilities

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

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

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

[Click to Complete Survey](#)

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

[Click to Continue](#)

Done

SOURCE: NISS-produced prototype.

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

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

File Edit View Go Bookmarks Tools Help

File:///E:/NISS/NCE5/OCR2004/MinimalInstrument/data-sportsintro2-minime

Getting Started Latest Headlines SAMSI Home Page NISS E-Mail Server

XXX University

Assessment of Students' Athletic Interests and Abilities

Information about Athletic Experience, Interests and Abilities

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

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

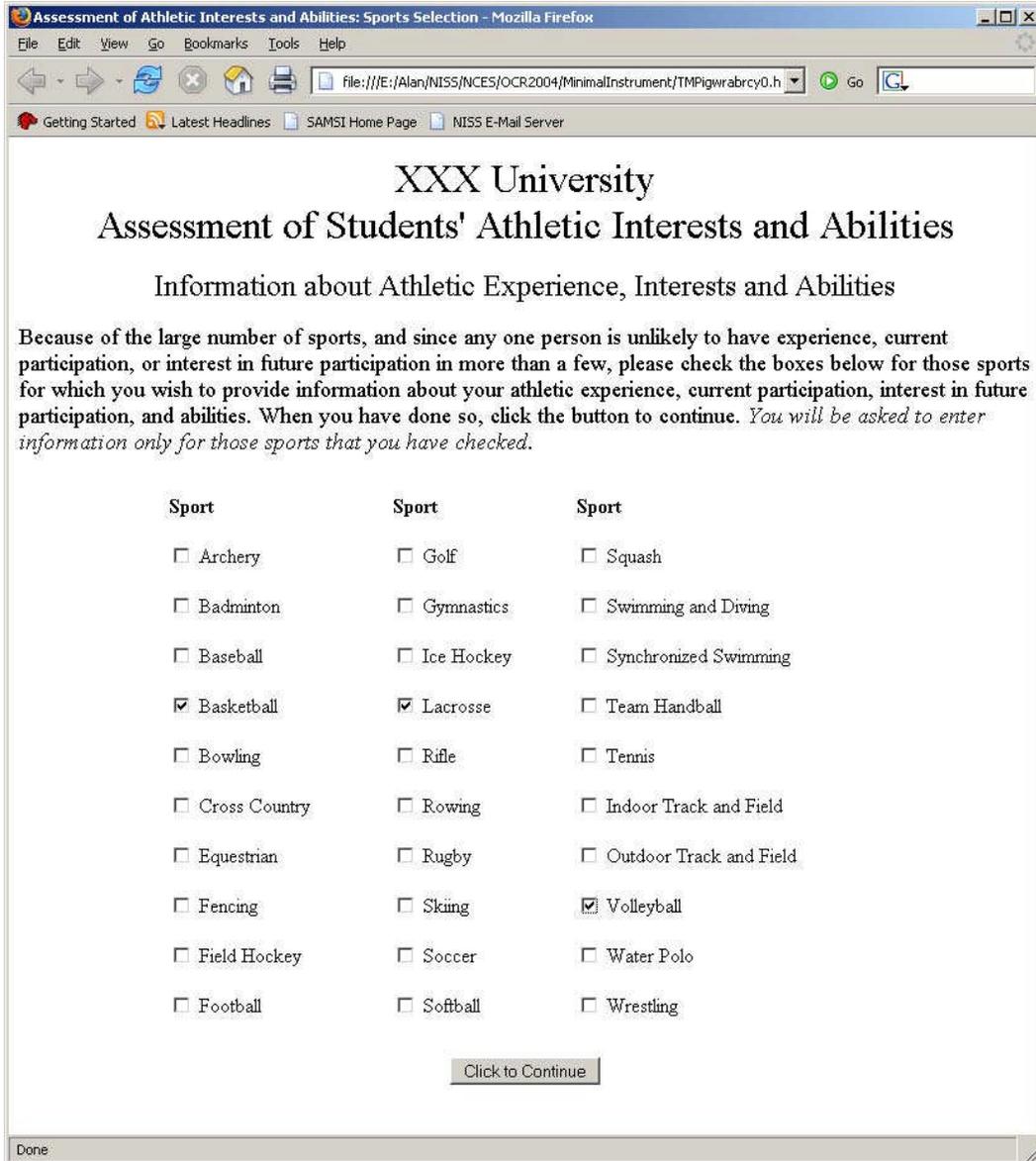
Because of the large number of sports, please check the boxes below for those sports for which you wish to provide information about your athletic experience, current participation, interests in future participation, and abilities. When you have done so, click the button to proceed. *You will be able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

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

Done

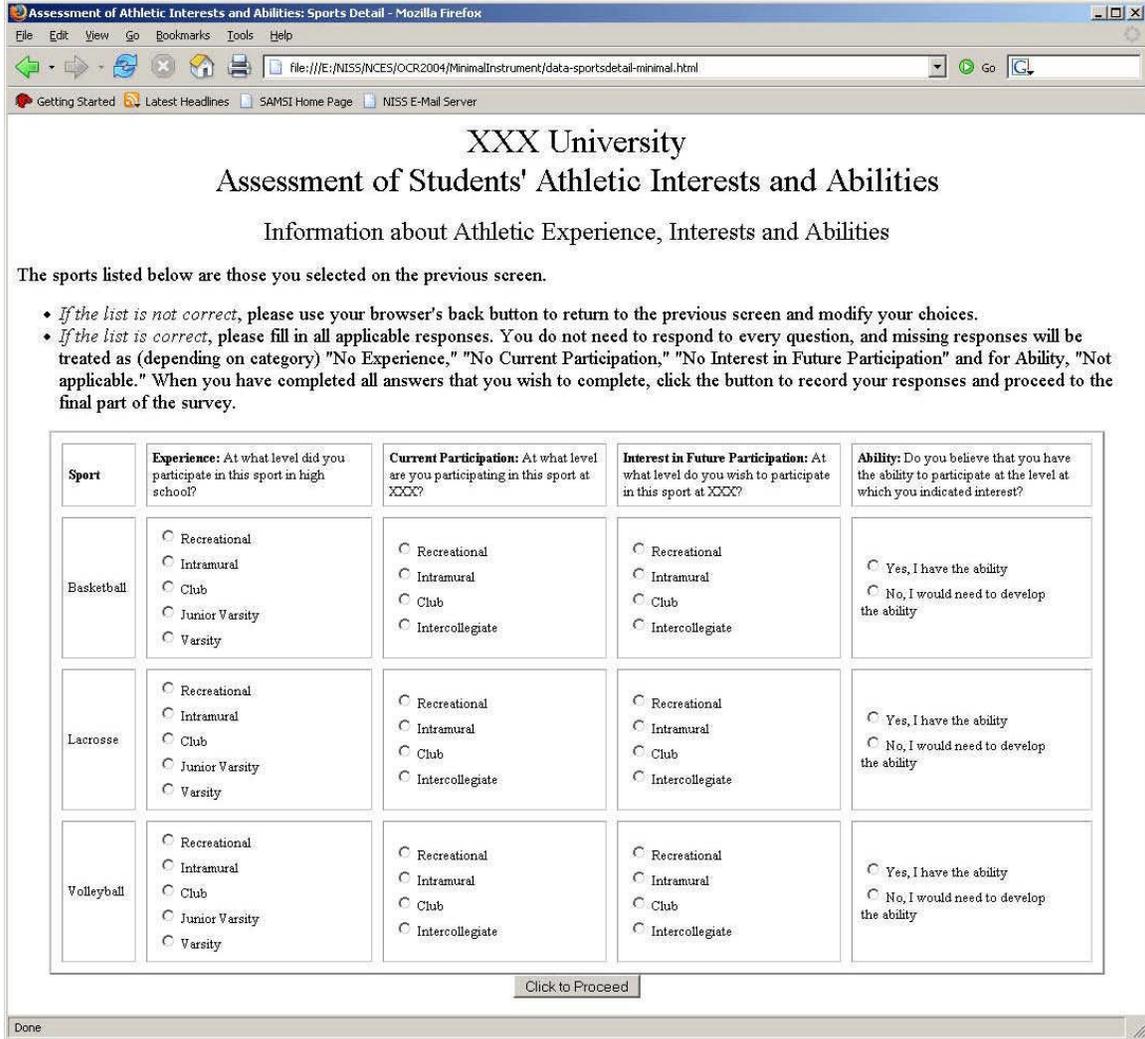
SOURCE: NISS-produced prototype.

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



SOURCE: NISS-produced prototype.

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



SOURCE: NISS-produced prototype.

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

Assessment of Athletic Interests and Abilities: Completion - Mozilla Firefox

File Edit View Go Bookmarks Tools Help

file:///e:/Alan/NISS/NCES/OCR2004/MinimalInstrument/TMPy5k1nbpbyk

Getting Started Latest Headlines SAMSI Home Page NISS E-Mail Server

XXX University

Assessment of Students' Athletic Interests and Abilities

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

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

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

Check here if you do not wish to be contacted.

Thank you very much for your cooperation and support!

Done

SOURCE: NISS-produced prototype.

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

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

File Edit View Go Bookmarks Tools Help

file:///E:/Alan/NISS/NCES/OCR2004/MinimalInstrument/TMP7gxdeball7.htm

Getting Started Latest Headlines SAMSI Home Page NISS E-Mail Server

XXX University

Assessment of Students' Athletic Interests and Abilities

Request to Be Contacted by Athletic Department

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

Age:	20
Gender:	Female
Year in school:	Junior
Status:	Full-time
Sport(s):	Lacrosse

Experience = Varsity
 Current Participation = Intramural
 Interest in Further Participation = Intercollegiate
 Ability = "Yes, I have the ability"

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

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

Done

SOURCE: NISS-produced prototype.

Technical Details

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

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

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

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

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

The screens and scripts would be customized with such items as

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

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

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

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

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

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

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

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

Additional Steps

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