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An Analysis of the Past, Present, and Future of Title IX in Intercollegiate Athletics Through Various Case Studies, Specifically Western Michigan University

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THE CARL AND WINIFRED LEE HONORS COLLEGE

CERTIFICATE OF ORAL EXAMINATION

Tara L. Becker, having been admitted to the Carl and Winifred Lee Honors College in Fall 2001 successfully presented the Lee Honors College Thesis on April 20, 2005.

The title of the paper is:

"An Analysis of the Past, Present, and Furture of Title IX Through Case Studies of Division I Schools, Specifically WMU"

A handwritten signature in blue ink, appearing to read 'Ashlyn Kuersten', is written over a horizontal line.

Dr. Ashlyn Kuersten, Political Science Department

A handwritten signature in blue ink, appearing to read 'Paul Devries', is written over a horizontal line.

Mr. Paul Devries, Athletics Department

An Analysis of the Past, Present, and Future of
Title IX in Intercollegiate Athletics through
Various Case Studies, Specifically Western
Michigan University.

Tara Becker

Lee Honors College Senior Thesis
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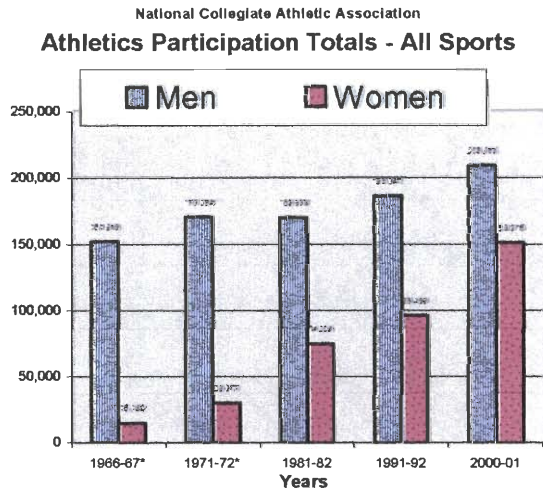
Introduction

Title IX: “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” (Schuld, 4).

Although collegiate athletics is only a small portion of Title IX, it has been the most widely discussed and controversial parts of the law to implement. The athletic component of Title IX covers any programs that take place in conjunction with an elementary, secondary, or post-secondary institution that receives federal funding. However, it seems that colleges and universities have had the most trouble complying with the specifics of the law. They not only have to provide equal opportunities and facilities, but also have to worry about scholarship and recruiting money, which are only a part of their multi-million dollar budgets. However, they have made great strides since the days of the predominantly male dominated world of collegiate sports in the past. The impact that Title IX has on a school obviously varies greatly between the different divisions of college athletics. However, even within Division I, the impact of this law and its ability to be complied with varies a great deal from one institution to the next. Schools are allowed a great deal of flexibility in choosing how to comply with Title IX, but have found that the vagueness of the law caused problems now that the steps towards equality are slowing and budgets are shrinking.

The strides that have been made since the inception of Title IX in 1972 have been staggering. For example, in 1995, women made up thirty-seven percent of collegiate athletes as compared to fifteen percent in 1971 (Valentin, 6). The number of women’s collegiate athletic teams also drastically increased by 3000 teams from 1981 to 1999 (Open to All, 2003). Just from this data alone, it is obvious that Title IX was not only desperately needed, but also widely successful in its first twenty-five years. According to the 2001 NCAA Gender Equity Survey,

men make up fifty-nine percent of athletes, fifty-seven percent of the scholarships, and sixty-four percent of the operating budget at all NCAA schools (Commission’s Report). We can see the dramatic impacts of Title IX simply by looking at the rate of increase in participation through the



Source: NCAA Year-By-Year Sports Participation 1992-2001; Sports and Recreation Programs of Universities and Colleges 1957-82 (NCAA)
 *Between 1956-57 and 1981-82, participation rates were collected in five-year intervals. The data for these years was not collected in the same manner as the data from 1982 to the present and it includes recreation programs. Therefore, these data are not directly comparable to the other data in this report. This information is only meant to provide a historical view.

years in the graph to the left. Taking into account differences in financial aid needs, cost of equipment, and other nondiscriminatory reasons for these differences, it appears that males and females are close, but not completely proportionally equal in athletics. However, as the drastic increases in the number of women playing college athletics have begun to stabilize, some of the negative effects have begun to

surface, such as the cutting of male squads. From 1993 to 1999, over 151 men’s teams were eliminated from collegiate athletics including diving, wrestling, golf, gymnastics, and other “Olympic” sports (Commission Report). Even with this reduction of male sports, there are still a larger number of males playing collegiate athletics as the graph shows. This discrepancy can be analyzed many different ways. Proponents of a stronger Title IX would see it as the result of past and present discrimination against female athletes and evidence that more must be done for females. However, others view this discrepancy as the natural balance of athletic participation based on interest in playing. They argue that it is okay for there to be more males in collegiate sports because there is more interest among males to play sports, even if it is just as walk-ons to a college team. It is also important to note that although there continues to be a large gap in the

number of males and females participating in collegiate sports, there were actually 330 more women's teams than men's according to a 1996-7 GAO survey which covered the NCAA and the NAIA (commission report).

History of Title IX

In order to analyze Title IX today, it is important to understand its history as well as the original intent of the law. (Appendix A) Title IX's origin is in President Johnson's Executive Order 11246 of 1965, which prohibited federal contractors from employment discrimination based on race, color, religion, or national origin (Valentin, 2). This Executive Order was later amended to include sex discrimination in 1968. Soon after this amended version passed, Bernice Sandler, a widely known women's rights activist, made the connection that since public universities are at least partially funded by the government, they were subject to the amended Executive Order. Only two years later, in 1970, the first compliance investigation began at Harvard University (Valentin, 2).

Soon after this investigation started, Representative Edith Green from Ohio began to put together an amendment to the 1964 Civil Rights Act that would prohibit discrimination in educational employment. Her proposed legislation would also have amended Title VI of the Civil Rights Act (which would mean that no departments of a federally funded entity could discriminate based on sex), and extend the Equal Pay Act to executives, administrators, and professionals (Valentin, 2-3). However, African American congressional leaders were concerned about the weakening of Title VI by the extending of its coverage, so Representative Green renamed it Title IX to keep it separate from the previous amendment. It took several months just for the House and Senate to come up with one version of this amendment that could be agreed upon, but the real debates had not yet begun because most people were unaware of its

future implications. One of the main problems the Senate saw with the bill was that it was unclear whether this bill would force high schools and colleges to allow women to play football. However, this lack of clarity was not in the minds of the lobby for higher education, as they kept surprisingly quiet because of their lack of realization of how this bill would affect them. In 1972, the Title IX that is still in effect today was passed by both houses of Congress and signed into law by President Nixon (Valentin, 3).

Historical Controversies

Once Title IX was signed into law, it did not just sit quietly in the history books. Not only was Congress still somewhat confused about the specific enactment and enforcement of the law, but college athletic programs, feminist groups, and the public were also beginning to want more details. Some of these details can be found in the transcripts of Congressional debates and discussions on the bill while it was in committee and on the floor. Senate sponsor of the bill, Birch Bayh, stated that “gender quotas were ‘exactly what this amendment intends to prohibit...’ and “the thrust of the amendment is to do away with every quota” (Schuld, 6). The House sponsor, Albert Quie, had similar feelings on the bill as he stated that Title IX “would provide that there shall be no quotas in the sex discrimination title” (Schuld, 6). These stipulations along with some of the others that were debated in Congress provided some guidelines, but not enough to be able to use the law in reality.

In order to clarify Title IX even more, it was given to the Department of Health, Education, and Welfare (HEW) to develop “the regulations that would instruct educational institutions on Title IX compliance” (Schuld, 6). It was not until 1975 that the group introduced its first policies. They included such stipulations as, each school system must “designate one employee as the Title IX coordinator,” and all employees and students must be notified of how to

be in touch with this person. (Valentin, 3). Other guidelines included that institutions must publicize grievance procedures, self-evaluate once and then take measures to fix the wrong that they found, and take “remedial or affirmative steps” where necessary to increase participation in areas of bias. (Valentin, 3). By this time, schools did have enough information to begin the road to equality, but the lack of a methodology to enforce Title IX was not giving schools much incentive to quickly move towards compliance with the law.

In 1979, the Department of Health, Education, and Welfare reorganized into the Department of Education and the Department of Health and Human Services, leaving responsibility for Title IX to fall into the just recently formed Office of Civil Rights (OCR). However, before these departments split, they concocted a policy interpretation that was meant to clarify Title IX for the schools. This became known as the 1979 Policy Interpretation, but since the department that developed it had split almost immediately after the interpretation was published, it was never reviewed or approved by Congress. Regardless, the three rules for compliance included in this document have been the most extensively used (and debated over) regulations used to decide Title IX cases.

The regulations that were written in this policy interpretation have become known as the “three prong test.” The first prong has become the most important because cases resulting from the policy interpretation implied that if an educational institution can show that they comply with this one, they are automatically proven in compliance with Title IX. It states that compliance can be achieved by showing that intercollegiate participation opportunities for each gender are “substantially proportionate” to the number of undergraduates of each gender enrolled at the institution. In 1996, the Education department affirmed the use of this first prong as a “safe harbor” in a memorandum on a recent Supreme Court decision (Suggs, A38). Compliance can

also be shown through the other two prongs, but courts have not given them the force of law and thus they are perceived to be stepping-stones to the compliance of prong one. The second prong states that athletic departments must show “continuous and reasonable efforts” in the past to achieve gender equality. This is usually viewed in terms of how many women’s teams or facilities have been added in the past x years. The third states that institutions must demonstrate that they are fulfilling the interests and abilities of the “underrepresented sex” in their programs. One way that this could be done is through a survey of the female population on campus (or statewide high schools) to see if their athletic needs are being met or if there are other opportunities desired (Schuld, 4-5).

As with all controversial and unclear laws, it was not long before the courts became involved with Title IX and this new policy interpretation. As soon as this policy interpretation was released, there were a small number of women who brought lawsuits to the courts since they finally had a law with which to fight. *Cannon v. University of Chicago* was just one example, and like the others, the decision was to remedy the University of Chicago’s discriminatory practices and allow the woman to participate in her sport and receive the same treatment and monetary benefits as her male counterparts (Schuld, 7). Even though the number of these cases was quite small and the decisions were not controversial, they did give schools motivation to change their policies quickly.

However, in the late 1980’s and early 1990’s, Title IX lawsuits started to hit the fervor that they are at today. Two major cases changed the way that Title IX was viewed and used to demand equity. In 1980, the Supreme Court set an important precedent when it decided in *Grove City College v. Bell* (1984) that “Title IX was program specific and that, therefore, only those programs and activities receiving direct federal funds needed to comply” (Valentin, 5). Since

sports programs were not a federally funded part of the University, this ruling meant that Title IX did not apply to them. However, before schools could completely reverse their new plans for equality, the decision was overturned by the Civil Rights Restoration Act. This Act stated that athletics were an “extension” of the federal funds that universities receive (Schuld, 8). *Franklin v. Gwinnet County Public Schools et al.* in 1992 was the second case that drastically changed the way female athletes could fight for equality and remains the precedent today. The decision established that an athlete who had been discriminated against could sue for unlimited damages and attorney’s fees in federal court rather than just for a remedy of the inequality. This sparked a great number of court cases in the 1990’s including *Cohen v. Brown* and *Roberts v. Colorado State University* where female athletes won thousands of dollars because their school had not been allowing them equal treatment in athletics (Schuld, 6).

Case Studies

As we begin to analyze the present and future implications of this law on Division I schools, it is important that we look at all different types of schools and consider the effects that this law has on them individually. Although the schools are all part of the same division, they all have differently situated enrollment characteristics and athletic departments, which lead to a differing view on what they need from future interpretations of Title IX in order to end gender discrimination effectively. One of the major causes for the differences in effects of Title IX on collegiate athletic departments is their size. Although Division I is one of the general categories of athletic programs, it is broad enough to encompass many subcategories, formal and informal. One the most obvious subcategories is the athletic budget. For example, the average budget for all Division I athletic departments was 12.2 million dollars, where the average budget among the six conferences that participate in college football’s Bowl Championship Series (BCS) was

thirty-four million dollars (Suggs, A41). A large part of this budget difference has to do with the large domination of football in these six leagues, compared to a lesser domination (or complete lack of a football team) at the other schools. However, the amount of money that is available for the “non-revenue” sports at schools where there is not a large football team is sometimes greater than what is available at the BCS schools. In fact, ninety-one Division I-A (which includes all of the BCS leagues) schools spend a “larger percentage of their budget on football than they do on all of women’s sports put together” (Suggs, A38).

The differences in budget can be correlated to differences in competitiveness of teams. These budgets not only reflect the size of a university, but also the value that it places on athletics. Ivy League schools such as Brown University, although still quite competitive, will have a different emphasis on the priority of collegiate sports compared to the powerhouse sports schools of the Southeastern Conference and similar conferences.

Brown University

Brown University was one of the first universities that had a case where a female could not only sue the University for remedies to the discrimination, but also for damages and attorney fees (*Franklin v. Gwinnett County Public Schools*). Amy Cohen, a Brown gymnast, took advantage of this new rule and sued Brown in 1992 for placing two women’s teams in the donor-status category, which meant that less than half of their budget was provided by the university (Schuld, 8). The lawyers for Brown University argued that the first part of the three-prong test amounted to an illegal quota system, and that they were meeting the second and third prong. They had greatly expanded women’s sports in the 1980’s, have a high number of women’s teams today, had surveyed Brown students as well as high school students to determine their interests, and had met these interests (Schuld, 8). From the data collected from the surveys, they claimed

that women had a much lesser interest in sports than men did on the collegiate and high school level. They also argued that as of 1992, there were eighty-five unfilled positions on varsity teams, thus showing that females were not even taking advantage of the opportunities that Brown had been forced to give them (Schuld, 11).

However, the judge decided that, while this 1979 policy interpretation did not carry the force of law, it was the only thing available to rely on as a guide. Therefore, he ruled that Brown did not comply with Title IX because they did not meet the proportionality test (Schuld, 8). Brown appealed this decision, but the Supreme Court rejected the case. Therefore, it ended up that Brown had three options. They could increase funding for all sports, cut some men's teams to pay for women's teams, or reduce the size of the football team. Brown attempted to increase the number of female athletes by creating varsity teams that were funded solely by private donors. However, this was also deemed against Title IX.

Some of the arguments of Brown could fit with many other Division I schools across the country, especially those which are academically rigorous. The argument of a lesser interest in sports by women is researched in a 1994 study by Peacy Economics Inc. of Boulder, Colorado. This organization studied different participation rates among NCAA schools (Division I and II) for a variety of different sports. They found that sixty-five percent of collegiate athletes were male whereas thirty-five percent were female. This could be used as an argument for proponents of Title IX because it shows that the law does need to be strengthened to reduce this large difference in the number of men competing as opposed to the number of women. However, the other parts of their survey included voluntary, interest based sports such as intramurals and club. Here they found that seventy-eight percent of intramural players were male as compared to the twenty-two percent who were female. In club sports, there was less of a discrepancy since sixty-

six percent of the athletes were male and thirty-four were female. Since both of these types of athletics are voluntary and open to either men or women (sometimes even co-ed teams), it cannot be argued that the opportunities are not there. (Schuld, 11).

In some aspects, athletics at Brown fit more under the category of club sports since, being a member of the Ivy League, they are only allowed to give student-athletes need-based financial aid (Porto, 1). This is quite different from many of the other Division I leagues where scholarships are used to recruit and keep talented players. While this does detract from the caliber of players that choose to play at Brown and other Ivy League Schools, it also sets the standard that students are there to learn first and participate in athletics second. In addition, it may explain the reasoning for why there are eighty-five empty slots in women's athletics. Most students attend Brown and other Ivy League schools to get one of the best educations offered in the country and by playing a sport, which is usually quite time consuming, it is hard to focus on academics. If it were true that there is discrepancy in the interest of males and females in athletic competition, then it would be best shown in the athletics of Brown University, since they have little to offer their athletes in the way of scholarships or other incentives to play. The natural assumption in the first prong is that males and females have identical interests in sports at all universities. However, at Brown where there are eighty-five empty female spots, it appears that men would be much more willing to play sports without other incentives than women would. However, as I have mentioned before, others would argue that the difference in interest is a result of the social conditioning of female Brown students in thinking that women are limited in their athletic abilities. This happens through being brought up watching male athletes on the television, in the newspaper, and being persuaded to pursue other activities besides sports. Either way, adding more women's team and cutting the men's, which is a common solution to

Title IX noncompliance, is not going to solve the problem because the women are not there for whatever reason to join the teams.

Auburn University

This can be compared to other universities such as Auburn University in Alabama where full ride scholarships are commonplace among college athletes. Since they have scholarships to offer their athletes, they can recruit players that are more competitive and use their scholarships to keep them focused on the sport as opposed to their schoolwork. A prime example of the differences between schools like Auburn and those similar to Brown is Nicci Rinaldi, one of the top thirty high school basketball players in the country. She was presented offers from both Auburn University and Dartmouth (an Ivy League school). Auburn University is a member of the Southeastern Conference (SEC), where women's athletics have begun to step into the "big business" of men's football and basketball. The women's basketball team at Auburn was extremely successful and earned national recognition. Nicci originally accepted Dartmouth's offer to play, but changed her mind two weeks before leaving because she did not want to have to incur the debt that attending Dartmouth without a scholarship would have left her with. Instead, she turned to Auburn who had offered her a full scholarship to play basketball (Porto, 1). However, even with the full scholarship, she realized that she did not want to sacrifice her academics for the overwhelming life as a big time collegiate athlete. She left Auburn after only three weeks and finished out her college career at Dartmouth. Her team was still competitive, but she was able to be a student first and an athlete second with none of the pressures of a scholarship riding on her.

At schools such as Auburn and other SEC powerhouses in women's sports such as Tennessee, is it any wonder that more women are interested in sports and more spots are filled on the rosters? They are visible and recognized not only on the university level, but also in thousands of homes (sadly though, still not matching men's powerhouse sports). Little girls of the 1990s have grown up watching these games on TV, hoping to play for Pat Summit (coach of the successful Tennessee women's basketball program) or other strong programs. These are competitive teams who recruit based on the player who would be best for their team as opposed to recruiting based on the fit of the university as a whole with the student. Brian Porto argues that many of the athletes who succeed at these types of schools have to put their academics and intellectual development second. They may be forced away from the major that they want or graduate in six years as opposed to four or five. In cases such as these, Title IX truly does come into play because there are enough (or more than enough) women to fill all of the spots on the teams even the spots that are "practice only." Thus, it seems that it is fairer to use the proportionality test because the interest levels for these highly competitive teams are there and in order to maintain the competitive nature, they must receive their fair share of the budget.

Historically Black Colleges and Universities

Another difference between various Division I teams is the gap between male and female enrollment. Nationwide, there is a significant gap between female and male students. Statistics from 1995-1996 show that across all post-secondary institutions, 56.9% of the students are female whereas 43.2% are male. This gap is slightly smaller for four-year institutions, but still encompasses the many non-traditional students who are not even eligible to play sports. (Schuld, 13) However, the largest gap between the sexes occurs at those schools that are historically black colleges. At these schools there are upwards of twenty percent more females than males.

“At eighteen of the twenty predominantly black colleges in division one, the proportion of female athletes was at least 19 percentage points below the percentage of female undergraduates” as compared to a seventeen percent average among all 305 division one institutions (Naughton, A55-56).

These historically black colleges include Florida A&M, Morgan State University, Coppin State College, and Hampton University. Several of these schools were included in a National Women’s Law Center complaint with the Office of Civil Rights because they were using discriminatory practices in their athletic departments. However, along with their increased percentage of female students, each of these schools has a higher percentage of female athletes than the nationwide average of Division I schools. For example, Coppin State’s percentage of female undergraduate students is seventy-two percent whereas its percentage of female athletes is fifty-six percent. At Hampton, there is a similar ratio with sixty-one percent of enrollment being female as compared to forty percent of athletes being female.

It may seem that the proportionality test would be fair in cases such as Hampton and Coppin because it is only right that if there are more female students, there is a need for more female athletic spots. However, these universities are usually the poorest and cannot afford to add enough women’s teams to become in compliance with the first prong. As Patricia V. Viverito, chair of the NCAA Committee of Women’s athletics states, “These are schools that are not getting into tournaments. They have no TV deal with ESPN. There is revenue available to others that are not available to them” (Naughton, A55-56). For these historically black colleges, the football team earns the national recognition for the athletic program. Although by no means do these teams earn enough revenue to pay for themselves, chances are that they are bringing in the most revenue and are most likely to get at least one game on TV. Football games are also the

best way to bring alumni and other visitors to campus. An example of the importance of football to these universities is Grambling State University, where football coach Eddie Robinson just retired with more victories than any other coach did in the history of college football (Naughton, A55-56).

In response to the complaint by the National Women's Law Center that was discussed earlier, historically black college and university officials are finding as they try to bring gender equity to their athletic program is that it is not going to be easy. One of the ways that will bring them most into compliance is to drop the football teams, since these teams account for sixty-three scholarships and eighty-five athletes in division IAA. This would obviously free up resources to women's sports, but it would cost the school in revenue, as I discussed earlier. Many people would argue that it is not necessary to drop these teams because it is always possible to add women's teams. However, this is actually quite difficult for several reasons. The NCAA sets limits on the number of scholarships that can be offered per each women's team, thus the colleges would be forced to add three or maybe even more sports. The second reason is that they simply cannot afford to add more teams, especially when the sports are archery or badminton where it is unsure if there will even be an interest or if they will be competitive. (Naughton, A55-56). Finally, the last argument against simply adding the sports is that many of the sports that have been added or may be added in the future are historically stereotyped as "white girl sports," and do not address the constant need of involving African Americans in a more diverse range of sports.

Big Football Schools

One of the biggest sticking points with Title IX is football. This sport accounts for at least eighty male athletes, and at the bigger schools, it could be upwards of 100. There are no

women's sports that even come close to having this many members, and there would probably need to be at least three women's teams to offset the number of scholarships and athletes that are on the football team. However, to some institutions, college football is their lifeblood, because it is profitable, earns national recognition through bowl games or TV deals, and brings people to campus. On the other side, many supporters of Title IX are pushing for a drastic minimization of football. They have a valid argument, as college football has become a lucrative business with some budgets in the tens of millions of dollars.

The best way to view just how much football affects an athletic program is to compare division I-A and I-AA to schools in division I-AAA, which do not have football teams. At these Division I-AAA schools, the average for women's sports is \$1.9-million which is quite close to the men's average budget of \$2.1 million (Suggs, A41). However, this small gap between budgets is not the case, especially at the Division I-A "big-football" schools of the BCS. In the six conferences that make up the BCS, \$14.7-million is spent on men's sports while women carry only \$6-million of the budget (Suggs, A41). As I mentioned before, ninety-one of the schools in Division I-A (including the BCS) spend a larger percent of their budget on football than they do on all of women's sports put together (Suggs, A38). Although this is a large gap and seems inequitable, a study of football and non-football Division I schools by the Chronicle of Higher Education found that "there is a wide variance in women's progress, with greater progress seen at the big money football and/or basketball schools (Schuld, 19). These BCS figures represent a fifty percent increase for women since 1997, but also a forty-two percent increase for males, who have always held the advantage in the budget. However, eighty-two of these football teams are able to earn a profit that is at least enough to pay for themselves. (Suggs, A38).

Louisiana State University

One example of a large Division I BCS school whose lifeblood is football is Louisiana State University. The athletic director, Joe Dean says, "If the football teams here wins, I am a very good athletic director. I'm not just good, I'm great. And if the football team loses..." (Suggs, A53-A55). The south has always been known for its football-crazed ways from little leagues right on up to Division I ball. This is true even at places like LSU where Joe Dean has only presided over three winning seasons in his tenure. Thus, these southern universities have had a hard time adjusting to and complying with Title IX as have most other Division I schools throughout the country. In 1994, former soccer and softball players complained that they had been treated unfairly and brought a class-action lawsuit against Dean and LSU. The lawsuit was based not only on LSU's noncompliance, but also the paternalistic and sexist attitude of Joe Dean when he made remarks such as "I'd love to help a cute little girl like you" (Suggs, A53-55). The appeals court sided with the women and since 1994, LSU has poured thousands of dollars into its women's programs. This extra attention and money has definitely helped as more highly competitive teams have been formed, many of which were ranked in the top twenty-five during 2000.

For schools such as LSU and other Division I-A big football schools, complying with the proportionality rule is not easy, especially in the big-business college football world in which we live. Many of these teams can pay for themselves or even turn a profit, which is then given out to support women's teams and other non-revenue male sports. Coaches and athletic directors argue that this alone should be enough for them to be left out of Title IX counts. Proponents of Title IX would disagree because they argue that the football teams are still initially having too much money spent initially on them that could be reduced and spread to the other teams. They

use the examples of other Division I schools where there are not football teams to make their point. Since there is no large men or women's team that dominates the budget or the media at these schools, they are able to keep many more men's teams while adding new women's teams because they're not spending one large chunk of their money on one team. Thus, these schools without football are more in compliance with the proportionality rule of equality than the schools with football. However, their teams, whether male or female, are not as competitive as the schools in the BCS leagues.

Brigham Young

In the smaller Division I-A schools that play football such as Brigham Young, the difference between the male and female budget still exists, but on a smaller scale. They spend \$6-million on men while they only spend \$2.8-million on women (Suggs, A41). However, these amounts represent a double in women's spending since 1997 and a fifty-percent increase in spending on male athletics (Suggs, A41). Thus, women's sports are making strides towards fiscal equity with males, and the goal is that eventually budgets for women's sports will be equivalent to those of men's. However, Brigham Young is another specialized case in that they have one entire athletic department for women and an entirely separate department for the men. Each program, especially the women's, have been extremely successful in the past several years. They finished 2002 ranked fifteenth in the Sears Directors Cup standings, which takes into account the success of all of the athletic teams. The success of Brigham Young has other schools looking into this method of two separate sports programs, seemingly making it easier to maintain the second or third prong of Title IX. The women's revenue could focus solely on the women and build new facilities or increase scholarship and recruitment budgets, while the men's program could also spend its money on their own programs. However, this type of program still

accounts for a large difference in budgets because male sports have more of an appeal in society and naturally attract more revenue. Therefore, male sports may always increase more than women's and the ability to meet proportionality requirements of the first prong will become less and less of a possibility.

Above are just some of the general differences between Division one colleges, however, on a closer look, there are differences in every single school. Each one provides an exception in its own way. This is what makes the enforcement of Title IX and other regulations so difficult. Although Title IX has the broad goal of ending discrimination based on gender, the way it goes about doing this is quite specific and does not take into account the differences in varying colleges or universities. The three prongs are quite simple and easy to understand in writing, but the question remains if they are all equally helping to make strides for women in athletics. Is using different guidelines at different Universities acceptable under this law even if it can be found that one is not as beneficial as the others? What if they are too strict for the financially strapped campuses who are being required to cut sports? These questions and many others were taken up by the 2003 Secretary of Education's Commission on Opportunity in Athletics in order to find and clarify the future implications of Title IX

2003 Secretary of Education's Commission on Opportunity in Athletics

When looking at statistics from pre-1970 to today, it is obvious that Title IX has helped women make huge strides in collegiate athletics. However, this law is now thirty years old and the huge strides are beginning to stabilize. It has also recently forced the dropping of men's teams. It is obvious that something needs to be done in order to continue the work towards collegiate athletic equity for men and women. The most recent step that was taken to do this is Secretary of Education Rod Paige's Commission on Opportunity in Athletics. This commission

was organized in June of 2002 to generate recommendations for the future implementation of Title IX. They were given seven main questions to focus their findings and recommendations around. These recommendations would not have the force of law, but would be reviewed carefully by Secretary Paige and President Bush.

Cynthia Cooper, a former WNBA player and coach and current Chief Executive Officer of the sports marketing company, ProHaven Inc, along with Ted Leland, the athletic director at Stanford University, co-chaired the fifteen member commission. (Open to All, 2003) The commission also included athletic directors from various colleges and universities such as Bob Bowsby, Cary Groth, and Dr. Deborah Yow. There were professors such as Percy Bates from the University of Michigan as well as former outstanding female athletes such as Julie Foudy and Donna de Varona both of whom play an active role in the Women In Sports Foundation. The commission was rounded out by the counsel to the President of Brigham Young University, Tom Griffith; the head coach of the Notre Dame women's basketball team, Muffet McGraw; the CEO of the Educational Leaders Council, Lisa Graham Keegan; the President of the Women's Freedom Network, Dr. Rita Simon; and a commissioner from the South-Eastern Conference, Mike Slive. (Open to All, 2003) Although this group of people represents a diverse group with various interests and opinions on what the future of Title IX should hold, there are notable groups of people not included in the commission such as coaches of men's sports that are traditionally the first cut at the collegiate levels or representatives from division two or three colleges where the emphasis on athletics is slightly less than at division one colleges.

In 2003, the commission produced a report that included the background of Title IX, the commission findings, and a list of twenty-three recommendations for future usage of Title IX (fifteen of which were passed unanimously). The recommendations focused on commitment,

clarity, fairness, and enforcement of Title IX (Commission Report). Some of these recommendations were quite revolutionary and called for many changes in the implementation and enforcement of Title IX to ensure that the modern Title IX was creating equal opportunities for all athletes, including males and females. However, along with the majority committee's report a minority report by Julie Foudy and Donna de Varona was submitted that claims that the changes proposed in the commission would drastically harm the equality that women have gained in the past thirty years and would constrict the future gains that women were able to make in athletics and education.

While many of the recommendations call for clear and consistent regulations, enforcement across all institutions, and stronger sanctions against schools that do not apply, several do recognize the differences that exist between schools. Number twelve is a good example of this as it states, "The Office of Civil Rights should re-examine its regulations regarding the standards governing private funding of particular sports aimed at preventing those sports from being dropped or to allow specific teams to be added" (Suggs, A40-41). This recognizes that some schools do have the donor money available to run smaller teams and these teams would not even need university money. Another of the recommendations states that there should be a "reasonable variance" in the rule of substantial proportionality and another even goes so far as to call for a search to find a new way of measuring participation for this prong. The idea of this first prong as a "safe harbor" was questioned as the board suggested that all three prongs should be looked at to determine compliance (or even different criteria). This emphasis on all three prongs has always been the case according to the previous clarifications of Title IX, but many schools had misunderstandings about the idea of the first prong being the only surefire way of compliance. Determining the interest level at the school, as well as in the state high

schools, is another method that was proposed in order for institutions to show compliance with the third prong. This would allow the uniqueness of interests at each school to be studied and then acted upon. Critics of these recommendations point out that the one thing that all of the recommendations do have in common is that they will make it easier for schools to show compliance.

Implications of the Commission's Report

During the first four months after the commission's report was released, there was not much being done about the recommendations. Part of the administration's reluctance to do anything about this might have stemmed from the outspoken opposition to the strong changes that were proposed in the commission's report. However, in July of 2003, the Assistant Secretary of Civil Rights, Gerald Reynolds, issued a report giving "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance." This document maintained that Title IX was going to stay the same regardless of the recommendations that were made by the committee.

The most influential aspect of this report revolved around its discussion of the "three prong test" that has historically determined whether an institution is in compliance with Title IX. Reynolds clearly stated that the "[Office of Civil Rights] encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations" (Reynolds, 2). That is, any institution has the ability to pick from one of the three prongs to show compliance. This is much different language than was introduced in the 1996 clarification when the first prong was designated as the "safe harbor." If schools were able to meet this prong, they would immediately be shown to be in compliance. Many institutions took this clarification as that they had to meet the first prong or they would not be in compliance. Recall

that the first prong states that the number of athletic opportunities for females must be “substantially proportionate” to the percentage of enrollment they hold at the school. This is probably the hardest and most financially constraining of the prongs, and many schools were cutting sports, especially male sports, to achieve compliance with this prong (Reynolds, 2). The dropping of male sports has been one of the most controversial aspects of institutional compliance with Title IX since the 1996 clarification. In response to this, the 2003 clarification makes note that this “elimination of teams is a disfavored practice” and that it is “contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams” (Reynolds, 2).

The clarification also stated that the Office of Civil Rights plans to begin a nationwide educational campaign to inform educational institutions about the choices that they have in complying with Title IX. This would include specifics on complying with Title IX using the second or third prong and ensuring that institutions know how flexible the law is. They also hope to show institutions practical ways to comply with any of these prongs without having to cut sports and provide technical assistance in doing so. This has the possibility of being very helpful in providing each unique school with the best method of equality for itself. Recall again that the second prong requires a “history and continuing practice of program expansion” and the third prong states that the institution must be “‘fully and effectively’ accommodating the interests and abilities of females” (Reynold, 2). This clarification also stands by Title IX and ensures that the Office of Civil Rights will “aggressively enforce Title IX standards,” and ensures that the enforcement will be consistent across all types of institutions across the country (Reynolds, 3). However, this recommendation may conflict with the others that focus on clarifying the wider range of options open to colleges and universities to comply with Title IX.

How can there be consistent enforcement if each school is complying according to the prong that works best for them? The only way I can see these two recommendations fitting together is through the use of set standards for each of the prongs, however, there will still be ambiguity among the differently situated institutions that are using the same prong.

Western Michigan University

After researching many of these unique schools from across the country, I became very curious about the challenges that are faced by my own university, Western Michigan University (WMU). I spent some time discussing the workings of Title IX as it appears “behind the scenes” with Paul DeVries, who is the compliance officer at WMU. The Equity in Athletics Disclosure Act of 1994 requires all federally funded colleges and universities to submit a yearly report detailing the status of their compliance with Title IX. This report provides detailed information about the expenses of each sport, as well as participation rates. It allows the public to see how well an institution is doing in complying with Title IX.

WMU competes in the National Collegiate Athletic Association Division 1-A and receives federal funding and therefore is required to fill out the Disclosure form, which is easily accessible from the Bronco Athletics home page.

(<http://www.wmubroncos.com/compliance/eada0304.pdf>). The most current report is from the 2003-2004 academic year. WMU’s undergraduate make up consists of 49% males and 51% females for a total population of 20,417 students. These are important numbers in terms of the first prong of Title IX. If Western determined compliance by this prong alone, 49% of the athletic opportunities and budget would go to males and 51% would be required by law to be given to female sports. There are 573 total athletes with 303 (53%) male participants and 270 (47%) female participants. The largest male sport is obviously football with 106 athletes, but

there are the same number of women on the track team. However, sports such as men's track and other male sports with high numbers of participants create the imbalance that continue to exist between male and female sports even though there are two more female sports.

This report also breaks up the spending budget based on each sports programs. The football program spent \$366,175 dollars in the 2003-2004 academic year, which is the largest total of any team. The hockey team received \$11,192 per player during this same year. Overall, WMU spends \$356,143 less on women's sports than men's sports. However, what is often not considered in determining gender equity is the revenue that each sport brings in. Since Western runs its programs together, all revenue generated by any sport is put together for the good of the department as a whole. The largest money earner is the football program, which brought in \$1,754,840 last year. The next largest revenue belonged to the men's basketball team with a gross income of \$381,375. Without these two sports, all of the other programs bring in a total of \$771,195.

Reading these statistics might lead the general public to question why Western Michigan University is not under scrutiny by the NCAA for gender inequity based on the first prong. However, WMU has never been under a major investigation by the NCAA. There have been minor self-correction violations that generally deal with issues unrelated from Title IX such as treating a prospective athlete to dinner, etcetera. (DeVries, P; personal communication) The main reason behind this is that WMU is able to maintain gender equity under one of the two other prongs of Title IX. While many schools interpreted the 1996 policy interpretation to imply that the first prong was a safe harbor and began to cut male sports, WMU has maintained a policy focused around the third prong. They make use a lot of data from students on campus as well as high school data to determine the interests of the female portion of the undergraduate

population (DeVries, P; personal communication). If the interest is not there, it is useless to add women's teams simply for the sake of being proportional. Internal statistics in the athletic department show that women are much more likely than men to quit playing a varsity sport if they do not receive playing time while men will generally be more content to simply be on a team even if they are not playing much. However, there has been increasing demand among women in the past several years. Just a few years ago, WMU added a women's synchronized skating team to their varsity line up due to the increasing demand for women's sports and the popularity of the synchronized skating club.

Regardless of their success under the third prong, WMU joined similarly budget constrained schools across the nation and recently had to cut several sports due to university budget cuts and pressure from the new academically minded president. These budget cuts forced WMU to cut the men's track and cross country programs as well as the relatively new women's synchronized skating program. All three of these programs have always been extremely successful and were devastated to hear the news. Most of the public information regarding this simply dealt with the financial numbers surrounding the cuts. However, what most people were not aware of were the Title IX implications of this cut.

The minimum number of teams that are necessary to remain at the Division I status of the National Collegiate Athletic Association (NCAA) is sixteen (DeVries, P; personal communication). Therefore, it was imperative that the committee recommend as few sports as possible. Obviously, it would be very hard to cut many smaller sports such as tennis, volleyball, or golf (DeVries, P; personal communication). Another important factor in the committee's decision was the idea of gender equity. If more women's teams were cut than men's teams, it would be extremely difficult to show compliance with any of the three prongs of Title IX. Since

Western has generally relied on the third prong to show compliance with Title IX, cutting too many women's sports would imply that there had been a dramatic decrease in interest in female varsity athletics on WMU's campus. It would be extremely easy for an investigation to show that this interest had not decreased, simply by taking a survey of females on campus. If this survey showed that females had the same interest as before the cuts, Western would be proven not compliant with Title IX. Therefore, by using any three of the Title IX guideposts, eliminating more women's sports than men's would have caused a gender inequity.

Although Western maintained a strong sense of gender equity through the sports cuts, they went against many of the ideas from the recent commission on gender equity in sports because they limited opportunities for both male and female athletes. As I said above, the commission focused on maintaining as many athletic opportunities as possible at an educational institution regardless of whether it was a male or female sport. They strongly stated that cutting male sports to maintain gender equity should be the last resort for any size of college or university. However, what they fail to mention or discuss is a situation such as what Western faced. That is, the necessity of cutting sports. There are no specific guidelines on what sport is least worthy of being a collegiate varsity sport. Obviously, Western had to look at gender equity in making this decision, but it is somewhat unclear what the commission (or Title IX) would have said about whose opportunities to cut first, male or female. It is also unclear if Title IX would have condoned the taking money away from large men's and women's programs in order to keep the other teams.

Another challenge Western faces in becoming equal is the fact that it is a relatively small division I school with large football and hockey programs that do not bring in as much revenue as schools like the University of Michigan. These programs generate a lot of money for the

University, but also account for many of the discrepancies in expenditures among women's and men's sports. This is not a problem faced by schools without a football or hockey team.

Without these sports there is a lesser income, but there is also more money able to be allocated to other sports (especially female sports) so it is generally looks better on paper.

Western along with all other colleges and universities that must comply with Title IX face the general challenge of complying under vague guidelines. Although there are frequent policy interpretations, they remain vague and do not necessarily answer every question that a school has about how to enforce Title IX. Being vague does allow institutions some autonomy in how they can best comply with Title IX, but it opens them up to lawsuits from women who believe that their rights were violated in one way or another. For example, a female at Western could hypothetically bring a lawsuit against the university for failing to proportionately represent the female population in their athletic opportunities. Those knowledgeable in Title IX will realize that Western is in compliance with the law because of the other two prongs, but if the media is involved, the story will tend to focus on the proportionality numbers and the most popular first prong of Title IX compliance, and WMU will find itself facing a hostile general public. This hypothetical situation sounds harsh, but could be a reality at smaller division I schools like WMU, that are not nationally renowned for their athletic programs. Similar incidents have been blasted all over the covers of national newspapers and schools reputations have been tarnished whether it is deserved or undeserved. This is part of the reason any alleged gender inequalities usually skip straight to the top administration in a University (DeVries, P; Personal Communication).

Conclusion

The concept of Title IX is simple, that is, to provide gender equity in sports to females. It has long served its job because of the gross inequities that existed in the 1970's and 1980's. However, these increases in growth are rapidly slowing, but the law is not. The policy interpretations are essentially making the job of compliance officers such as Paul DeVries more and more difficult because although technically you are only required to meet one prong of Title IX, many people believe that all three should be met and will attempt to file complaints based on any of the three.

I have looked at a diverse group of Division I colleges and universities and it is obvious that they are all differently suited to the idea of gender equity. Ideally, there would be the same amount of attention, money, scholarships, etcetera given to men and women. However, the current greater interest in men's sports tends to prohibit that, especially at Universities where there is a large female undergraduate population. I believe that the law will continue to evolve through court cases, commissions, policy interpretations, and actions by various colleges and universities. Ideally, this evolution will lead to a place and time where if there is enough interest to play a particular sport on a college campus, whether it be male or female interest, the athletic department will cut spending from somewhere else to dedicate to this new program. Not until we reach this step will we truly have collegiate athletic equity for all.

Appendix A

Title IX Timeline

- 1972 **Title IX Enacted.** President Nixon signed Title IX into law June 23, 1972.
- 1974 **Javits Amendment.** This amendment called for regulations to implement Title IX.
- 1975 **Title IX Regulations.** Guidelines for enforcing Title IX published in the Code of Federal Regulations.
- 1979 **Policy Interpretation.** Interpretation of Title IX rules published in the Federal Register.
- 1979 ***Cannon v. University of Chicago.*** Holding that Title IX creates an implied private cause of action.
- 1980 **Investigator's Manual.** Office for Civil Rights investigator's manual published.
- 1984 ***Grove City College v. Bell.*** Holding that Title IX applies only to programs receiving direct federal funding.
- 1987 **Civil Rights Restoration Act.** Requiring all programs of an educational institution receiving federal funds to be subject to Title IX.
- 1990 **Investigator's Manual Revised.** Office for Civil Rights investigator's manual rewritten.
- 1992 ***Franklin v. Gwinnett County Schools.*** Holding that monetary damages are available in Title IX lawsuits.
- 1994 **Equity in Athletics Disclosure Act.** Requiring colleges and universities to provide information on athletic participation according to sex.
- 1996 ***Cohen v. Brown University.*** Establishing deference to the Office for Civil Rights' three-part test. Other federal appeals court cases are noted on page 20, note 12.
- 1996 **Clarification Letter.** "Dear Colleague" letter to colleges on Title IX enforcement issued by the Office for Civil Rights.
- 2002 ***National Wrestling Coaches Association v. Department of Education.*** Lawsuit filed by national groups challenging Title IX regulations.
- 2003 **Secretary of Education's Commission on Opportunity in Athletics**
Published Report with recommendations for the future implementation of Title IX

Taken from the Secretary of Education's Commission on Opportunity in Athletics Report: "Open to All: Title IX at 30"

<http://www.ed.gov/about/dgscomm/hst/athletics/title9report.cfm>

Appendix B

2003 Commission Findings

Question One: Are Title IX standards for assessing equal opportunity in athletics working to promote opportunities for male and female athletes?

- *After 30 years of Title IX, great progress has been made, but more needs to be done to create opportunities for women and girls and retain opportunities for boys and men.*
- *Current Title IX policy provides for three separate ways for institutions to demonstrate that they are in compliance with Title IX's participation requirement.*
- *Many practitioners feel that their institutions must meet the proportionality test to ensure a "safe harbor" and avoid expensive litigation.*
- *Although, in a strict sense, the proportionality part of the three-part test does not require opportunities for boys and men be limited, it has been a factor, along with other factors, in the decision to cut or cap teams.*
- *Escalating operational costs in intercollegiate athletics threaten the effort to end discrimination in athletics and preserve athletic opportunities.*

Question Two: Is there adequate Title IX guidance that enables colleges and school districts to know what is expected of them and to plan for an athletic program that effectively meets the needs and interests of their students?

- *There is great confusion about Title IX requirements caused by a lack of clarity in guidance from the Office for Civil Rights.*
- *The Office for Civil Rights' enforcement of Title IX can be strengthened*

Question Three: Is further guidance or other steps needed at the junior and senior high school levels, where the availability or absence of opportunities will critically affect the prospective interests and abilities of student athletes when they reach college age?

- *Currently, in structuring their athletic programs, colleges are not appropriately responsive to athletic participation at the high school level.*

Question Four: How should activities such as cheerleading or bowling factor into the analysis of equitable opportunities?

- *The Office for Civil Rights utilizes flexible guidelines in helping schools determine whether an activity is a sport.*

Question Five: How do revenue producing and large-roster teams affect the provision of equal athletic opportunities? The Department has heard from some parties that whereas some men athletes will "walk-on" to intercollegiate teams—without athletic financial aid and without having been recruited—women rarely do this. Is this accurate and, if so, what are its implications for Title IX analysis?

- *Title IX does not require mirror image men's and women's sports programs.*
- *Artificial limits on walk-on opportunities do not benefit anyone.*

- *Since Congress has previously declined to exempt revenue-producing sports from Title IX consideration, any change in that policy would have to be generated by Congressional action.*

Question Six: In what ways do opportunities in other sports venues, such as the Olympics, professional leagues, and community recreation programs, interact with the obligations of colleges and school districts to provide equal athletic opportunity? What are the implications for Title IX?

- *Opportunity at the Olympic and professional levels enhances student interest in participating in these sports in high school and collegiate programs.*

Question Seven: Apart from Title IX enforcement, are there other efforts to promote athletic opportunities for male and female students that the Department might support, such as public-private partnerships to support the efforts of schools and colleges in this area?

- *An increase in allowable scholarships for women's sports might help schools to come into compliance with Title IX.*

Appendix C Commission Recommendations

- *The Department of Education should reaffirm its strong commitment to equal opportunity and the elimination of discrimination for girls and boys, women and men*
- *Any clarification or policy interpretation should consider the recommendations that are approved by this Commission, and substantive adjustments to current enforcement of Title IX should be developed through the normal federal rulemaking process.*
- *The Department of Education's Office for Civil Rights should provide clear, consistent and understandable written guidelines for implementation of Title IX and make every effort to ensure that the guidelines are understood, through a national education effort. The Office for Civil Rights should ensure that enforcement of and education about Title IX is consistent across all regional offices.*
- *The Office for Civil Rights should not, directly or indirectly, change current policies in ways that would undermine Title IX enforcement regarding nondiscriminatory treatment in participation, support services and scholarships*
- *The Office for Civil Rights should make clear that cutting teams in order to demonstrate compliance with Title IX is a disfavored practice.*
- *The Office for Civil Rights should aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. The Department of Education should also explore ways to encourage compliance with Title IX, rather than merely threatening sanctions.*
- *The Department of Education should encourage educational and sports leaders to promote male and female student interest in athletics at the elementary and secondary levels to encourage participation in physical education and explore ways of encouraging women to walk on to teams.*
- *The Department of Education should encourage educational institutions and national athletic governance organizations to address the issue of reducing excessive expenditures in intercollegiate athletics. Possible areas to explore might include an antitrust exemption for college athletics.*
- *The Department of Education should encourage the redesign of the Equity in Athletics Disclosure Act so that it provides the public with a relevant and simplified tool to evaluate the status of Title IX compliance in the nation's post-secondary institutions.*
- *The Office for Civil Rights should disseminate information on the criteria it uses to help schools determine whether activities they offer qualify as athletic opportunities.*
- *The Office for Civil Rights should educate educational institutions about the standards governing private funding of particular sports aimed at preventing those sports from being dropped or to allow specific teams to be added.*
- *The Office for Civil Rights should reexamine its regulations regarding the standards governing private funding of particular sports aimed at preventing those sports from being dropped or to allow specific teams to be added.*

- *The Department of Education should encourage the NCAA to review its scholarship and other guidelines to determine if they adequately promote or hinder athletic participation opportunities.*
- *If substantial proportionality is retained as a way of complying with Title IX, the Office for Civil Rights should clarify the meaning of substantial proportionality to allow for a reasonable variance in the relative ratio of athletic participation of men and women while adhering to the nondiscriminatory tenets of Title IX.*
- *The Office for Civil Rights should consider a different way of measuring participation opportunities for purposes of allowing an institution to demonstrate that it has complied with the first part of the three-part test. An institution could establish that it has complied with the first part of the test by showing that the available slots for men and women as demonstrated by the predetermined number of participants for each team offered by the institution, is proportional to the male/female ratio in enrollment.*
- *In providing technical assistance, the Office for Civil Rights should advise schools, as necessary, that walk-on opportunities are not limited for schools that can demonstrate compliance with the second or third parts of the three-part test.*
- *The Office for Civil Rights should allow institutions to conduct continuous interest surveys on a regular basis as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports. The Office should specify the criteria necessary for conducting such a survey in a way that is clear and understandable.*
- *The Office for Civil Rights should study the possibility of allowing institutions to demonstrate that they are in compliance with the third part of the three-part test by comparing the ratio of male/female athletic participation at the institution with the demonstrated interests and abilities shown by regional, state or national youth or high school participation rates or national governing bodies, or by the interest levels indicated in surveys of prospective or enrolled students at that institution.*
- *In demonstrating compliance with the proportionality requirement of the first part of the three-part test, the male/female ratio of athletic participation should be measured against the male/female ratio of an institution's undergraduate population minus nontraditional students.*
- *The designation of one part of the three-part test as a "safe harbor" should be abandoned in favor of a way of demonstrating compliance with Title IX's participation requirement that treats each part of the test equally. In addition, the evaluation of compliance should include looking at all three parts of the test, in aggregate or in balance, as well as individually.*
- *The Office for Civil Rights should be urged to consider reshaping the second part of the three-part test, including by designating a point at which a school can no longer establish compliance through this part.*
- *Additional ways of demonstrating equity beyond the existing three-part test should be explored by the Department of Education*

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