

TOPIC:

THE TITLE IX IMPLICATIONS OF ELIMINATING AN INTERCOLLEGIATE SPORTS TEAM

INTRODUCTION:

In the first years of the second decade of the twenty-first century, colleges and universities face grave financial challenges. Endowments, which seemed certain to grow in perpetuity, are declining. The promise that state government will heavily subsidize the tuition of every student has been broken. As institutions, particularly those outside of the major NCAA Division I conferences, decide how to balance their budgets, it is tempting to focus on an expensive activity that benefits only a few students—intercollegiate athletics in the “non-revenue” sports.

Yet the decision to eliminate an intercollegiate sports team has significant legal ramifications, particularly in the area of Title IX. The purpose of this NACUANOTE is to explore those implications. This NACUANOTE has two parts. Part I provides an overview of Title IX’s application to intercollegiate athletics. Part II discusses the legal consequences of eliminating an intercollegiate athletics team.

DISCUSSION:

Overview of Title IX's Application to Intercollegiate Athletics

Title IX of the Education Amendments of 1972 prohibits public and private educational institutions that receive federal funds from discriminating because of sex in any aspect of their operations [\[1\]](#). If any aspect of an institution’s operations receives federal funds, then all aspects of the institution’s operations are subject to Title IX. Because virtually all institutions of higher education receive federal funds in the form of student financial aid, virtually all institutions are covered.

Athletics Participation

Although nothing in the statutory text mentions intercollegiate athletics, the U.S. Department of Education had promulgated regulations regarding the application of Title IX to intercollegiate athletics [\[2\]](#). In a further effort to clarify the regulations, the Department of Health, Education and Welfare issued a policy interpretation of the regulations which was later adopted by the Office for Civil Rights of the U.S. Department of Education, (“OCR”), the agency charged with enforcing Title IX [\[3\]](#). Under the OCR’s interpretation, which the federal appellate courts have universally endorsed, an institution must do one of three things to comply with Title IX in the context of athletics

participation [4]. This is traditionally referred to as the “Three-Part” or “Three-Prong” test.

Substantial Proportionality Test

Under the “Substantial Proportionality” test, each sex's representation in varsity athletics must be substantially proportionate to its full-time undergraduate representation in the student body. In 1996, the OCR clarified that athletic opportunities are “substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team [5].” In plain English, the OCR first determines how many additional opportunities are required for the underrepresented sex [6] in order to achieve perfect proportionality. If this number is sufficient to field a viable team, then the institution is not substantially proportionate and must add a team.

To illustrate how this OCR test works, suppose a university is 55% female and presently offers 700 athletic participation opportunities. Men have 385 athletic participation opportunities and women have 315 participation opportunities. This means women represent 45% of the athletes (315 divided by 700) although women represent 55% of the full time undergraduates. The first step is to determine how many opportunities are required for women to achieve perfect proportionality of 55%. If male participation remains constant at 385, which is the assumption employed by the OCR, the university must add 156 participation opportunities for women. If the university did so, it would have 471 female opportunities (315 current + 156 additional) and 385 male (all current). The second step is to determine whether the number of new participation opportunities required, 156 in this example, is sufficient to field a viable team. Obviously, it is sufficient. In fact, the university could field seven or eight new women's teams with 156 additional opportunities. In short, if one sex is fifty percent of the student body, its representation among varsity athletes must approximate fifty percent.

Note that courts have not explicitly ruled on the precise issue of what constitutes “substantial proportionality” nor have they adopted the test set forth by OCR. Some case settlements have included percentage disparities, but the issue itself remains to be litigated.

History & Continuing Practice of Program Expansion Test

Under the “History & Continuing Practice of Program Expansion” test, if an institution has not achieved substantial proportionality, an institution may demonstrate compliance by showing that it has a continuing history of expanding opportunities for the underrepresented sex. In other words, it is acceptable for female representation among athletes to be substantially below their representation in the student body if the institution has consistently added new teams for women and intends to do so in the future. In evaluating “history,” the OCR looks at the institution's record for adding teams, the institution's record of increasing participants on existing teams, and the institution's response to requests to add teams. In assessing “continuing practice,” the OCR examines the institution's current policy for adding teams. While not specifically referenced in the 1996 Clarification, OCR will not find a program to be in compliance with this test if its expansion of programs for the underrepresented sex coincides with continued expansion of programs for the overrepresented sex. In practical terms, in order to comfortably rely upon this prong, an institution must have consistently added new teams for the underrepresented sex about every three to four years, must refrain from eliminating any teams for the underrepresented sex, should not have been concurrently adding programs for the overrepresented sex and must have a plan for adding new teams in the future.

Fully Accommodating Interests & Abilities Test

Under the “Fully Accommodating Interests & Abilities” test, an institution may demonstrate that it is currently meeting all “interests and abilities of the institution's students who are members of the underrepresented sex—including students who are admitted to the institution though not yet enrolled [7].” This aspect of the three-part test is the subject of controversy. During the Bush Administration,

via a Policy Clarification issued in 2005, the OCR allowed colleges and universities to demonstrate compliance by relying on surveys of the student body [8]. Critics argued that the “model survey” included in the 2005 Clarification was based on flawed methodology, was burdensome for students to complete, was drafted to encourage responses of “not interested”, allowed schools to count non-responses as affirmative statements of non-interest, and did not require any minimum response rate in order to validate the survey. In 2010, the Obama Administration withdrew the 2005 Policy Clarification and insisted that the inquiry is broader [9].

After the 2010 Clarification, the OCR determines interest by examining (1) survey data; (2) requests by students to add a particular sport; (3) participation rates in club or intramural sports; (4) participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the school draws its students; and (5) interviews with students, coaches, and administrators [10]. Moreover, in assessing competitive opportunities, the OCR evaluates: (1) the athletic experience and accomplishments of students and admitted students interested in playing the sport; (2) opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; (3) participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport in which there is interest; and (4) competitive opportunities offered by other schools against which the institution competes and those offered by other schools in the relevant geographic area against which the institution does not now compete [11]. Still, as noted in the 1996 Clarification and reiterated in the 2010 Clarification, while such indicators may be “helpful to OCR in ascertaining likely interest of an institution’s students and admitted students in particular sports” the actual test remains “whether an institution is meeting the actual interest and abilities of its students and admitted students”. In sum, the Obama Administration has returned to the approach set forth by OCR in 1996 and focuses not only on the student body, but also on the experiences of the broader community and the institution’s traditional rivals.

Scholarships

If an institution provides athletic scholarships, “it must provide reasonable opportunities for such awards for members of each sex *in proportion* to the number of students of each sex participating in interscholastic sports [12].” In effect, if fifty percent of the athletes are female, then females should receive approximately fifty percent of total athletic financial assistance [13].

To be sure, the financial assistance regulation and the accommodating interests and abilities regulation work in tandem. As a sex’s participation increases, its share of scholarship money must also increase. Thus, while adding some extra non-scholarship players may help the institution achieve substantial proportionality in the participation context, it may actually cause non-compliance in the financial context [14]. Conversely, limiting non-scholarship players to achieve financial assistance compliance may cause the university to fail the substantial proportionality test. It is extremely difficult to meet both standards.

Other Considerations

In addition to participation opportunities and scholarships, the regulations require “equal athletic opportunity for members of both sexes [15].” In determining whether equal opportunities are available, OCR considers, but is not limited to, the following factors: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice times; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutors; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; and (10) Publicity [16]. Although the regulation emphasizes that equal expenditures are not required, the failure to provide “necessary

funds for teams of one sex” is relevant [\[17\]](#).

Analysis of a Decision to Eliminate an Intercollegiate Team

OCR’s three-part test for participation has the long-term effect of mandating substantial proportionality. If an institution achieves substantial proportionality, then OCR expects the institution to maintain substantial proportionality. Any elimination of teams must maintain that delicate balance.

Similarly, if an institution is short of substantial proportionality, then OCR expects the institution to take measures to increase participation among the underrepresented sex to achieve substantial proportionality eventually. For example, part two of the three- part test (“History & Continuing Practice of Program Expansion”) requires expansion of opportunities for the underrepresented sex. This expansion continues until the school achieves substantial proportionality. Similarly, part three of three-part test (“Fully Accommodating Interests and Abilities”) requires an assessment of the campus, the wider community from which students are drawn, and the practices of traditional rivals in order to gauge the interests of the underrepresented sex. As interest develops, the institution must add teams until it achieves substantial proportionality.

Eliminating an Intercollegiate Team for the Overrepresented Sex

If the institution lacks substantial proportionality and chooses to eliminate an intercollegiate team for the overrepresented sex, then the net effect of the decision is to bring the institution closer to substantial proportionality. However, unless the institution actually achieves substantial proportionality through the cuts, being closer to substantial proportionality does not guarantee compliance with the three-part test. Elimination of opportunities for the overrepresented sex does not constitute expansion of opportunities for the underrepresented sex. Similarly, denying some of the interests and abilities of the overrepresented sex does not equate with full and effective accommodation of the underrepresented sex.

Moreover, the overrepresented sex may claim discrimination because it bore all of the cuts. If the cuts result in compliance or continued compliance with the three-part test, then the need for the institution to comply with OCR’s interpretation likely justifies the disparate treatment. Conversely, if the cuts do not result in compliance, then the institution likely cannot justify singling out the overrepresented sex.

Eliminating an Intercollegiate Team for the Underrepresented Sex

If an institution chooses to eliminate an intercollegiate team from the underrepresented sex, then it must do so in a manner that ensures substantial proportionality. As explained below, part two and part three are not viable options.

If an institution eliminates a team and does not replace it with a team that provides greater participation opportunities, then it is legally impossible to comply with part two (“History & Continuing Practice of Program Expansion”) of the three-part test [\[18\]](#). As explained above, part two requires an institution to demonstrate a history and continuing practice of program expansion for the underrepresented sex. Yet, if a college or university is eliminating a team for the underrepresented sex, it is necessarily reducing, not expanding opportunities.

Similarly, if an institution eliminates a team, it is legally impossible to comply with part three (“Fully Accommodating Interests & Abilities”) of the three-part test. As detailed previously, part three of the three-part test requires an institution to demonstrate that its current selection of sports fully and effectively accommodates the interests of the underrepresented sex. However, regardless of whether one uses the narrow definition of the Bush Administration or the broader definition of the Obama Administration, an institution that has eliminated a team cannot prove full and effective

accommodation. Quite simply, the fact that the institution recently fielded an intercollegiate team demonstrates that there is interest and ability in the sport as well as an expectation of reasonable competition. The institution really has no viable claim otherwise.

Elimination of Intercollegiate Teams and Financial Assistance

Regardless of whether an institution is cutting teams from the overrepresented or underrepresented sex and regardless of how it complies with the three-part test, the institution must comply with the financial assistance regulations. This means that the institution must increase or decrease a sex's share of financial assistance to reflect the new reality.

CONCLUSION:

In an era of financial difficulties, many institutions conclude that it is necessary to cut their intercollegiate athletic teams. In undertaking this course, colleges and universities must focus not only on the financial bottom line, but also on the requirements of Title IX. In the end, OCR's three-part test with its emphasis on eventual substantial proportionality becomes the touchstone.

FOOTNOTES

AUTHOR:

[William E. Thro, University Counsel and Assistant Professor of Government, Christopher Newport University.](#)

RESOURCES:

Statutes:

- [Title IX of Education Amendments of 1972, 20 U.S.C. § 1681](#)

Regulations:

- [34 C.F.R. § 106.37\(c\)](#)
- [34 C.F.R. § 106.41\(a-c\)](#)

Department of Education Guidance:

- [Policy Interpretation on Title IX and Intercollegiate Athletics](#) (1979)
- [Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Text](#) (1996)
- [Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance](#) (2003)
- [Additional Clarification of Intercollegiate Athletics Policy: Three Part Test—Part Three](#) (2005) (Withdrawn 2010)
- [Intercollegiate Athletics Policy Clarification: The Three Part Test—Part Three](#) (2010)

Case Law:

- [Biediger v. Quinnipiac University](#), 616 F. Supp. 2d 277 (D. Conn. 2009)
- [Equity in Athletics, Inc. v. United States Department of Education](#), 504 F. Supp. 2d 88 (W.D. Va. 2007), *aff'd*, 291 Fed. Appx. 517 (4th Cir. 2008) (unpublished)
- [Miami Univ. Wrestling Club v. Miami University](#), 302 F.3d 608 (6th Cir. 2002)
- [Chalenor v. University of North Dakota](#), 291 F.3d 1042 (8th Cir. 2002)
- [Pederson v. Louisiana State University](#), 213 F.3d 858 (5th Cir. 2000)
- [Neal v. Board of Trustees](#), 198 F.3d 763 (9th Cir. 1999)
- [Kelley v. Board of Trustees, Univ. of Ill.](#), 35 F.3d 265 (7th Cir. 1994)
- [Cohen v. Brown University](#), 991 F.2d 888 (1st Cir. 1993)
- [Roberts v. Colorado State Univ.](#), 814 F. Supp. 1507 (D. Colo.), *aff'd in part, rev'd in part sub nom.* Roberts v. Colorado State Board of Agriculture, 998 F.2d 824 (10th Cir.)

Journal of College and University Law Articles:

- [The Changing Collective Definition of Collegiate Sport and the Potential Demise of Title IX Protections](#). Todd Crosset and Lisa Masteralexis. 34 JCUL 671 (2008)
- [Intramural and Club Sports: The Impact of Title IX](#). Sarah K. Fields. 33 JCUL 653 (2007)
- [Title IX, the NCAA and Intercollegiate Athletics](#). Sue Ann Mota. 33 JCUL 121 (2006)
- [An Analysis of the New Clarification of Intercollegiate Athletics Policy Regarding Part Three of the Three-Part Test for Compliance with the Effective Accommodation Guidelines of Title IX](#). Catherine Pieronek. 32 JCUL 105 (2006)
- [Title IX Beyond Thirty: A Review of Recent Developments](#). Catherine Pieronek. 30 JCUL 75 (2003)
- [Gender-Based Pay Disparities in Intercollegiate Coaching: The Legal Issues](#). John Gaal, Michael S. Glazier, and Thomas S. Evans. 28 JCUL 519 (2002)
- [The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX in Intercollegiate Athletics](#). Crista D. Leahy. 24 JCUL 489 (1998)

NACUA Outlines:

- [Title IX: A New Frontier in Employment Litigation](#). Dawn Theodora. (March 2009 CLE Workshop)
- [College Athletics Case Law Update](#). Robin Green Harris. (2008 Annual Conference)
- [College Athletics and Title IX Issues](#). Kenneth McKanders. (2007 Pre-Conference Workshop for Lawyers New to Higher Education)

- [Review of Recent Cases in Athletics](#). Lee Tyner. (2007 Annual Conference)
- [Women in Athletics: Title IX, Hiring Practices, Employment and Other Issues](#). Neena Chaudhry. (2006 Annual Conference)
- [Title IX in 2003](#). Robin L. Parker. (2003 Annual Conference)
- [Title IX and Intercollegiate Athletics: Myths and Realities of 30 Years of Enforcement](#). Catherine Pieronek. (2002 Annual Conference)
- [Get Started: A Practical Guide to Auditing and Monitoring Your Coaches' Compensation System](#). Julie D. Vannatta. (November 1999 CLE Workshop)
- [Salary and Coaches ... Women's Sports: Present and Future](#). Alison B. Marshall. (November 1999 CLE Workshop)
- [Current Legal Issues in College Athletics](#). Mary Ann Connell. (October 1998 CLE Workshop)
- [Title IX and the Reign of Proportionality](#). Maureen E. Mahoney. (1998 Annual Conference)
- [Broadening the Demand for Gender-Equity in Athletics: Financial Aid and Coaches' Compensation](#). Brian A. Snow. (1998 Annual Conference)

Additional Resources:

- [NCAA Title IX Resource Center](#)
- [GAO Report: Intercollegiate Athletics—Recent Trends in Teams and Participants in National Collegiate Athletics Association Sports](#) (July 2007)

Permitted Uses of NACUANOTES Copyright and Disclaimer Notice

View this document in PDF or Word

**NACUANOTES Homepage | NACUANOTES Issues
Contact Us | NACUA Home Page**

"To advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve."