Title IX, Sex Discrimination, and Intercollegiate Athletics: A Legal Overview

Jody Feder
Legislative Attorney

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Summary

Enacted over three decades ago, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in federally funded education programs or activities. Although the Title IX regulations bar recipients of federal financial assistance from discriminating on the basis of sex in a wide range of educational programs or activities, such as student admissions, scholarships, and access to courses, the statute is perhaps best known for prohibiting sex discrimination in intercollegiate athletics.

Indeed, the provisions regarding athletics have proved to be one of the more controversial aspects of Title IX. At the center of the debate is a three-part test that the Department of Education (ED) uses to determine whether institutions are providing nondiscriminatory athletic participation opportunities for both male and female students. Proponents of the existing regulations point to the dramatic increases in the number of female athletes in elementary and secondary school, college, and beyond as the ultimate indicator of the statute's success in breaking down barriers against women in sports. In contrast, opponents contend that the Title IX regulations unfairly impose quotas on collegiate sports and force universities to cut men's teams in order to remain in compliance. Critics further argue that the decline in certain men's sports, such as wrestling, is a direct result of Title IX's emphasis on proportionality in men's and women's college sports.

In 2002, ED appointed a commission to study Title IX and to recommend whether or not the athletics provisions should be revised. The Commission on Opportunity in Athletics delivered its final report to the Secretary of Education in 2003. In response, ED issued new guidance in 2003 and 2005 that clarified Title IX policy and the use of the three-part test.

This CRS report provides an overview of Title IX in general and the intercollegiate athletics regulations in particular, as well as a summary of the Commission's report and ED's response and a discussion of legal challenges to the regulations and to the three-part test. For related reports, see CRS Report RS22544, *Title IX and Single Sex Education: A Legal Analysis*, by Jody Feder.

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I. Introduction

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In 2002, ED appointed a commission to study Title IX and to recommend whether or not the athletics provisions should be revised.[3] The Commission on Opportunity in Athletics delivered its final report to the Secretary of Education in 2003.[4] In response, ED issued new guidance in 2003 and 2005 that clarified Title IX policy and the use of the three-part test.[5]

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II. Title IX Background

Enacted in response to a growing concern regarding disparities in the educational experiences of male and female students, Title IX is designed to eliminate sex discrimination in education. Although Title IX prohibits a broad range of discriminatory actions, such as sexual harassment in elementary and secondary schools or discrimination against women in graduate school admissions, Title IX is perhaps best known for its role in barring discrimination against women in college sports. Indeed, when the Department of Health, Education, and Welfare (HEW), which

[1] 20 U.S.C. §§ 1681 et seq.

[2] June Kronholz, *College Coaches Press Bush on Title IX*, The Wall Street Journal, Aug. 27, 2002, at A4.

[3] Erik Brady, *Major Changes Debated for Title IX*, USA Today, Dec. 18, 2002, at A1.

[4] The Secretary of Education's Commission on Opportunity in Athletics, *"Open to All": Title IX at Thirty*, Feb. 28, 2003, http://www.ed.gov/about/bdscomm/list/athletics/report.html.

[5] Department of Education, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003) (hereinafter 2003 Clarification); Department of Education, Additional Clarification on Intercollegiate Athletics Policy: Three-Part Test—Part Three (March 17, 2005) (hereinafter 2005 Clarification).

was the predecessor agency of the Department of Education, issued policy guidance regarding Title IX and athletics, the agency specifically noted that participation rates for women in college sports "are far below those of men" and that "on most campuses, the primary problem confronting female athletes is the absence of a fair and adequate level of resources, services, and benefits."[6]

Federal law regarding Title IX intercollegiate athletics consists of three basic components: (1) the Title IX statute, which was enacted in the Education Amendments of 1972 and amended in the Education Amendments of 1974;[7] (2) the Department of Education regulations, which were originally issued in 1975 by HEW;[8] and (3) ED's policy guidance regarding Title IX athletics. The athletics policy guidance is primarily comprised of two documents: (1) a 1979 Policy Interpretation that established the controversial three-part test,[9] and (2) a 1996 Clarification of the three-part test, which reinvigorated enforcement of Title IX in intercollegiate athletics.[10] In addition, ED issued further clarifications in 2003 and 2005.[11] Despite the public attention generated by the three-part test, it is important to note that the test itself forms only a small part of the larger body of Title IX law. A general overview of the Title IX statute and regulations is provided below, while the athletics policy guidance and the legal debate surrounding Title IX and the three-part test are described in greater detail in subsequent sections.

In addition to this substantial body of Title IX law and policy, one other federal statute – the Equity in Athletics Disclosure Act[12] – also applies to intercollegiate athletics. Under this statute, colleges and universities are required to report statistical data, broken down by sex, on undergraduate enrollment and athletic participation and expenditures.

The Title IX Statute

Enacted over thirty years ago, the Title IX statute is designed to prevent sex discrimination by barring recipients of federal funds from discriminating in their education programs or activities. Specifically, the statute declares, "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," subject to certain exceptions.[13]

The original Title IX legislation, which set forth the broad prohibition against sex discrimination but provided little detail about specific programs or activities, made no mention of college sports.

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[6] Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 FR 71413, 71419 (Dec. 11, 1979) (hereinafter 1979 Policy Interpretation).

[7] P.L. 93-380.

[8] 34 CFR Part 106.

[9] 1979 Policy Interpretation, *supra* footnote 6, at 71413.

[10] Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) (hereinafter 1996 Clarification).

[11] 2003 Clarification, *supra* footnote 5; 2005 Clarification, *supra* footnote 5.

[12] 20 U.S.C. § 1092(g).

[13] *Id.* at § 1681(a). Exceptions include admissions to elementary and secondary schools, educational institutions of religious organizations with contrary religious tenets, military training institutions, educational institutions that are traditionally single-sex, fraternities and sororities, certain voluntary youth service organizations such as the Girl or Boy Scouts, father-son or mother-daughter activities at educational institutions, and beauty pageants. *Id.*

However, the Education Amendments of 1974 directed HEW to issue Title IX implementing regulations "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."[14] This provision was added after Congress eliminated a section that would have made revenue-producing sports exempt from Title IX.[15]

It is important to note that, under Title IX, the receipt of any amount of federal financial assistance is sufficient to trigger the broad nondiscrimination obligation embodied in the statute. This nondiscrimination obligation extends institution-wide to *all* education programs or activities operated by the recipient of the federal funds, even if some of the education programs or activities themselves are not funded with federal dollars.[16] For example, virtually all colleges and universities in the United States are recipients of federal financial assistance because they receive some form of federal aid, such as scientific research grants or student tuition financed by federal loans. Once a particular school is deemed a recipient of federal financial assistance, all of the education programs and activities that it operates are subject to Title IX. Thus, if a college or university receives federal assistance through its student financial aid program, its nondiscrimination obligation is not restricted solely to its student financial aid program, but rather the obligation extends to all of the education programs or activities conducted by the institution, including athletics and other programs that do not receive federal funds. The provision regarding receipt of federal funds, therefore, is the primary mechanism for compelling institutions to comply with Title IX in their athletic programs.[17]

The Title IX Regulations

Because Title IX's prohibition against sex discrimination extends to all education programs or activities operated by recipients of federal funds, the scope of Title IX is quite broad. While the statute lays out only the general prohibition against sex discrimination, the implementing regulations specify the wide range of education programs or activities affected. Indeed, the regulations bar recipients from discriminating on the basis of sex in: student admissions, recruitment, scholarship awards and tuition assistance, housing, access to courses and other academic offerings, counseling, financial assistance, employment assistance to students, health and insurance benefits and services, athletics, and all aspects of education-related employment, including recruitment, hiring, promotion, tenure, demotion, transfer, layoff, termination, compensation, benefits, job assignments and classifications, leave, and training.[18]

Despite the wide array of programs and activities subject to Title IX, it is the provisions on athletics that have generated the bulk of public attention and controversy in recent years. Under

[14] P.L. 93-380 § 844.

[15] 1979 Policy Interpretation, *supra* footnote 6, at 71413.

[16] Department of Justice, Civil Rights Division, Title IX Legal Manual 51 (Jan. 11, 2001), *available at* http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf.

[17] For a brief period from 1984 to 1988, Title IX enforcement in college athletics was suspended as a result of a Supreme Court ruling that Title IX was "program-specific," meaning that the statute's requirements applied only to education programs that received federal funds and not to an institution's programs as a whole. Grove City College v. Bell, 465 U.S. 555, 574 (1984). Because few university athletic programs receive federal dollars, college sports were essentially exempt from Title IX coverage after this decision. In the Civil Rights Restoration Act of 1987 (P.L. 100-259), however, Congress overrode the Supreme Court's interpretation of Title IX by passing legislation to clarify that Title IX's requirements apply institution-wide and are not program-specific, thus reinstating Title IX's coverage of athletics. 20 U.S.C. § 1687.

[18] 34 CFR §§ 106.31-106.56.

the Title IX regulations, recipients of federal financial assistance are prohibited from discriminating on the basis of sex in their sports programs. Specifically, the regulations declare, "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient."[19] In addition, recipients are barred from providing athletics separately on the basis of sex, except under certain circumstances, such as when team selection is based on competitive skill or the activity is a contact sport.[20] Finally, the regulations require institutions that provide athletic scholarships to make such awards available in proportion to the numbers of male and female students participating in intercollegiate athletics.[21]

An important principle embodied in the Title IX regulations on athletics is the principle of equal opportunity. Under the regulations, recipients such as colleges and universities must "provide equal athletic opportunity for members of both sexes."[22] When evaluating whether equal opportunities are available, the Department of Education (ED) examines, among other factors, the provision of equipment and supplies, scheduling of games and practice time, travel and per diem allowance, opportunity to receive coaching and academic tutoring, assignment and compensation of coaches and tutors, provision of locker rooms and practice and competitive facilities, provision of medical training facilities and services, provision of housing and dining facilities and services, and publicity.[23] In addition, ED considers "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."[24] In order to measure compliance with this last factor, ED established the three-part test that has been challenged by opponents of existing Title IX policy.

To clarify how to comply with the intercollegiate athletics requirements contained in the Title IX regulations, ED issued a Policy Interpretation in 1979 and a subsequent Clarification of this guidance in 1996.[25] Combined, these two documents form the substantive basis of the policy guidance on the three-part test, which has generated the bulk of the questions and concerns surrounding Title IX and intercollegiate athletics. ED also issued a further clarification in 2003, but this document made only minor alterations to the 1979 Policy Interpretation and the 1996 Clarification.[26] In addition, in 2005, ED issued yet another clarification that established a new way in which colleges may demonstrate compliance with the interest test prong of the three-part test.[27] These guidance documents are discussed in greater detail in the section below.

[19] *Id.* at § 106.41(a).

[20] *Id.* at §106.41(b). Under the regulations, contact sports are defined to include boxing, wrestling, rugby, ice hockey, football, and basketball.

[21] *Id.* at § 106.37(c).

[22] *Id.* at § 106.41(c).

[23] *Id.*

[24] *Id.*

[25] 1979 Policy Interpretation, *supra* footnote 6; 1996 Clarification, *supra* footnote 10.

[26] 2003 Clarification, *supra* footnote 5.

[27] 2005 Clarification, *supra* footnote 5.

III. Intercollegiate Athletics and the Policy Guidance

As noted above, ED has set forth its interpretation of the intercollegiate athletics provisions of the Title IX statute and implementing regulations in two documents: the 1979 Policy Interpretation and the subsequent 1996 Clarification. These two documents, which remain in force, were designed to provide guidance to colleges and universities regarding how to achieve Title IX compliance by providing equal opportunity in their intercollegiate athletic programs. To that end, both of the guidance documents discuss the factors that ED considers when enforcing Title IX.[28]

Under the 1979 Policy Interpretation, HEW established three different standards to ensure equal opportunity in intercollegiate athletics.[29] First, with regard to athletic scholarships, the compliance standard is that such aid "should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program."[30] Second, HEW established a standard that male and female athletes should receive "equivalent treatment, benefits, and opportunities" in the following areas: equipment and supplies, games and practice times, travel and per diem, coaching and academic tutoring, assignment and compensation of coaches and tutors, locker rooms and practice and competitive facilities, medical and training facilities, housing and dining facilities, publicity, recruitment, and support services.[31] Finally, in terms of meeting the regulatory requirement to address the interests and abilities of male and female students alike, the compliance standard is that such interests and abilities must be equally effectively accommodated.[32]

In order to determine compliance with the latter accommodation standard, ED considers three additional factors: (1) the determination of athletic interests and abilities of students, (2) the selection of sports offered,[33] and (3) the levels of competition available, including the opportunity for team competition.[34] It is the criteria used to assess this third and final factor that form the basis of the three-part test. The three-part test, the debate over the test and its proportionality requirement, ED's Title IX review commission, and ED's response to the Commission's report are discussed in detail below.

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[28] 1979 Policy Interpretation, *supra* footnote 6; 1996 Clarification, *supra* footnote 10.

[29] Although the Policy Interpretation focuses on formal intercollegiate athletic programs, its requirements also apply to club, intramural, and interscholastic athletics. 1979 Policy Interpretation, *supra* footnote 6.

[30] *Id.* at 71414. This requirement, however, does not mean that schools must provide a proportional number of scholarships or that all individual scholarships must be of equal value; the only requirement is that the overall amount spent on scholarship aid must be proportional. *Id.* at 71415.

[31] *Id.* Such benefits, opportunities, and treatment need not be identical, and even a finding of nonequivalence can be justified by a showing of legitimate nondiscriminatory factors. According to the Policy Interpretation, "some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities." The Policy Interpretation specifically cites football as an example of such a sport. *Id.*at 71415-16.

[32] *Id.* at 71414.

[33] According to the Policy Interpretation, "the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex." *Id.* at 71417-18.

[34] *Id.* at 71417.

The Three-Part Test

Under the Policy Interpretation, in accommodating the interests and abilities of athletes of both sexes, institutions must provide the opportunity for male and female athletes to participate in competitive sports. ED measures an institution's compliance with this requirement through one of the following three methods:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion, which is demonstrably responsive to the developing interest and abilities of the members of that sex ; or (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[35]

These three methods for determining whether institutions are complying with the Title IX requirement to provide nondiscriminatory participation opportunities for both male and female athletes have come to be referred to as the three-part test. In its 1996 Clarification, which addresses only the three-part test, ED provides additional guidance for institutions seeking to comply with Title IX.

According to the 1996 Clarification, an institution must meet only one part of the three-part test in order to prove its compliance with the nondiscrimination requirement.[36] Thus, institutions may prove compliance by meeting: (1) the proportionality test, which measures whether the ratio of male and female athletes is substantially proportional to the ratio of male and female students at the institution, (2) the expansion test, which measures whether an institution has a history and continuing practice of expanding athletic opportunities for the underrepresented sex, or (3) the interests test, which measures whether an institution is accommodating the athletic interests of the underrepresented sex.[37]

In addition, the 1996 Clarification reiterates that ED examines many other factors beyond those set forth in the three-part test when it evaluates an institution's Title IX athletics compliance.[38] The 1996 Clarification also provides a more detailed examination of the factors that ED considers under each of the three tests, as well as examples illustrating how the various factors affect a finding of compliance or noncompliance.[39]

The 2003 Clarification and the 2005 Clarification, which provide additional guidance regarding the three-part test, are discussed separately below.

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[35] *Id.* at 71418.

[36] 1996 Clarification, *supra* footnote 10.

[37] Dear Colleague Letter from the Department of Education's Office for Civil Rights regarding the Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), *available at* http://www.ed.gov/about/offices/list/ocr/docs/clarific.html (hereinafter Dear Colleague Letter).

[38] 1996 Clarification, *supra* footnote 10.

[39] *Id.*

The Proportionality Test

The first prong of the three-part test—the proportionality test—is the most controversial. Indeed, critics contend that proportionality amounts to an unfair system of quotas. Because women's enrollment in postsecondary schools has increased dramatically in the decades since Title IX was enacted, rising 30 percent from 1981 to 1999,[40] critics argue that proportionality results in reverse discrimination, forcing schools to cut existing men's teams in order to create new slots for women.[41]

Proponents of proportionality respond that Title IX does not require quotas because schools that cannot demonstrate proportionality can still comply with Title IX if they pass one of the two remaining parts of the three-part test. Supporters also reject the notion that Title IX forces schools to eliminate men's teams, arguing that costly men's sports like football are to blame for cuts in less popular sports for both men and women. In addition, supporters note that instead of cutting men's sports, schools can achieve proportionality by adding women's teams.[42]

Critics counter that even though the three-part test offers an alternative to the proportionality approach in theory, in reality, maintaining proportionality is the only sure way to avoid a lawsuit. Furthermore, say critics, even though schools can technically comply with the proportionality standard by adding women's teams, budget realities often force institutions to cut men's teams instead. Proponents, however, respond that the vast majority of schools that add women's teams do not eliminate men's teams. Changing the proportionality test, say proponents, would be tantamount to repealing a law that is widely credited for dramatically increasing women's interest, participation, and success in sports.[43]

In 2001, the General Accounting Office (GAO) released a study of intercollegiate athletics. The GAO report included the following findings:

- "The number of women participating in intercollegiate athletics at 4-year colleges and universities increased substantially–from 90,000 to 163,000–between school years 1981-82 and 1998-99, while the number of men participating increased more modestly–from 220,000 to 232,000."[44]
- "Women's athletic participation grew at more than twice the rate of their growth in undergraduate enrollment, while men's participation more closely matched their growth in undergraduate enrollment."[45]
- "The total number of women's teams increased from 5,595 to 9,479, a gain of 3,784 teams, compared to an increase from 9,113 to 9,149 teams for men, a gain of 36 teams."[46]

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[40] General Accounting Office, Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams 8 (March 2001).

[41] Brady, *supra* footnote 3.

[42] *Id.*

[43] *Id.*

[44] General Accounting Office, Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams 4 (March 2001).

[45] *Id.*

[46] *Id.*

- "Several women's sports and more than a dozen men's sports experienced net decreases in the number of teams. For women, the largest net decreases in the number of teams occurred in gymnastics; for men, the largest decreases were in wrestling."[47]
- In men's sports, "the greatest increase in numbers of participants occurred in football, with about 7,200 more players. Football also had the greatest number of participants–approximately 60,000, or about twice as many as the next largest sport. Wrestling experienced the largest decrease in participation–a drop of more than 2,600 participants."[48]
- "In all, 963 schools added teams and 307 discontinued teams since 1992-93. Most were able to add teams–usually women's teams–without discontinuing any teams."[49]
- "Among the colleges and universities that added a women's team, the two factors cited most often as greatly influencing the decision were the need to address student interest in particular sports and the need to meet gender equity goals or requirements. Similarly, schools that discontinued a men's team cited a lack of student interest and gender equity concerns as the factors greatly influencing their decision, as well as the need to reallocate the athletic budget to other sports."[50]

ED's Interpretation of the Title IX Proportionality Test

Until recently, when ED appointed a commission to study changes in Title IX athletics policy, the agency had historically favored the proportionality approach. Among the factors that ED considers under the proportionality test are the number of participation opportunities provided to athletes of both sexes. According to ED, "as a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants."[51] ED next determines whether these participation opportunities are substantially proportionate to the ratio of male and female students enrolled at the institution, but, for reasons of flexibility, ED does not require exact proportionality.[52]

According to the 1996 Clarification, the proportionality test acts as a safe harbor. In other words, if an institution can demonstrate proportional athletic opportunities for women, then the institution will automatically be found to be in compliance.[53] If, however, an institution cannot prove proportionality, then the institution can still establish compliance by demonstrating that the imbalance does not reflect discrimination because the institution either (1) has a demonstrated history and continuing practice of expanding women's sports opportunities (prong two) or (2) has fully and effectively accommodated the athletic interests of women (prong three).

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[47] *Id.*

[48] *Id.* at 10.

[49] *Id.* at 5.

[50] *Id.*

[51] 1996 Clarification, *supra* footnote 10.

[52] *Id.*

[53] Dear Colleague Letter, *supra* footnote 37.

In its 2003 Clarification, ED specifically addressed the "safe harbor" language in the 1996 guidance. Noting that the "safe harbor" phrase had led many schools to believe erroneously that achieving compliance with Title IX could be guaranteed by meeting the proportionality test only, ED reiterated that "each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored."[54]

Finally, the 1996 Clarification explicitly declares that "nothing in the three-part test requires an institution to eliminate participation opportunities for men" and challenges the notion that the three-part test requires quotas.[55] Rather, the 1996 Clarification states that "the three-part test gives institutions flexibility and control over their athletic programs."[56] Furthermore, the 1996 Clarification notes that the Policy Interpretation in general and the three-part test in particular have been upheld by every court that has reviewed the guidance documents.[57]

The Title IX Review Commission

Although ED has enforced its Title IX policy, including the three-part test and its proportionality standard, virtually unchanged since shortly after the statute was enacted three decades ago, several years ago the agency considered whether or not to alter its athletics policy. To that end, ED appointed the Commission on Opportunity in Athletics in June 2002 to review Title IX and to recommend changes if warranted. The commission, which held a series of meetings around the country to discuss problems with and improvements to Title IX, issued its final report containing findings and recommendations in February 2003.[58]

In its report, the Commission noted that it "found strong and broad support for the original intent of Title IX, coupled with a great deal of debate over how the law should be enforced," but that "more needs to be done to create opportunities for women and girls and retain opportunities for boys and men."[59] Ultimately, the final report contained 23 recommendations for strengthening Title IX, including 15 recommendations that were adopted unanimously. When the Commission issued its final report, however, two dissenting members of the panel refused to sign the document and instead issued a minority report in which they withdrew their support for two of the unanimous recommendations and raised concerns about several other unanimous recommendations.[60] The Secretary of Education indicated that he intended to consider changes only with respect to the unanimous recommendations of the Commission.

Among the unanimous recommendations of the Commission are suggestions that ED: (1) reaffirm its commitment to eliminating discrimination; (2) clarify its guidance and promote consistency in enforcement; (3) avoid making changes to Title IX that undermine enforcement; (4) clarify that cutting teams in order to achieve compliance is a disfavored practice; (5) enforce Title IX

[54] 2003 Clarification, *supra* footnote 5.

[55] 1996 Clarification, *supra* footnote 10.

[56] *Id.*

[57] Dear Colleague Letter, *supra* footnote 37. For a brief review of significant Title IX court decisions, see the "Title IX and the Courts" section below.

[58] The Secretary of Education's Commission on Opportunity in Athletics, *"Open to All": Title IX at Thirty*, Feb. 28, 2003, http://www.ed.gov/about/bdscomm/list/athletics/report.html.

[59] *Id.* at 4, 21.

[60] Donna de Varona and Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 2003, http://www.nwlc.org/pdf/MinorityReportFeb26.pdf.

aggressively by implementing sanctions against violators; (6) promote student interest in athletics at elementary and secondary schools; (7) support amendments to the Equity in Athletics Disclosure Act that would improve athletic reporting requirements; (8) disseminate information on the criteria it uses to help schools determine whether activities that they offer qualify as athletic opportunities; (9) encourage the National Collegiate Athletic Association to review its scholarship and other guidelines; (10) advise schools that walk-on opportunities are not limited for schools that comply with the second or third prong of the three-part test; (11) examine the prospect of allowing institutions to demonstrate compliance with the third prong of the three-part test by comparing the ratio of male and female athletic participation with the demonstrated interests and abilities shown by regional, state, or national youth or high school participation rates or by interest levels indicated in student surveys; (12) abandon the "safe harbor" designation for the proportionality test in favor of treating each of the three tests equally; and (13) consider revising the second prong of the three-part test, possibly by designating a point at which a school can no longer establish compliance through this part.[61]

The Commission originally adopted an additional two recommendations unanimously, but the two dissenting members of the panel withdrew their support for these recommendations upon further opportunity for review of the final report. These contested recommendations suggest that ED: (1) clarify the meaning of "substantial proportionality" to allow for a reasonable variance in the ratio of men's and women's athletic participation; and (2) explore additional ways of demonstrating equity beyond the three-part test.[62]

Other recommendations that the Commission adopted by a majority, but not unanimous, vote included suggestions that ED: (1) adopt any future changes to Title IX through the normal federal rulemaking process; (2) encourage the reduction of excessive expenditures in intercollegiate athletics, possibly by exploring an antitrust exemption for college sports; (3) inform universities about the current requirements governing private funding of certain sports; (4) reexamine its requirements governing private funding of certain sports to allow such funding of sports that would otherwise be cut; (5) allow schools to comply with the proportionality test by counting the available slots on sports teams rather than actual participants; (6) for purposes of the proportionality test, exclude from the participation count walk-on athletes, who are non-scholarship players that tend to be male; (7) allow schools to conduct interest surveys to demonstrate compliance with the three-part test; and (8) for purposes of the proportionality test, exclude nontraditional students, who tend to be female, from the count of enrolled students. In addition, the Commission was evenly divided on a recommendation that would allow schools to meet the proportionality test if athletic participation rates were 50 percent male and 50 percent female, with a variance of two to three percentage points allowed.[63]

[61] The Secretary of Education's Commission on Opportunity in Athletics, *"Open to All": Title IX at Thirty*, Feb. 28, 2003, 33-40, http://www.ed.gov/about/bdscomm/list/athletics/report.html.

[62] Donna de Varona and Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 2003, http://www.nwlc.org/pdf/MinorityReportFeb26.pdf.

[63] The Secretary of Education's Commission on Opportunity in Athletics, *"Open to All": Title IX at Thirty*, Feb. 28, 2003, 33-40, http://www.ed.gov/about/bdscomm/list/athletics/ report.html.

ED's Response to the Title IX Commission: The 2003 and 2005 Clarifications

In response to the Commission's report, ED indicated that it would study the recommendations and consider whether or not to revise its Title IX athletics policy.[64] Several months later, ED issued new guidance that essentially left the existing Title IX policy unchanged. In its 2003 Clarification, which provided further guidance regarding Title IX policy and the three-part test, ED reiterated that all three prongs of the three-part test have been and can be used to demonstrate compliance with Title IX, and the agency encouraged schools to use the approach that best suits its needs. In addition, the 2003 Clarification declared that complying with Title IX does not require schools to cut teams and that eliminating teams is a disfavored practice. The 2003 Clarification also noted that ED expects both to provide technical assistance to schools and to aggressively enforce Title IX. Finally, the guidance indicated that ED will continue to allow private sponsorship of athletic teams.[65]

In 2005, ED issued yet another clarification of the three-part test.[66] In the 2005 Clarification, ED provided additional guidance with respect to part three of the three-part test. Under that test, known as the interests test, an institution may demonstrate compliance with Title IX by establishing that it is accommodating the athletic interests of the underrepresented sex. The new guidance clarified that one of the ways in which schools may demonstrate compliance with the interests test is by using an online survey to establish that the underrepresented sex has no unmet interests in athletic participation. Such a survey must be administered periodically to all students that are members of the underrepresented sex, and students must be informed that a failure to respond to the survey will be viewed as an indication of a lack of interest. As a result, the survey must be administered in a way designed to generate high response rates.

The 2005 Clarification emphasized that schools have flexibility to demonstrate compliance under any one part of the three-part test and that schools who choose to demonstrate compliance through the interests test have the option to do so in several ways. Among the factors that ED considers when determining whether the school has accurately measured student interest are: surveys, requests for the addition of a varsity team, participation in club or intramural sports, participation rates in local high schools and athletic organizations, and intercollegiate participation rates in the school's region. Even if a school's population of the underrepresented sex is found to have an unmet interest in sports, the institution will not be found to have violated Title IX unless ED also finds that there is sufficient ability to sustain a team and a reasonable expectation of intercollegiate competition in the sport within the school's normal competitive region.[67]

[64] ED also recently amended the Title IX regulations in order to encourage single-sex classes and schools. 71 FR 62530.

[65] 2003 Clarification, *supra* footnote 5.

[66] 2005 Clarification, *supra* footnote 5.

[67] *Id.*

IV. Title IX and the Courts

Over the years, the Supreme Court has heard several cases pertaining to Title IX. Until a recent decision in 2005, none of these cases involved college or high school sports, but they did help to shape the legal landscape surrounding Title IX athletics policy. For example, in 1979, the Supreme Court held that Title IX includes a private right of action.[68] This decision strengthened Title IX enforcement because it means that an individual can sue in court for violations under the statute rather than wait for ED to pursue a complaint administratively. The Court further strengthened Title IX enforcement in 1992, when it ruled that individuals could sue for money damages in a Title IX lawsuit.[69] Finally, in a decision that was later overturned by Congress, the Court ruled that Title IX did not apply to an entire educational institution but rather applied only to the portion of the institution that received federal funds.[70]

In 2005, the Court handed down its decision in *Jackson v. Birmingham Board of Education*.[71] In this case, which involved a girl's basketball coach who claimed that he was removed from his coaching position in retaliation for his complaints about unequal treatment of the girl's team, the Court held that Title IX not only encompasses retaliation claims, but also is available to individuals who complain about sex discrimination, even if such individuals themselves are not the direct victims of sex discrimination.[72] Reasoning that "Title IX's enforcement scheme would unravel" "if retaliation went unpunished,"[73] the Court concluded that "when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional discrimination on the basis of sex in violation of Title IX.[74]

Although the Supreme Court has decided only one case that directly involves Title IX athletics, the lower federal courts have heard multiple challenges to the statute and regulations. In fact, all of the federal courts of appeals that have considered the athletics Policy Interpretation, the three-part test, and the proportionality rule have upheld ED's Title IX regulations and policy.[75] In general, these courts have noted that the regulations and guidance represent a reasonable agency interpretation of Title IX, and they have ruled that the three-part test does not unfairly impose quotas because institutions may select from two other methods besides proportionality in order to comply with Title IX. Indeed, in 1993, the First Circuit reached this conclusion in *Cohen v. Brown University*, a landmark Title IX case that was the first federal appeals court decision

[68] Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).

[69] Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

[70] Grove City College v. Bell, 465 U.S. 555 (1984). *See also supra* notes 16-17 and accompanying text.

[71] 125 S.Ct. 1497 (2005).

[72] *Id*. at 1502.

[73] *Id*. at 1508.

[74] *Id*. at 1504 [internal quotations omitted].

[75] *See, e.g.*, Chalenor v. Univ. of North Dakota, 291 F.3d 1042 (8th Cir. 2002); Pederson v. Louisiana State Univ., 213 F.3d 858 (5th Cir. 2000); Neal v. Bd. of Trustees, 198 F.3d 763 (9th Cir. 1999); Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994); Kelley v. Bd. of Trustees, 35 F.3d 265(7th Cir. 1994), *cert. denied*, 513 U.S. 1128; Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004; Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (hereinafter Cohen I). In addition, in a second appeal on a separate issue in the *Cohen* case, the First Circuit strongly reiterated its previous ruling upholding Title IX. Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (hereinafter Cohen II).

regarding Title IX athletics.[76] This section provides a brief summary of the *Cohen* decision, as well as a description of the National Wrestling Coaches Association lawsuit, which has been dismissed, and recent cases involving the question of whether high school sports associations discriminate when they schedule boys and girls' sports in different seasons.

Cohen v. Brown University

In the *Cohen* case, female athletes at Brown University sued under Title IX when the school eliminated two women's sports—gymnastics and volleyball—and two male teams—golf and water polo—in a cost-cutting measure.[77] Although the cuts made far larger reductions in the women's athletic budget than in the men's, the cuts did not affect the ratio of male to female athletes, which remained roughly 63 percent male to 37 percent female, despite a student body that was approximately 52 percent male and 48 percent female.[78] In their lawsuit, the members of the women's gymnastics and volleyball teams "charged that Brown's athletic arrangements violated Title IX's ban on gender-based discrimination."[79] When the district court ordered the university to reinstate the two women's team pending a full trial on the merits, Brown appealed by challenging the validity of both the Title IX guidance in general and the three-part test in particular. The First Circuit, however, affirmed the district court's decision in favor of the female athletes.[80]

In reaching its decision to uphold the validity of the three-part test, the First Circuit emphasized that ED's interpretation of Title IX warranted deference. According to the court, "the degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX."[81] Thus, the court adopted ED's three-part test as an acceptable standard by which to measure an institution's compliance with Title IX, as have all other appeals courts to subsequently consider the issue.[82]

Next, the court in *Cohen* turned to the question of whether the university had met any one part of the three-part test. Because there was a large disparity between the proportion of women at Brown who were students versus the proportion who were athletes and because the university had not demonstrated a history of expanding women's sports, the court focused its inquiry on whether or not Brown had met part three of the test by effectively accommodating student interest. The university argued that when measuring interest under this standard, the relative athletic interests of male and female students should be the proper point of comparison rather than the relative

[76] 991 F.2d 888, 891 (1st Cir. 1993).

[77] *Id.* at 892.

[78] *Id.*

[79] *Id* at 893.

[80] *Id.* at 891.

[81] *Id.* at 895.

[82] *See, e.g.*, Chalenor v. Univ. of North Dakota, 291 F.3d 1042 (8th Cir. 2002); Pederson v. Louisiana State Univ., 213 F.3d 858 (5th Cir. 2000); Neal v. Bd. of Trustees, 198 F.3d 763 (9th Cir. 1999); Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994); Kelley v. Bd. of Trustees, 35 F.3d 265(7th Cir. 1994), *cert. denied*, 513 U.S. 1128; Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004; Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (Cohen I). In addition, in a second appeal on a separate issue in the *Cohen* case, the First Circuit strongly reiterated its previous ruling upholding Title IX. Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (Cohen II).

enrollment of male and female students.[83] In effect, Brown argued that its female students were less interested in sports than its male students and that its Title IX compliance should thus be measured by this standard.

Under ED's construction of the accommodation test, however, institutions must ensure participation opportunities where there is "sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team."[84] Noting that this standard does not require institutions to provide additional athletic opportunities every time female students express interest, the court upheld the district court's finding that the existence and success of women's gymnastics and volleyball at Brown demonstrated that there was sufficient interest in and expectation of competition in those sports to rule in favor of the female athletes with regard to the third prong of the three-part test.[85] In a subsequent appeal in the *Cohen* case, the court explicitly noted that Brown's view of the accommodation test, which seems to assume that women are naturally less interested in sports than men, reflects invidious gender stereotypes and could potentially freeze in place any existing disparity in athletic participation.[86]

Finally, the court rejected the university's constitutional challenge, ruling that Title IX does not violate the Equal Protection clause of the Fourteenth Amendment.[87] In a subsequent appeal in the *Cohen* case, the court emphasized this point:

> No aspect of the Title IX regime at issue in this case – inclusive of the statute, the relevant regulation, and the pertinent agency documents – mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.... Race- and gender-conscious remedies are both appropriate and constitutionally permissible under a federal anti-discrimination regime, although such remedial measures are still subject to equal protection review.[88]

Challenges to Sports Scheduling Decisions

In recent years, some parents and students have begun filing lawsuits that challenge the decision of certain state high school sports associations to schedule girls' sports in nontraditional seasons that differ from the season for corresponding boys' sports, arguing that the scheduling disparity violates the Equal Protection clause of the Constitution and Title IX. In Michigan, for example, a federal district court ruled that the Michigan High School Athletic Association's (MHSAA) scheduling of high school sports seasons in Michigan discriminated against female athletes on the basis of gender and thus violated the Constitution and Title IX.[89] Without reaching the statutory Title IX argument, the U.S. Court of Appeals for the Sixth Circuit upheld the district court on

[83] Cohen I, 991 F.2d at 899.

[84] 1979 Policy Interpretation, *supra* footnote 6, at 71418.

[85] Cohen I, 991 F.2d at 904.

[86] Cohen II, 101 F.3d 155, 176.

[87] Cohen I, 991 F.2d at 900-01.

[88] Cohen II, 101 F.3d at 170, 172.

[89] Cmtys. for Equity v. Michigan High Sch. Athletic Ass'n., 178 F. Supp. 2d 805 (W.D.Mich.2001).

constitutional grounds.[90] Although this type of Title IX lawsuit appears to have emerged only in recent years, similar legal challenges have occurred in other states.[91]

The National Wrestling Coaches Association Lawsuit

Meanwhile, disturbed by the decline in the number of men's wrestling teams at colleges and universities across the country, the National Wrestling Coaches Association (NWCA), together with former wrestling teams at several institutions, filed a lawsuit against ED in 2002, arguing that the Title IX regulations were adopted illegally and that Title IX unfairly discriminates against men.[92] In the lawsuit, the NWCA argued (1) that ED's establishment of the Title IX regulations and policy guidance was procedurally defective, (2) that ED exceeded its authority under the Title IX statute when enacting those regulations and guidance, and (3) that ED's regulations and guidance discriminate against male athletes, thereby violating the Title IX statute and the Equal Protection clause of the Fourteenth Amendment.[93]

In response to the lawsuit, ED, backed by the Bush Administration, moved to dismiss the case on the grounds that (1) the plaintiffs lacked standing to bring the case; (2) judicial review was unauthorized under the circumstances of this particular case; and (3) the suit was barred by the statute of limitations.[94] The National Women's Law Center (NWLC) filed an amicus brief in support of ED, arguing that the suit was improper because there was no guarantee that institutions would reinstate men's sports teams even if the Title IX regulations and policy were changed. The NWLC further observed that arguments similar to those made in the NWCA lawsuit had been rejected by every federal appeals court to consider the issue of Title IX.[95] Ultimately, the NWCA lawsuit was dismissed from federal court on the grounds that the plaintiffs lacked the proper standing to bring the case.[96] The dismissal was affirmed by an appeals court,[97] and the Supreme Court effectively upheld the dismissal when it refused to review the case.[98]

Given the results in the NWCA case and in other Title IX cases brought before the federal courts of appeals, it seems likely that the courts will continue to defer to ED with regard to Title IX athletics policy in the near future. As noted above, ED has indicated that it intends to continue to use the three-part test to enforce Title IX. However, Congress could, if it disapproves of ED's Title IX athletics policy, respond with legislation to override the current regulations and guidance.

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[90] Cmtys. for Equity v. Mich. High School Athletic Ass'n, 377 F. 3d 504 (6th Cir. 2004). The Supreme Court vacated and remanded the Sixth Circuit decision, Mich. High School Athletic Ass'n v. Cmtys. for Equity, 544 U.S. 1012 (2005), but the Sixth Circuit upheld its decision on remand. Cmtys. for Equity v. Mich. High School Athletic Ass'n, 459 F.3d 676 (6th Cir. 2006), *cert. denied*, Mich. High Sch. Ath. Ass'n v. Cmtys. for Equity, 127 S. Ct. 1912 (2007).

[91] *Review is Sought on Girls' Sports Ruling*, Wash. Post, May 3, 2005, at D02.

[92] Lori Nickel and Nahal Toosi, *Title IX is Taken To Task*, Milwaukee Journal Sentinel, Jan. 17, 2002 at C1.

[93] Complaint for Declaratory and Injunctive Relief, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., Civil Action No. 1:02CV00072-EGS, available at http://www.nwcaonline.com.

[94] Defendant's Motion to Dismiss, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., Civil Action No. 1:02CV00072-EGS, available at http://www.ed.gov/news/pressreleases/2002/05/wrestling.dismiss.mem.fin.pdf.

[95] Brief of Amici Curiae, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., Civil action No. 1:02CV00072-EGS, *available at* http://www.nwlc.org/pdf/amicusbrief.final.pdf.

[96] Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 263 F. Supp. 2d 82, at 129-30 (D.D.C. June 11, 2003).

[97] Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 361 U.S. App. D.C. 257 (D.C. Cir. May 14, 2004).

[98] Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 545 U.S. 1104 (U.S. 2005).

Author Contact Information

Jody Feder
Legislative Attorney
jfeder@crs.loc.gov, 7-8088