

New Federal Initiatives Project

Title IX

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Title IX

“Making Title IX as strong as possible is a no-brainer,” Vice President Joe Biden told a cheering crowd at George Washington University this past April.¹ Biden appeared at GWU to announce that schools could no longer demonstrate compliance with Title IX by using the Model Survey, an instrument designed by the Bush Department of Education to help universities assess relative male and female interest in college athletics participation. Like Biden, many critics of the Model Survey see increasing female participation as much as possible as an important moral goal, worth significant costs. But unlike Biden, proponents of the Model Survey hardly see the issue as a “no-brainer.” Instead, they are more inclined to emphasize the costs associated with creating new teams for women. Others have also noted that, in order to ensure proportional representation of men and women in athletics, some universities have chosen to eliminate men’s teams rather than add more women’s teams.² This conflict over costs and benefits has animated much of the debate surrounding Title IX, including the sparring over the Model Survey that led to its rescission.

Background on Title IX

Title IX of the Education Amendments of 1972 requires 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.”³ In 1979, the U.S. Department of Health, Education and Welfare issued guidance clarifying this language with respect to athletics stating that it would apply the following test to determine if an institution is providing non-discriminatory 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, the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program.⁴

The three elements of this guidance are often referred to as “prongs,” and a school is in compliance with Title IX if it is in compliance with any prong. But critics of the guidance charge that while the three-part test appears to give schools choices regarding how to comply with Title IX, in fact schools can only feel comfortable about their legal obligations if they are in compliance with the first prong.⁵ For example, these critics charge, a university is theoretically in compliance under prong two if it can show “a history and continuing practice of program expansion.” But critics assert that in a world in which resources are scarce, few if any universities can afford to continue expanding

athletic programs indefinitely.⁶ Universities hoping to comply under prong two are thus left to wonder: how much continuous expansion is enough? In practice, the answer might become: when proportional representation is achieved under prong one.⁷

Achieving compliance under prong three—by demonstrating that the interests and abilities of the underrepresented sex have been fully and effectively accommodated—may be even more difficult. In theory, prong three offers schools a safe harbor: even if athletic offerings are unequal, a school is in compliance so long as the unequal offerings were not produced by discrimination. The Department of Education issued a guidance document in 1996 that listed six different indicators that its Office of Civil Rights (“OCR”) might use to determine that discrimination did not produce any inequalities, but which also noted that the list of indicators was not necessarily exhaustive.⁸ The document also did not explain how OCR might analyze a case in which some of the listed indicators showed unmet interest and others did not. Critics charged that this list of indicators was therefore too vague to be useful. In particular, the claim that OCR would look to “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” appeared problematic, as determining what is the relevant area from which an institution draws its students can be quite difficult.⁹ Some of the largest and most selective national universities, for example, commonly recruit from a national or even international pool of students. Perhaps because of these problems, many institutions preferred to use prong one or two. Indeed, only rarely have schools faced with a Title IX complaint been able to demonstrate compliance with the law under this third prong.¹⁰

The Model Survey

To help schools facing these difficulties with compliance under the third prong, OCR issued further guidance in 2005.¹¹ This guidance also included a Model Survey, an instrument designed to measure student interest in participating in intercollegiate varsity athletics. When the Model Survey indicates insufficient student interest to field a team, OCR indicated that the result would create a presumption of compliance with Title IX.¹² This presumption, however, could be rebutted with “direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team.”¹³

Critics raised several different concerns about the limitations of the new Model Survey. First, critics complained that the survey was unlikely to measure women’s interest in sports fairly because women capable of playing sports, but influenced by negative stereotypes that women should not be athletes, might indicate on the surveys that they are uninterested in athletics.¹⁴ According to these advocates, the purpose of Title IX is to ensure that schools provide women with adequate opportunities to play sports so that they can overcome the influence of stereotypes.¹⁵ Similarly, Jocelyn Samuels, formerly of the National Women’s Law Center and now of the Department of Justice, has said that the Model Survey unfairly relies on women’s self-assessment of their ability to compete athletically at the college level. Again for cultural reasons, women may be disproportionately likely to assess their own athletic skills too harshly.¹⁶ Still, others have countered these claims by noting that female participation in sports rose considerably in the years immediately before Title IX’s passage and has continued to rise.¹⁷ It is

therefore unclear to what extent – or if at all – such stereotypes still resonate with today’s college-age women.

Secondly, critics of the Model Survey charge that, because the Model Survey is necessarily administered only to students currently enrolled in a school, it fails to capture the athletic interests of students who would have attended that school had it offered particular sports. Though some proponents acknowledge that this is true, they claim that it is unclear from this point alone that these surveys are inadequate to measure men and women’s relative interest. A simple hypothetical may best illustrate the point. Imagine a state, Ames, with two large universities – East Ames State and West Ames State. East Ames State does not offer the imaginary sport of women’s fraggle ball, whereas West Ames State does. There may be women who might have slightly preferred to attend East Ames over West Ames had both universities offered fraggle ball. But if there are enough slots at West Ames to give all the interested women of Ames an opportunity to play fraggle ball, it is not clear why East Ames should also offer fraggle ball. Indeed, in a world in which university budgets are often tight, such specialization may even be desirable.

Third, critics (including Samuels) claimed that the Model Survey fails to depict student interest accurately because the Department of Education permits schools to accept non-responses as evidence of lack of interest.¹⁸ Samuels has suggested that students may not respond to an e-mail survey for reasons wholly unrelated to interest in sports participation, such as the e-mail survey’s being caught in a spam filter or a student’s not having time to respond at the moment that she received the e-mail.¹⁹ Supporters of the Model Survey, however, have noted that the guidance document accompanying the survey explains to schools that they are required to administer it “in a manner that is designed to generate high response rates.”²⁰ That is, if sending out a single e-mail does not generate appropriately high response rates, then administration of the survey in this manner may not be sufficient to bring an institution into compliance.²¹ The Additional Clarification document accompanying the Model Survey also suggested that schools distribute the survey by methods more certain than e-mail to generate large responses– such as, for example, by incorporating the survey into the mandatory online class registration process.²²

Although the Model Survey might have made compliance easier for some institutions, almost no universities ever actually opted to use it.²³ Notably, the NCAA passed a resolution discouraging their member universities from using the Model Survey.²⁴ Myles Brand, president of the NCAA, told *The Washington Post* in 2005 that concerns about litigation in part motivated the NCAA’s decision. “Whether that will be tested in court or some other way, we are waiting to see what the Women’s Law Center and others might do. We are supportive of their actions,” he said.²⁵

Because so few institutions ever actually adopted the Model Survey, its rescission will likely have little short term impact. But, had it not been rescinded, perhaps a plaintiff would have brought a lawsuit challenging it, just as Brand predicted. Had a court upheld the survey, some institutions might have chosen not to create or maintain some women’s sports teams. But, as defenders of the survey might point out, such a decision would have lowered universities’ costs of compliance with Title IX and possibly freed up resources for other programs that benefit men and women. Notably, some surveys indicate that women are more interested in certain non-athletic extracurricular activities than are men.²⁶

The Model Survey's rescission may also be a signal of how the Obama administration chooses to enforce Title IX in other contexts. While praising Title IX's impact on increasing women's participation in athletics, "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."²⁷ The nation's university science, technology, engineering, and mathematics departments may thus soon find themselves faced with the task of complying with a regulatory regime similar to the intercollegiate athletics three part test.

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¹ Katie Thomas, "Rule Change Takes Aim at Loophole in Title IX," *New York Times*, April 19, 2010.

² See, for example, John Irving, "Wrestling with Title IX," *The New York Times*, January 28, 2003. Irving claimed that Marquette University eliminated its wrestling team only to comply with Title IX. He also cited the elimination of teams at Boston College as likely due to Title IX. See also Frank Deford, "Rethinking How Title IX Is Applied," National Public Radio, May 2, 2007 – "Take James Madison University in Virginia as a typical example. As USA Today reports, 61 percent of the student body is what we'd like to call distaff. So JMU is axing ten sports teams, seven of them men's. But that sort of thing is happening everywhere, and as the gender imbalance inexorably increases so will the accelerated elimination of men's sports." Others have claimed that many such teams were actually eliminated because universities wanted to reallocate resources away from less popular men's sports (such as soccer or wrestling) and toward more popular teams like football. See, e.g., National Women's Law Center, *Title IX and Men's "Minor" Sports: A False Conflict*, July, 2008.

³ 20 U.S.C. 1681(a).

⁴ 44 *Fed. Reg.* at 71418.

⁵ See, e.g., Jessica Gavora, *Tilting the Playing Field: Schools, Sports, Sex, and Title IX*. San Francisco: Encounter Books, 2002, 32-3.

⁶ Complicating the picture further, the typical college added many sports in the 1970s and early 1980s and has not added any in more recent years. Jill K. Johnson, Note: Title IX and Intercollegiate Athletics, Current Judicial Interpretation and Standards for Compliance, 74 B.U.L.Rev. 553, 583, (May 1994), *citing* William E. Thro & Brian A. Snow, *Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics*, 84 Educ. L. Rep. (West) 611, 625 (1993).

⁷ See Gavora at 36.

⁸ Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test. The U.S. Department of Education, January 16, 1996, *available at* <http://ed.gov/about/offices/list/ocr/docs/clarific.html#two>. The relevant excerpt from this guidance document reads in full: "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;

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- 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).”

⁹ The guidance document accompanying the model survey made a similar point: 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.” Additional Clarification at 36.

¹⁰ Between 1992 and 2000, the Clinton DOE’s Office of Civil Rights investigated 44 Title IX complaints. In only three of these cases was the school found compliant under prong two. None of the schools investigated could successfully demonstrate compliance under prong three. Gavora at 37.

¹¹ Under this guidance, an institution will be found in compliance with the third prong 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 fulfilled. Additional Clarification at 4.

¹² Additional Clarification at 4-5.

¹³ *Id.* at 5. The type of direct and persuasive evidence that would rebut the presumption might include, for example, “the recent elimination of a varsity team of the underrepresented sex or a recent, broad-based petition from an existing club team to varsity status.”

¹⁴ Sociology professor and feminist theorist Don Sabo, for example, has testified that women are less likely than men to express interest in sports because of the “historical, social, and political contextualization of women’s role in society.” Quoted in Gavora at 76. *See also Note: Cheering on Women and Girls, Using Title IX To Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1640 (1997): “In effect, the ‘substantially proportionate’ approach recognizes that women’s attitudes toward sports are socially constructed and have been limited by discrimination and gender stereotypes. Congress passed Title IX to combat such gender discrimination and

stereotypes, thereby changing the environment in which girls and women develop, or do not develop, interests in sports.”

¹⁵ Gavora has called this approach the “Field of Dreams” approach to Title IX, referring to the often quoted line from that movie “If you build it, they will come.” 86.

¹⁶ *Id.*, p. 48. Also on the theme of gender differences in self-assessment, *see generally* Catherine Hill et al., “Why So Few? Women in Science, Engineering, Technology and Mathematics,” American Association of University Women (2010), *available at* <http://www.aauw.org/learn/research/upload/whysofew.pdf> (last accessed May 25, 2010), 63. According to the AAUW report, female students rated their mathematical abilities lower than did male students with equivalent levels of achievement. The effect is reversed, however, when students are asked to rate their own verbal abilities: there, men are more likely to underrate their abilities and women to overrate them. *Id.*

¹⁷ In 1971, the year before Title IX was passed, 1 in 27 high school age women played sports. In 1972, the year that Title IX was passed, the number rose to 1 in 9. In 2002, the number was in 1 in 3. Gavora at 32-3.

¹⁸ U.S. Commission on Civil Rights report at 53. Statement of Jocelyn Samuels.

¹⁹ *Id.*

²⁰ Additional Clarification at 6-7.

²¹ *Id.*

²² Additional Clarification at 7.

²³ Jessica Gavora testified before the U.S. Commission on Civil Rights in 2007 that she knew of no schools that had used the Model Survey at that time. One news report states, however, that Western Illinois University administered the Model Survey to its students in 2009. See “WIU Completes Model Survey,” *available at* <http://savingsports.blogspot.com/2009/05/wiu-completes-model-survey.html> (last accessed June 3, 2010).

²⁴ NCAA News Release, “In Honor of Title IX Anniversary NCAA Urges Department of Education to Rescind Additional Clarification of Federal Law,” *available at* http://www.thencaa.biz/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/media+and+events/press+room/news+release+archive/2005/announcements/in+honor+of+title+ix+anniversary+ncaa+urges+department+of+education+to+rescind+additional+clarification+of+federal+law (last accessed June 3, 2010).

²⁵ Michael Dobbs, “Title IX Web Surveys Criticized By NCAA,” *The Washington Post*, March 24, 2005.

²⁶ Data presented during the *Cohen v. Brown University* litigation, one prominent Title IX case, showed that 91 percent of Brown applicants interested in dance were women, 56 percent of those interested in drama were female, and 66 percent of those interested in music were women. By contrast, 60% of Brown applicants who expressed an interest in competing in varsity athletics were male, and 40% were female. Gavora at 77-8. Statistics from the National Federation of High Schools also show that women are disproportionately interested in music and the performing arts. Eighty percent of high school aged choir members are female, as are over 60 percent of high school orchestra members and 55 percent of high school marching bands. Gavora at 143.

²⁷ Senator Obama's responses to questions from the Association for Women in Science and The Society of Women Engineers, Oct. 2008, *available at* <http://www.sciencedebate.org/www/AWSSWEObamaMcCainResponses.pdf>

Related Links:

Office for Civil Rights of the U.S. Department of Education “Dear Colleague” Letter and “Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three.” <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>

April 1, 2010, Commission Releases Title IX Athletics Report: <http://www.usccr.gov/press/2010/PR-04-01-10.pdf>

“Title IX Athletics: Accommodating Interests and Abilities (PDF)” Report by U.S. Commission on Civil Rights: <http://www.usccr.gov/pubs/TitleIX-2010.pdf>

“A Step Backward on Title IX” by Allison Kasic, *Minding the Campus*: http://www.mindingthecampus.com/forum/2010/04/student_interest_surveys_are_n.html

"Ending Title IX A No-Brainer?" by Neal McCluskey, *Cato @ Liberty*: <http://www.cato-at-liberty.org/2010/04/20/ending-title-ix-survey-a-no-brainer/>

“Rescinding of Title IX model survey draws praise from critics” by Erik Brady, *U.S.A. Today*: http://www.usatoday.com/sports/college/2010-04-19-title-ix-reaction_N.htm

"Title IX Athletics Policies: Issues and Data for Education Decision Makers" report from the National Coalition for Women and Girls in Education: <http://www.womenssportsfoundation.org/~media/Files/PDFs%20and%20other%20files%20by%20Topic/Issues/Equity%20Issues/N/Download%20Read%20the%20Full%20Report.pdf>