
THE OBAMA ADMINISTRATION: CHANGING THE RULES OF THE TITLE IX GAME?

By *Alison Somin**

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 colleges could no longer demonstrate compliance with Title IX by using the Model Survey, an instrument designed by the Bush Department of Education’s Office of Civil Rights (“OCR”) to help universities assess relative male and female interest in participating in sports on their campuses.

In fact, whether to make Title IX as strong as possible is anything but a no-brainer. Indeed, virtually since the statute’s enactment in 1972, there has been vigorous debate over how to interpret and enforce this statute, especially with regard to equality in collegiate athletic offerings. While the Department of Education’s guidance documents interpreting Title IX purport to give schools choice over how to demonstrate compliance with the law, in practice they encourage schools to comply only by demonstrating substantial proportionality between men and women’s teams. The Model Survey was intended to solve the problem by giving colleges an easy way to demonstrate relative levels of male and female interest in sports. Because of the Model Survey’s rescission, it will now be harder for schools to demonstrate that they are complying with Title IX. Also, colleges that use substantial proportionality approaches may become embroiled in litigation over whether to count cheerleaders as athletes—an issue that pits women against women. If using an interest-based model were more viable, universities could avoid these battles altogether. Finally, and perhaps most significantly, the Model Survey’s rescission may also portend a wave of Title IX enforcement actions directed at science and engineering programs, both academic fields in which there are disproportionately few women relative to men—a troubling development for separate reasons.

Background on Title IX

Title IX of the Education Amendments of 1972 requires that “[n]o 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 Although Title IX is perhaps best known for its impact on intercollegiate athletics, issues of equal opportunity in athletics barely made it into the legislative history. While Birch Bayh made a few offhand remarks about football and shared locker rooms before the Senate, members of the 92nd Congress were not focused on equality of athletic opportunity. On the other hand, the bill’s sponsors were clear that they did not intend Title IX to impose gender quotas on universities. Birch Bayh said on the floor of the Senate that gender quotas were “exactly what this amendment intends to prohibit,” and that the “thrust of the

amendment is to do away with every quota.”³ In the House, Rep. Albert Quie said that Title IX “would provide that there shall be no quotas in the sex anti-discrimination title.”⁴

Despite these strong anti-quota statements from Congress, the Department of Health, Education, and Welfare issued a 1979 guidance document that would transform Title IX into a statute requiring de facto quotas in university athletics. The 1979 guidance document stated 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.⁵

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 while the three-part test appears to give schools choices regarding how to comply with Title IX, often universities can only feel comfortable about their legal obligations if they are in compliance with the first prong.⁶ For example, a university is theoretically in compliance under prong two if it can show “a history and continuing practice of program expansion.” But in a world in which resources are scarce, few if any universities can afford to continue expanding athletic programs indefinitely.⁷ Universities hoping to comply under prong two are thus left to wonder: how much continuous expansion is enough? In practice, the answer often becomes: when proportional representation is achieved under prong one.⁸

Achieving compliance under prong three—by demonstrating that the interests and abilities of the underrepresented sex have been fully and effectively accommodated—can be even more difficult. In theory, prong three is supposed to offer 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: The relevant excerpt from this guidance document reads in full:

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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).⁹

The document also did not explain how OCR might analyze a case in which some of the listed indicators show unmet interest and others do not, indicating that this list is too vague to give universities much useful guidance. 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" is problematic, as determining what is the relevant area from which an institution draws its students can be quite difficult.¹⁰ Some of the largest and most selective national universities, for example, commonly recruit from a national or even international pool of students.¹¹ 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.¹²

This emphasis on proportionality has sometimes led schools to slash men's teams. As noted above, adding new teams is expensive, and few if any universities have the resources to continue expanding athletic opportunities indefinitely. Jerome Kravitz, a consultant to the U.S. Department of Education and professor at Howard University, testified at a meeting of the federal Title IX commission that from 1982 to 2001, women gained 2,046 teams and 51,967 athletic opportunities.¹³ During the same period, men lost between 1,434 teams and 57,100 to 57,700 participation opportunities. Many witnesses also testified before the Commission that they believed the teams on which they participated were cut due to concerns about Title IX compliance.¹⁴

Critics sometimes claim that budgetary issues, rather than Title IX, actually drove these cuts to men's teams. In some

cases, these claims appear particularly dubious—at UCLA, the university athletic department claimed that it cut its men's gymnastics team for budgetary reasons—but then added a women's soccer team the same year.¹⁵ These critics also fail to recognize that these causes are not mutually exclusive. Title IX (as interpreted) makes men's sports very expensive. For every men's sports team, the university needs an equivalent number of female athletes—unless the school can prove that women do not want these opportunities. When universities face budget crunches, Title IX thus makes cutting a men's team more attractive than cutting a women's team.

The Model Survey

To help schools thus struggling with compliance under the third prong, OCR issued further guidance in 2005.¹⁶ 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.¹⁷ This presumption, however, could be rebutted with "direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team."¹⁸ Critics raised several different concerns about the limitations of the new Model Survey. For reasons I discuss below, however, those criticisms are not well-founded enough to justify the Obama Administration's decision to rescind the survey.

First, some critics objected to the survey's design on technical grounds. For example, Jocelyn Samuels, formerly of the National Women's Law Center and now of the Department of Justice, claimed that the Model Survey fails to depict student interest accurately because OCR permits schools to accept non-responses as evidence of lack of interest.¹⁹ 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.²⁰ But the guidance document accompanying the survey answers Samuels's objection: it states clearly that schools must administer the survey "in a manner that is designed to generate high response rates."²¹ That is, if sending out a single mass e-mail generates few responses, then administration of the survey in this manner may not be sufficient to bring an institution into compliance with Title IX.²² The Additional Clarification document accompanying the Model Survey also suggested that schools distribute the survey by methods more certain than mass e-mail to generate large responses—for example, by incorporating the survey into the mandatory online class registration process.²³

Other objections have been more philosophical and indicate these critics' opposition to the use of any type of interest survey, regardless of how high response rates are. For example, some say that the survey would not measure women's interest in sports fairly because women capable of playing sports, but influenced by negative stereotypes that women shouldn't be athletes, might indicate on the surveys that they're uninterested in athletics.²⁴ According to these advocates, the purpose of Title IX is to effect a cultural transformation of gender roles. They

argue that it was designed to ensure that schools offer adequate opportunities to young women to play sports, an approach that commentator Jessica Gavora calls the “if you build it, they will come” approach to Title IX.²⁵ But it remains unclear whether this approach really works in practice. When Brown University was sued under Title IX in 1992, for example, the university had more than eighty unfilled slots on various female varsity teams—at the same time that Brown was demoting men’s water polo and golf teams from university-funded to donor-funded status due to budgetary constraints.²⁶

Similarly, Samuels 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.²⁷ But female participation in sports rose considerably in the years immediately before Title IX’s passage and has continued to rise.²⁸ It’s therefore unclear to what extent—or if at all—such stereotypes still resonate with today’s college-age women. Also, the higher number of female students of non-traditional age—rather than stereotypes—might partially explain females’ lower levels of interest in sports. Two-thirds of undergraduates over thirty are female, as are 66.4% of undergraduates over forty.²⁹

Third, critics of the Model Survey charge that, because the Model Survey is necessarily administered only to students currently enrolled in a particular school, it fails to capture the athletic interests of students who would have attended that school had it offered particular sports. It’s 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’s not clear why East Ames should also offer the sport. Indeed, in a world in which university budgets are often tight, such specialization may even be desirable.

Impact of the Model Survey’s Rescission

Although the Model Survey might have made demonstrating compliance easier for some institutions, almost no universities ever actually opted to use it.³⁰ Many universities may have made this decision because the NCAA passed a resolution discouraging their members from using the Model Survey.³¹ Myles Brand, president of the NCAA, told *The Washington Post* in 2005 that concerns about litigation from advocacy groups in part motivated the NCAA’s decision. “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,” he said.³²

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 because of the decision. But 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.

This last point—that women appear to be more interested in many non-athletic extracurriculars than men, and that Title IX may divert resources from these programs—may be all-too-often overlooked during discussions about Title IX. For example, data presented during the *Cohen v. Brown University* litigation, one prominent Title IX case, showed that ninety-one percent of Brown applicants interested in dance were women, fifty-six percent of those interested in drama were female, and sixty-six percent of those interested in music were women. By contrast, sixty percent of Brown applicants who expressed an interest in competing in varsity athletics were male, and forty percent were female.³³ Statistics from the National Federation of High Schools also show that women are disproportionately interested in music and the performing arts.³⁴ Eighty percent of high school aged choir members are female, as are over sixty percent of high school orchestra members and fifty-five percent of high school marching bands. U.S. Department of Education data show that more men than women participate in academic clubs, hobby clubs, music programs, and vocational clubs.³⁵

Title IX and Cheerleading

Widespread use of the Model Survey might have also permitted universities to head off a possible wave of litigation regarding whether cheerleaders count as athletes under Title IX and some of the gender politics questions that will inevitably accompany this litigation. Recently, universities eager to get their numbers right for Title IX purposes have designated competitive cheer as a sport.³⁶ Competitive cheerleaders distinguish their competitions—events in which teams of cheerleaders compete against each other to perform elaborate routines, an activity that they claim is similar to the traditional sport gymnastics—from “sideline cheer,” the more traditional form of cheerleading that entails chanting cheers from the sidelines at another sports event.³⁷

The gender politics of whether cheer should count as a sport have proven complicated. Some Title IX advocates have said that counting cheerleaders as athletes only perpetuates stereotypes that women cannot succeed in more traditionally masculine athletic activities.³⁸ Take, for example, the comments of former Stanford basketball player and author Mariah Burton Nelson regarding cheerleading and athletics:

I respect that they [cheerleaders] are athletic. I realize it requires strength, stamina and balance. They tell you it’s not about looks, but what they’re really doing is showing off their bodies, showing off their underwear and shaking their breasts around. It’s quite embarrassing when I go to games with children and see how sexualized the routines have become.³⁹

But other young women have had experiences with cheerleading that feminists might well applaud. “I began cheerleading my freshman year of high school,” writes Syracuse University student Deanna Harvey in the *New York Daily News*, “and it immediately gave me a confidence that I’d never had before.

It also made me appreciate what it takes to succeed in a competitive, challenging and dangerous environment.⁴⁰

To date, only one federal district court has weighed in on the issue and has concluded that competitive cheerleading at Quinnipiac University not a sport for Title IX purposes.⁴¹ Judge Stefan Underhill's opinion bases its conclusion on the requirement of judicial reference to OCR letters, stating that OCR has presumed that cheerleading should not qualify as a sport. He noted that the same presumption applies to other extracurricular activities that have a significant athletic component but are not considered sports, such as drill teams.⁴² Underhill also looked at a test for what activities qualify as sports set forth in another OCR letter, which entails looking to: 1) the quality of team's practice opportunities; 2) whether the regular season differs qualitatively or quantitatively from the regular seasons of other varsity sports; 3) whether the pre and post seasons are consistent with other varsity sports; and 4) whether the team is organized primarily for the purpose of engaging in athletic competition.⁴³ While cheerleading resembled other varsity sports along three of these axes, Underhill's opinion concluded that the competitive cheerleading schedule differed significantly from those of other Quinnipiac varsity sports. Significantly, unlike other varsity athletes, Quinnipiac cheerleaders also competed against high-school-aged athletes and non-scholastically-affiliated "all star" teams of competitive cheerleaders.⁴⁴

To his credit, Judge Underhill's opinion avoided the thorny questions of gender politics. He emphasized:

In deciding that competitive cheer is not presently a Title IX sport, I do not mean to minimize the experience shared by the Quinnipiac cheer team. . . . In reaching my conclusion, I also do not mean to belittle competitive cheer as an athletic endeavor. Competitive cheerleading is a difficult task that requires strength, agility, and grace.⁴⁵

Still, despite the restrained tone of Underhill's opinion, news reports about the decision indicate that at least some reacted angrily to the Underhill decision because they thought it belittled cheerleading. Deanna Harvey, writing in the *New York Daily News* column cited above, wrote that "[m]y message to the judge who ruled that cheerleading is not a sport is to try one stunt, perform a backflip in the air, and wait for two petite girls to catch you. And then get back to me."⁴⁶ Similarly, in the *Atlanta Journal-Constitution*, a former University of Georgia football player turned competitive cheer coach commented, "I think this is just a bunch of old men who don't know the sport. This is a multi-million dollar year-round sport, not some girls wearing short skirts and smiling."⁴⁷

It bears repeating that this question made it into the federal courts only because colleges want their numbers to come out right for substantial proportionality purposes. In a world in which substantial proportionality were less important—in one in which compliance under the accommodation prong was a more viable option for many universities—universities wouldn't need to count cheerleaders' heads toward their totals of female athletes. In that world, some young women might see competitive cheer as a feminist and empowering activity, while others would not. The federal courts would not need to wade into this particular controversy. But as the world is,

wade into it they must—even though their involvement makes this particular battle in the gender wars all that much more unnecessarily contentious.

Title IX and Science

The Obama Administration's decision to rescind the Model Survey might also indicate an interest in "title nining" academic science. Obama himself seems to have latched onto the idea. While praising Title IX's impact on increasing women's participation in athletics, 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 science, technology, engineering, and mathematics ("STEM") disciplines."⁴⁸ The nation's university science, 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.

Such proposals to "title nine" academic science have been in the air for some time. Debra Rolison, Head of the Advanced Electrochemicals Section at the Naval Research Laboratory in Washington, made one proposal as early as 2000.⁴⁹ She has promoted Title IX as an "implacable hammer" in terms of getting faculty attention. Rolison noted the disparities between the numbers of women who receive Ph.Ds in chemistry and the numbers who receive tenure track positions in the sciences. She cited the rapid increase in the numbers of women who have started participating in sports since the passage of Title IX and claimed that application of a similar "creative legal strategy" could close gender gaps in the sciences.⁵⁰ There are at least two potential problems with Rolison's proposed approach. First, where Rolison sees "creativity," others might see "lawlessness": as discussed earlier, neither the text of Title IX nor its legislative history indicates that Congress meant Title IX to require proportional representation of women in academic science. Second, it's at best unclear whether it was Title IX or other factors that caused the vast increases in the number of women playing sports. For example, Jessica Gavora pointed to data in her book indicating that the fundamental shift in girls' athletics participation actually occurred in the late 1960s or early 1970s, before Title IX was passed.⁵¹

Rolison's essay also claims that the primary cause of the disparities is a "culture that is unappealing to women otherwise interested in math and science studies, including how scientific arrogance and other solipsistic behaviors are rewarded by the existing culture."⁵² This culture, according to Rolison, is one in which "round-the-clock scholarship by men doing science was historically sustained by a sociological and emotional infrastructure first provided by monasteries and then by wives."⁵³ She does not explain how this culture might differ from the culture of other academic disciplines that were also once sustained by a similar "sociological and emotional infrastructure." Art historians, for example, also face intense pressure to publish and also benefit from having spouses to help with domestic tasks so that they may focus on academic work. Yet women significantly outnumber men in art history departments, and the picture is similar in other humanities departments.⁵⁴

Indeed, there remains a vigorous debate over what the most important causes of the current gender disparities in

science are. As Stephen Ceci and Wendy Williams state in their recent book *The Mathematics of Sex*, writers on this topic have commonly advanced three classes of explanations regarding gender disparities in science. One class of explanations resembles Rolison's—that bias and barriers prevent scientifically gifted women from maximizing their potential. The second concerns innate ability, or the claim that boys and men have greater inherent mathematical abilities.⁵⁵ A third class of explanation alleges that women are simply less interested in mathematics and science than men.⁵⁶

Ceci and Williams themselves concluded, after three years of reviewing the relevant studies, that the “major cause” of the disparities is “sex differences in occupational preferences.”⁵⁷ Mathematically talented women prefer to enter non-mathematical fields like medicine, veterinary medicine, law, and the biological sciences, whereas men with equal mathematical talent more often choose math-intensive fields like engineering and physics. Mathematically gifted women are also more likely than mathematically gifted men to be verbally gifted, meaning that many will choose careers making use of these other gifts. Ceci and Williams do agree somewhat with Rolison that gender bias and barriers may deter some women's pursuit of scientific careers. But they ultimately found that bias and barriers “have declined in importance in recent years and now seem fairly weak as an explanation for women's current under-representation.”⁵⁸ Ceci and Williams were careful to claim, however, that their results are not necessarily definitive and do call for additional research on these questions at the end of their book.⁵⁹ It is difficult to craft to a solution to a problem without understanding the causes of the problem. Yet regulators attempting to “title nine” academic science would find themselves in precisely this position.

Some might claim that these differences in interest—even if not caused by bias or the persistence of stereotypes—are still a problem worth remedying. At the same time, it is less than obvious why the government should expend potentially millions of tax dollars urging academically inclined women to teach college physics instead of Shakespeare, or to convince would-be pre-laws to switch to engineering instead. Perhaps most importantly, those who drafted the law never intended to impose such quotas on academic science. Consider also that extensive Title IX compliance reviews in academic science would come at tremendous opportunity cost. Cosmology professor Amber Miller, responding to a 2007 U.S. Department of Education review of her department at Columbia University, described the process as a “waste of time.” Miller was required to make an inventory of all of the equipment in her lab and indicate whether women were permitted to use various items. “I wanted to say, leave me alone, and let me get my work done,” she told *Science* magazine.⁶⁰ The work that scientists like Miller do is tremendously valuable in driving national prosperity and innovation. The government should be extremely careful about imposing on these scientists' highly valuable time.

Conclusion

The Obama administration should not have rescinded the Model Survey. If a court had upheld the Model Survey,

it would have become easier for universities that are in fact in compliance with Title IX's prohibition on gender discrimination to demonstrate that compliance under the third prong. Instead, the current numbers games to satisfy substantial proportionality requirements will continue. As a result of these games, budget-minded universities will be forced to divert resources away from programs for which there may be substantial demand (such as dance club, men's wrestling, or cheerleading) and toward some women's athletics team for which there is less demand. As in the Brown example, some teams may even have empty slots. Finally, Obama's stance on the Model Survey foretells that his administration may soon adopt an aggressive approach to enforcing Title IX in academic science. “Title nining” academic science is a bad idea for both legal and policy reasons. First, the law was never intended to mandate strict proportionality in academic science. Secondly, there is no clear consensus among researchers regarding the causes of current gender disparities in science. Until these issues are better understood, a federally imposed solution might well do more harm than good.

Endnotes

1 Katie Thomas, *Rule Change Takes Aim at Loophole in Title IX*, N.Y. TIMES, April 19, 2010.

2 20 U.S.C. 1681(a).

3 117 Cong. Rec. 30,409 (1971).

4 117 Cong. Rec. 39,261-2 (1971).

5 44 Fed. Reg. at 71418.

6 See, e.g., JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX, AND TITLE IX*, 32-33 (2002).

7 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. See 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)). A wave of news stories published after the 2008 financial crisis also indicates that budget cuts are becoming quite common. See, e.g., Editorial, *University Budget Cuts are a Reality Check*, ATHENS BANNER-HERALD, Mar. 4, 2010 (describing budget cuts at the University of Georgia), available at http://www.onlineathens.com/stories/030410/opi_570347902.shtml; Noa Naftali, *Budget Cuts, Fee Increases Draw Anger at University of California*, TUFTS DAILY, Mar. 2, 2010, available at <http://www.tuftsdaily.com/budget-cuts-fee-increases-draw-anger-of-university-of-california-students-1.2175778>; Rohan Mascarenhas, *Rutgers University Students Protest Higher Education Cuts from Governor Chris Christie's Budget*, NEWARK STAR-LEDGER, Apr. 13, 2010, available at http://www.nj.com/news/index.ssf/2010/04/rutgers_university_protest_hig.html.

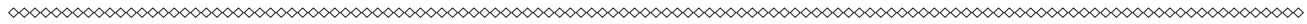
8 See GAVORA, *supra* note 6, at 36.

9 U.S. DEP'T OF EDUC., *CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE PART TEST* (Jan. 16, 1996), available at <http://ed.gov/about/offices/list/ocr/docs/clarific.html#two> (last accessed June 3, 2010).

10 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.
- 11 Princeton University, for example, has students from fifty states and ninety-eight different countries. See PRINCETON VIEWBOOK 4, *available at* http://www.princeton.edu/admission/pdfs/Princeton_VB_0910.pdf (last accessed July 26, 2010). Haverford College has students from forty-five states and thirty-five different countries. See Haverford College at a Glance, *available at* <http://www.haverford.edu/abouthaverford/ataglance.php> (last accessed July 26, 2010). Lehigh University has undergraduates from forty-nine different states and forty-nine different foreign countries. See Lehigh at a Glance, *available at* <http://www4.lehigh.edu/admissions/undergrad/glance> (last accessed July 26, 2010).
- 12 Between 1992 and 2000, the Clinton DOE's Office of Civil Rights investigated forty-four 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, *supra* note 6, at 37.
- 13 SPORTING EQUALITY: TITLE IX THIRTY YEARS LATER 13 (Rita J. Simon ed., Transaction Publishers 2006).
- 14 *Id.*
- 15 *Id.*
- 16 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.
- 17 *Id.* at 4-5.
- 18 *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."
- 19 U.S. COMM'N ON CIVIL RIGHTS, TITLE IX ATHLETICS: ACCOMMODATING INDIVIDUAL INTERESTS AND ABILITIES, Statement of Jocelyn Samuels, 53 (Feb. 2010), *available at* <http://www.usccr.gov> (last accessed August 14, 2010).
- 20 *Id.*
- 21 Additional Clarification at 6-7.
- 22 *Id.*
- 23 *Id.* at 7.
- 24 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, *supra* note 6, 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.")
- 25 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." GAVORA, *supra* note 6, at 86.
- 26 Cohen v. Brown University, 101 F.3d 155,162 (1st Cir. 1996). The eighty unfilled slots statistic appears in Allison Kasic and Kimberly Schulz's "Title IX and Athletics: A Primer," Position Paper No. 610, at 9, The Independent Women's Forum (Sept. 2008).
- 27 *Id.* at 48. Also on the theme of gender differences in self-assessment, see generally CATHERINE HILL ET AL., AM. ASS'N OF UNIV. WOMEN, WHY SO FEW? WOMEN IN SCIENCE, ENGINEERING, TECHNOLOGY AND MATHEMATICS 63 (2010), *available at* <http://www.aauw.org/learn/research/upload/whysofew.pdf> (last accessed May 25, 2010). 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.*
- 28 In 1971, the year before Title IX was passed, one in twenty-seven high-school-age women played sports. In 1972, the year that Title IX was passed, the number rose to one in nine. In 2002, the number was in one in three. GAVORA, *supra* note 6, at 32-33.
- 29 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPARTMENT OF EDUCATION PROFILE OF UNDERGRADUATES IN U.S. POST-SECONDARY EDUCATION INSTITUTIONS: 2003-2004, at 84, Table 3.1 (June 2006).
- 30 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 Posting of Eric McErlain to Saving Sports blog, WIU Completes Model Survey, <http://savingsports.blogspot.com/2009/05/wiu-completes-model-survey.html> (May 27, 2009, 12:05 ET).
- 31 Press Release, NCAA, 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).
- 32 Michael Dobbs, *Title IX Web Surveys Criticized by NCAA*, WASH. POST, Mar. 24, 2005, *available at* <http://www.washingtonpost.com/wp-dyn/articles/A61507-2005Mar23.html> (last accessed August 13, 2010).
- 33 GAVORA, *supra* note 6, at 77-78.
- 34 *Id.* at 143.
- 35 Inst. of Educ. Scis., U.S. Dep't of Educ., Digest of Education Statistics, Table 147 (2007) ("Percentage of High School Sophomores Who Participate in Various School-sponsored Extracurricular Activities, by Selected Student Characteristics: 1990 and 2002"), *available at* http://nces.ed.gov/programs/digest/d07/tables/dt07_147.asp (last accessed Aug. 13, 2010).
- 36 The universities that have done so include the University of Maryland and Seton Hall University. See Posting of Marc Edelman to Above the Law, Sports and the Law: Can Schools 'Cheer' Their Way Into Title IX Compliance?, <http://abovethelaw.com/2009/02/sports-and-the-law-can-schools-cheer-their-way-into-title-ix-compliance/> (Feb. 4, 2009, 13:59 ET). So has Baylor University in Texas. See *Baylor: Competitive Cheer Compliant with Title IX*, WACO TRIBUNE-HERALD, *available at* <http://www.wacotrib.com/sports/baylor/99078104.html> (last accessed August 13, 2010).
- 37 See, e.g., *Biedinger v. Quinnipiac University*, No. 3:09cv21 (D. Conn. July 21, 2010).
- 38 See, e.g., Frank Deford, *Women's Sports, Title IX, and the Cheerleader Option*, National Public Radio, Nov. 25, 2009, *available at* <http://www.npr.org/templates/story/story.php?storyId=120766782> (last accessed July 26, 2010).
- 39 Quoted in Wayne Drehs, *Athletes Are Cheerleaders, Too*, ESPN.COM *available at* <http://sports.espn.go.com/espn/page2/story?page=drehs/040316> (last accessed August 5, 2010).
- 40 See, e.g., Deanna Harvey, *Federal Judge Who Rules Cheerleading Not a Sport Under Title IX Should Toss His Decision*, N.Y. DAILY NEWS, July 22, 2010.
- 41 *Biedinger v. Quinnipiac University*, No. 3:09cv21 (D. Conn. July 21, 2010).
- 42 *Id.* at 53.
- 43 *Id.*
- 44 *Id.* at 65.



45 *Id.* at 71.

46 Harvey, *supra* note 40.

47 D. Aileen Dodd, *Following Judge's Ruling, Cheerleaders Defend Their Athleticism*, ATLANTA JOURNAL-CONSTITUTION, July 23, 2010, *available at* <http://www.ajc.com/lifestyle/following-judges-ruling-cheerleaders-577183.html>.

48 Senator Obama's responses to questions from the Association for Women in Science and The Society of Women Engineers, Oct. 2008, *available at* <https://www3750.sslldomain.com/awis/documents/AWISandSWEQuestionnaireObamaResponses-2.pdf>.

49 See "Women in the Chemical Workforce." A Workshop Report to the Chemical Sciences Roundtable, *available at* <http://www.nap.edu/openbook.php?isbn=030907293X> (last accessed August 5, 2010).

50 Debra R. Rolison, "Title IX as a Change Strategy for Women in Science and Engineering," in *Women, Work, and the Academy: Strategies for Responding to "Post Civil Rights Era" Discrimination (2004)*, *available at* <http://www.barnard.edu/bcrw/womenandwork/rolison.htm> (last accessed August 13, 2010).

51 GAVORA, *supra* note 6, at 32-33.

52 Rolison, *supra* note 50.

53 *Id.*

54 Over the last fifteen years, women have earned more than two-thirds of the art history Ph.Ds granted in the United States. RENATE SADROIZINSKI, MARESI NARAD & JOSEPH CERNY, PH.DS IN ART HISTORY OVER A DECADE LATER: A NATIONAL CAREER PATH STUDY OF ART HISTORIANS (Mar. 2003), *available at* <http://depts.washington.edu/cirgeweb/c/wp-content/uploads/2008/02/intro.pdf>.

55 Stephen Ceci & Wendy Williams, *THE MATHEMATICS OF SEX*, xii (2009).

56 *Id.*

57 *Id.*

58 *Id.* The results of an informal poll of professors may give additional credence to Ceci and Williams' findings: most see the issue as a result of disparities in interest rather than gender bias. Sociologists Neil Gross of Harvard University and Solon Simmons of George Mason University asked 1417 professors what they believed accounted for the relative scarcity of female math, science, and engineering professors. Just one percent attributed the scarcity to women's lack of study; twenty-four percent to sex discrimination; and seventy-four percent to differences in what characteristically interests men and women.

59 *Id.* at 219.

60 *Cited in* Christina Hoff Sommers, *The Science on Women and Science*, 95 (2009).

