# ATHLETIC INTEREST SURVEYS: A NECESSARY TOOL IN AN INSTITUTION'S TITLE IX COMPLIANCE TOOL BELT 

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## I. Introduction

On April 20, 2010, the U.S. Department of Education's Office for Civil Rights ("OCR") issued its most recent guidance for compliance with the participation aspect of Title IX titled, "Intercollegiate Athletics Policy Clarification: The Three-Part Test - Part Three." ("2010 Clarification"). ${ }^{2}$ In its 2010 Clarification, the OCR withdrew its 2005 Additional Clarification including a user's guide and model survey the OCR previously developed for institutions to measure athletic interest. ${ }^{3}$ This 2005 model survey and accompanying guidance from the OCR, which provided an institution could rely on the survey method in order to prove there is no unmet athletic interest, became controversial from the outset. ${ }^{4}$ Many groups claimed the model survey would be a step backward in what Title IX had done for women in athletics. ${ }^{5}$ In fact, shortly after the OCR issued the 2005 model survey and guidance, the National Collegiate Athletic Association ("NCAA") urged its member institutions to not utilize the model survey as its method of proving compliance with Title IX. ${ }^{6}$

[^0]Considering the controversy that surrounded the 2005 model survey and the OCR's 2010 Clarification that withdrew the 2005 model survey and accompanying guidance, it is understandable that an institution would be hesitant to utilize any survey as a tool to prove compliance with Title IX. While a survey clearly should not be used as the sole method of proving compliance with the participation aspect of Title IX, the use of a survey is a useful, and in most cases, necessary tool to prove compliance. The purpose of this article is to demonstrate how athletic departments with football as a sport should utilize an athletic interest survey to prove compliance with Title IX.

## II. Title IX Compliance: The Three Part Test

In 1979, the OCR published its Policy Interpretation that detailed how an institution should determine if it is in compliance with Title IX for the athletic programs it offers. ${ }^{7}$ In its Policy Interpretation, the OCR provided guidance for three aspects of Title IX in relation to athletics: participation, scholarships, and other benefits. ${ }^{8}$ Because the survey method would only be utilized for proving compliance with the participation aspect of Title IX, the "scholarships" and "other benefits" aspects of Title IX will not be addressed in this article. For the "participation" aspect of Title IX, the OCR created the well-established three-part test to determine whether an institution's athletic programs are in compliance with Title IX. ${ }^{9}$

Under the three-part test, an institution can prove compliance with the participation aspect of Title IX if any of the three following tests is met:
[Part One] Intercollegiate level participation opportunities for male and female students [must be] provided in numbers substantially proportionate to their respective enrollments;

## OR

[Part Two] Where the members of one sex have been and are underrepresented among intercollegiate athletes,...the institution [must] show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex;

OR
[Part Three] Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history of continuing practice of program expansion, as described above... it [must] be demonstrated that the interests and abilities of that sex have been fully accommodated by the present program. ${ }^{10}$

## III. Part One - Substantial Proportionality

Under Part One, if $52 \%$ of an institution's students are females, then an institution would need to provide $52 \%$ of its athletic participation opportunities to female student-athletes in order to be considered perfectly proportional. ${ }^{11}$ If an institution offers men's football as a sport, it is almost impossible to comply

[^1]with Part One of the three-part test. To illustrate this, consider that in 2011-2012, the average NCAA football team consisted of 107 players. ${ }^{12}$ Even if an institution did not offer a single men's sport other than football, the institution would need to offer the following eight women's sports just to have the same number of participation opportunities between males and females: Women's Basketball (average squad size of 15), Women's Bowling (average squad size of 9), Women's Cross-Country (average squad size of 14.5), Women's Golf (average squad size of 7.5), Women's Soccer (average squad size of 23.9), Women's Volleyball (average squad size of 15.1), Women's Tennis (average squad size of 10.6), and Women's Skiing (average squad size of 11.5). ${ }^{13}$ Moreover, each additional men's sport that is offered, such as men's baseball with an average squad size of 34.5 , would mean that the institution would need to add even more women's sports if it were to attempt to prove compliance with Part One of the three part test. Although in most cases this is a losing battle for institutions with football, some institutions have become creative in their efforts to comply with Part One. For example, some institutions have attempted to play the numbers game by urging female athletes to participate in multiple sports so one athlete may be counted as two or three participation opportunities, adding male practice participants to the female squad so they are counted as female participation opportunities, increasing the roster sizes of women's sports even if many of the athletes never see actual competition time, adding women's sports with the highest number of roster spots, or dropping certain men's sports. ${ }^{14}$ However, instead of attempting to prove compliance under Part One (substantial proportionality), most institutions with men's football will move on to proving compliance under Part Two or Part Three. As explained below, for Part Two and Part Three, an institution should utilize a survey as one of its tools to prove compliance with Title IX.

## IV. Part Two - History and Continuing Practice of Program Expansion

Under Part Two, even if an institution's female participation opportunities are not remotely proportionate to the percentage of the institution's female students (e.g., $52 \%$ of its students are females but only $20 \%$ of the athletic participation opportunities are offered to females), the institution can still prove compliance if it can demonstrate it has a history and continuing practice of program expansion for females. The key is for the institution to prove that the history and continuing practice of program expansion for females is "demonstrably responsive to the developing interests and abilities of the members of that sex." ${ }^{15}$

In other words, an institution would not be in compliance with Part Two even if it recently added two women's sports unless it could prove that those sports were added in direct response to the developing interests and abilities of women at the university. For example, in Pederson v. Louisiana State University, the court determined that the university's plan to add Women's Softball and Women's Soccer would not demonstrate compliance with Part Two of the test because there was insufficient analysis on LSU's part. ${ }^{16}$ The court explained,

[^2][T]his Court finds the evidence shows that LSU's decision to add two intercollegiate varsity women's sports was neither for the purpose of encouraging women's athletics, nor for responding to an increasing interest and ability in women's athletics on campus. In adding the two teams, LSU chose merely to follow the decisions made by the Southeastern Conference concerning whether to add additional women's teams, the time table for adding the new teams, and the actual institution of additional women's sports. ${ }^{17}$

Before trying to show compliance with Part Two by adding a women's sport(s) or attempting to rely on a women's sport(s) that the school had previously added, an institution must determine whether the particular sport was or will be added in direct response to the developing interests and abilities of women at the university. To do this, an institution should, in part, send a survey to its incoming and enrolled students. For example, if an institution is considering adding Women's Bowling, how can the institution effectively demonstrate it is adding bowling in response to the developing interests and abilities of its female students when it has not even asked its students what their interests and abilities are? For most institutions, it would be nearly impossible to conduct in-person interviews with all or the majority of its female students. Although interviews with selected groups of students can be effective and should be accomplished in conjunction with the survey, a survey is the best method to reach a large population quickly.

In fact, the examples the OCR has provided of how an institution can ensure that its program expansion is "demonstrably responsive to the developing interests and abilities of members of the [underrepresented] sex" wisely includes "survey[ing] its enrolled and incoming female students." ${ }^{18}$ Although the OCR previously withdrew the 2005 model survey, the OCR provided suggestions in its 2010 Clarification as to the content of a survey. ${ }^{19}$ For obvious reasons, the OCR in 2010 seemed reluctant to call these suggestions for the survey a "model survey" as it did in 2005 when it sparked the controversy described above; however, the OCR's suggestions offer institutions some useful guidance. The survey would ask the incoming and current students the following information for each sport:

| Sport | Interest in Future Participation: <br> At what level do you wish to <br> participate in this sport at our <br> institution (select all that apply) | Current <br> Participation: <br> At what level are you <br> participating in this <br> sport? <br> (select all that apply) | Prior Experience: <br> At what level did <br> you participate in <br> this sport or any <br> other relevant sport <br> in high school, <br> college, or in <br> another capacity? <br> (select all that apply) |
| :--- | :--- | :--- | :--- |

[^3]

Attachment 1 to this article contains a full sample survey that is based on the guidance provided by the OCR in its 2010 Clarification. ${ }^{20}$ The sample survey enclosed as Attachment 1 to this article also provides a framework for an institution to utilize the survey in an electronic format that can be linked to a student's enrollment. Ideally, the survey would be a condition of enrollment to ensure the survey response rate is as high as possible.

If an institution is planning on adding a particular sport such as Women's Bowling but the survey results indicate there is no interest or ability among the incoming or current students in bowling, the institution's addition of Women's Bowling would do nothing for its compliance with Part Two under Title IX. ${ }^{21}$ While an institution would not be prohibited from adding Women's Bowling in the above scenario, it would not be useful for the purpose of demonstrating compliance with Title IX. On the other hand, if through the survey and other methods an institution determines there is an unmet interest in bowling and its students have the ability to participate in bowling, adding bowling as a sport would demonstrate compliance with Part Two. It should be noted that an institution that determines there is an unmet interest and ability for six sports would likely not be in compliance with Part Two by only adding two of those sports. For example, in 2012, the OCR determined that Merrimack College was not in compliance with Part Two because even though Merrimack indicated it would be adding women's golf and crew teams, doing so "was not significant enough to bring the College into Title IX compliance.,"22 The OCR and Merrimack College subsequently entered into a resolution agreement to add six women's teams. ${ }^{23}$

[^4]Even if an institution with football is unsure of whether it will attempt to prove compliance under Part Two (history and continuing practice of program expansion) or Part Three (interests have been fully accommodated), the institution should submit a survey to its incoming and enrolled students assessing interests and abilities in sports. As stated above, a survey is a useful if not a mandatory tool in demonstrating compliance with Part Two, and as described below, a survey should also be considered a necessary element of proving compliance with Part Three.

## V. Part Three: Interests and Abilities Have Been Fully Accommodated

Even if an institution with football that will be unable to prove compliance with Part One (substantial proportionality) is also unable to prove under Part Two that it has a history or continuing practice of program expansion responsive to the interests and abilities of its female students, the institution can still prove compliance under Title IX. ${ }^{24}$ The institution must show compliance by proving under Part Three that the interests and abilities of its female students have been fully and effectively accommodated by the present programs. ${ }^{25}$

In determining whether an institution is in compliance with Part Three, the OCR considers multiple factors and requires the institution to answer the following three questions:
(1) Is there unmet interest in a particular sport?
(2) Is there sufficient ability to sustain a team in the sport?
(3) Is there a reasonable expectation of competition for the team? ${ }^{26}$

According to the OCR, "If the answer to all three questions is 'Yes,' OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three., ${ }^{, 27}$ As with Part Two, it is difficult to understand how an institution could prove whether there is unmet interest by its female students in a particular sport unless it specifically asks its female students in a survey. Again, conducting student interviews can be effective and should be utilized, but it is not as effective in reaching all admitted or enrolled female students. Of course, there are sports in specific regions where even if there is a high interest in the sport, an institution will not need to add the sport under Title IX because the team would not be able to compete. For example, institutions in Florida or Texas will not need to add Women's Skiing even if there is unmet interest among its students because there are no mountains or ski resorts for the team to practice and compete.

However, for most sports, the survey will provide necessary information including whether there are enough female students who actually want to participate in a particular sport and what abilities they may have based on prior and current athletic experience. Although the OCR has indicated that an institution cannot rely solely on the survey as its only method of proving compliance with Title IX, the survey results will indicate how deep of an analysis must be performed for each particular sport. For example, if the response rate to the survey is high and indicates there are no female students who want to participate in Women's Lacrosse, and if Women's Lacrosse is not offered at the surrounding high schools, areas where the institution would recruit, or within the institution's athletic conference, the institution would clearly not be required to add Women's Lacrosse under Title IX. In such a case, the

[^5]institution can move on to the analysis of the next sport. On the other hand, if the response to the survey indicates there is an interest among an institution's female students in Women's Lacrosse, the institution must perform a much deeper analysis to determine whether the institution would be required by Title IX to add Women's Lacrosse. This deeper analysis could include interviewing the club team members, analyzing the wins and losses of the club teams, and even conducting tryouts to gauge the ability of those who indicated they are interested in participating in a particular sport. ${ }^{28}$

## VI. Conclusion

The key to demonstrate compliance under Title IX is to use an athletic interest survey as one of many tools in the institution's tool belt of proving compliance with the participation aspect of Title IX, but not to use the survey as its sole method of compliance or abandon the use of surveys altogether. Although it is understandable why an institution would be hesitant to use any survey after the OCR abolished the 2005 "model survey," institutions with football should utilize the survey method regardless of whether it is seeking to prove compliance with Part Two or Part Three of the participation aspect of Title IX.

A sample of survey based on the OCR's guidance in its 2010 Clarification is enclosed as Attachment 1. Because the "OCR does not consider non-responses to surveys as evidence of lack of interest or ability in athletics," institutions should ensure that the survey is sent in a manner that receives the highest response rate (e.g., requiring the survey to be completed before enrolling in courses). The sample survey enclosed as Attachment 1 can be utilized as a web based survey that could be tied to students' enrollment in courses.

[^6]
## VII. Attachment 1: Sample Survey

Title IX survey for all undergraduate female ${ }^{29}$ students and admitted female students.

## Screen One:

Please complete the following survey in order to proceed with enrolling for your courses.
Survey Purpose: The University is conducting this survey pursuant to its obligations under federal law (Title IX) in relation to athletic participation opportunities offered by the University's Department of Intercollegiate Athletics. In particular, the University is considering whether to add an additional women's intercollegiate athletic team(s) to the following intercollegiate athletic teams it currently offers: [list sports]. To that end, the University would like to know what your potential athletic ability is and whether you are interested in potentially participating in a women's intercollegiate athletics team(s) it does not currently offer. This data collection is being conducted for evaluation, research, and planning purposes and may be used along with other information gathered by the athletic department to determine whether the University is effectively accommodating the athletic interests and abilities of its female students, including whether to add additional women's teams.

Please select one of the following:
O I am interested in the University adding additional women's intercollegiate athletic teams for my potential participation and would like to complete the survey. (The survey will take approximately 5 minutes.)

O I am not interested in the University adding additional women's intercollegiate athletic teams for my potential participation and do not wish to complete the survey. [Note: when a student clicks on this option, the following prompt should appear, "Are you sure you are not interested in the University adding additional teams for your potential participation and want to exit the survey?"]

O I would like to complete the survey at later time and would like the athletic department to follow up with me at the below contact information:

Name: [*required field]
E-mail: [ ${ }^{*}$ required field]
Phone Number: [*required field]
The following note should appear at the bottom of Screen One: "Confidentiality Statement: All responses as well as any personally identifiable information you provide will be kept confidential to the maximum extent permitted by applicable law. Additionally, please be aware that the aggregate survey information

[^7]Athletic Interest Surveys
will be shared with appropriate University employees as necessary to ensure compliance with the University's obligations under Title IX."

## Screen Two:

Please select any of the options below that apply to you. If any of the options do not apply to you, please leave the field blank.

\begin{tabular}{|c|c|c|c|}
\hline Sport \({ }^{30}\) \& Interest in Future Participation: At what level do you wish to participate in this sport at the University (select all that apply) \& \begin{tabular}{l}
Current Participation: \\
At what level are you participating in this sport? \\
(select all that apply)
\end{tabular} \& Prior Experience: At what level did you participate in this sport or any other relevant sport in high school, college, or in another capacity? (select all that apply) \\
\hline Women's Basketball \& Intercollegiate
Club
Intramural
Recreational
I am a current intercollegiate student-athlete in this sport. \& Intercollegiate
Club
Intramural
Recreational
Other \(\qquad\) \& College
Intercollegiate
Club
Intramural
Recreational

Varsity
Junior Varsity
Club
Intramural
Recreational
Other $\qquad$ <br>
\hline
\end{tabular}

[^8]
## Athletic Interest Surveys

| Women's Bowling | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College Intercollegiate Club Intramural Recreational <br> High School Varsity Junior Varsity Club Intramural Recreational Other |
| :---: | :---: | :---: | :---: |
| Women's Cross Country | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College Intercollegiate Club Intramural Recreational <br> High School Varsity Junior Varsity Club Intramural Recreational Other |
| Women's Fencing | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College Intercollegiate Club Intramural Recreational <br> High School Varsity Junior Varsity Club Intramural Recreational Other $\qquad$ |


| Women's Field Hockey | Intercollegiate <br> Club <br> Intramural <br> Recreational <br> I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College <br> O Intercollegiate <br> OClub <br> O Intramural <br> ORecreational <br> High School <br> O Varsity <br> O Junior Varsity <br> Club <br> O Intramural <br> ORecreational <br> Other |
| :---: | :---: | :---: | :---: |
| Women's Golf | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College <br> O Intercollegiate <br> O Club <br> O Intramural <br> Recreational <br> High School <br> OVarsity <br> O Junior Varsity <br> Club <br> O Intramural <br> Recreational <br> Other |
| Women's Gymnastics | Intercollegiate <br> Club <br> Intramural <br> Recreational <br> I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College <br> O Intercollegiate <br> O Club <br> O Intramural <br> Recreational <br> High School <br> OVarsity <br> O Junior Varsity <br> Club <br> O Intramural <br> Recreational <br> Other |


| Women's Ice Hockey | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College <br> O Intercollegiate <br> Club <br> O Intramural <br> ORecreational <br> High School <br> OVarsity <br> O Junior Varsity <br> Club <br> O Intramural <br> ORecreational <br> Other |
| :---: | :---: | :---: | :---: |
| Women's Lacrosse | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College <br> O Intercollegiate <br> Club <br> O Intramural <br> Q Recreational <br>  <br> High School <br> Varsity <br> O Junior Varsity <br> Club <br> O Intramural <br> Recreational <br> Other |
| Women's Rifle | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College O Intercollegiate O Club O Intramural Q Recreational High School O Varsity O Junior Varsity Club O Intramural Qecreational Other |


| Women's <br> Rowing | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College Intercollegiate Club Intramural Recreational <br> High School Varsity Junior Varsity Club Intramural Recreational Other |
| :---: | :---: | :---: | :---: |
| Women's <br> Sand <br> Volleyball | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College O Intercollegiate Club O Intramural Recreational High School O Varsity Junior Varsity Club O Intramural Recreational Other |
| Women's Skiing | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College O Intercollegiate O Club O Intramural Q Recreational High School O Varsity O Junior Varsity Club O Intramural ORecreational Other |


| Women's Soccer | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College Intercollegiate Club Intramural Recreational <br> High School Varsity Junior Varsity Club Intramural Recreational Other |
| :---: | :---: | :---: | :---: |
| Women's Softball | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College O Intercollegiate Club O Intramural Recreational High School O Varsity Junior Varsity Club O Intramural Recreational Other |
| Women's Swimming and Diving | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College O Intercollegiate O Club O Intramural Q Recreational High School O Varsity O Junior Varsity Club O Intramural ORecreational Other |


| Women's Tennis | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College Intercollegiate Club Intramural Recreational <br> High School Varsity Junior Varsity Club Intramural Recreational Other |
| :---: | :---: | :---: | :---: |
| Women's <br> Indoor Track and Field | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College O Intercollegiate O Club O Intramural Recreational High School O Varsity Junior Varsity Club O Intramural Recreational Other |
| Women's <br> Outdoor <br> Track and Field | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College O Intercollegiate O Club O Intramural Recreational High School O Varsity Junior Varsity Club O Intramural Recreational Other |


| Women's Volleyball | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College O Intercollegiate Club Intramural Recreational High School O Varsity Junior Varsity Club Intramural Recreational Other |
| :---: | :---: | :---: | :---: |
| Women's Water Polo | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College O Intercollegiate Club Intramural Recreational High School OVarsity O Junior Varsity Club Intramural Recreational Other |
| Women's <br> Sand <br> Volleyball | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College O Intercollegiate Club Intramural Recreational High School O Varsity Junior Varsity Club Intramural Recreational Other |


| Women's Equestrian | Intercollegiate Club Intramural Recreational I am a current intercollegiate student-athlete in this sport. | Intercollegiate Club Intramural Recreational Other $\qquad$ | College <br> O Intercollegiate <br> Club <br> O Intramural <br> ORecreational <br> High School <br> OVarsity <br> O Junior Varsity <br> Club <br> O Intramural <br> ORecreational <br> Other |
| :---: | :---: | :---: | :---: |
| Other sport(s) [Please list]: $\qquad$ $\qquad$ $\qquad$ $\qquad$ | Intercollegiate Club Intramural Recreational | Intercollegiate Club Intramural Recreational Other $\qquad$ | College <br> Intercollegiate <br> Q Club <br> Q Intramural <br> QRecreational <br> High School <br> Q Varsity <br> Sunior Varsity <br> Q Club <br> Q Intramural <br> QRecreational <br> QOther |

Please list any additional information you believe would be helpful for the athletic department regarding your interest, experience, and ability:
[If a student fails to select any of the options above, the following prompt should appear: "You have not made any selections. Please click "continue" to confirm that you are not interested and have no experience in participating in any of the above sports."]

## Screen Three:

Please provide your contact information in order to allow the athletic department to follow up with you regarding your interests and abilities.

Name: $\qquad$ [*required field]

E-mail: $\qquad$ [*required field]

Phone Number: $\qquad$ [*required field]

Mailing Address: $\qquad$ [*required field]

O I do not wish to be contacted. I understand that failing to provide my contact information may result in the University not being able to assess whether I have the ability to participate in any of the sports above, which could impact the University's decision regarding whether to add a particular sport.


[^0]:    ${ }^{1}$ Eric D. Bentley holds the title of Associate General Counsel for the University of Houston System. Bentley is also an adjunct faculty member who teaches a sports law course in the University of Houston's Department of Health and Human Performance.
    ${ }^{2}$ See Russlyn Ali, Dear Colleague Letter, U.S. Dept. of Educ. (Apr. 20, 2010), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf.
    ${ }^{3} I d$.
    ${ }^{4}$ See Catherine Pieronek, The 2010 "Dear Colleague" Letter on Title IX Compliance For College Athletic
    Programs: Pointing the Way to Proportionality ...Again38 J.C. \& U.L. 277, 281 (2011-2012).
    ${ }^{5}$ Id.
    ${ }^{6}$ See supra note 2.

[^1]:    ${ }^{7}$ See Intercollegiate Athletics and Sex Discrimination, 44 Fed. Reg. at 71, 414 (Dec. 11, 1979), available at http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html. ${ }^{8}$ Id.
    ${ }^{9}$ See Neal v. Bd. of Trustees of California State Universities, 198 F.3d 763, 767 ( ${ }^{\text {th }}$ Cir. 1999).
    ${ }^{10}$ See Intercollegiate Athletics and Sex Discrimination, 44 Fed.Reg. at 71, 418.
    ${ }^{11}$ Title IX does not require perfect proportionality, but rather requires "substantial proportionality." Although there is no magic number that is considered to be in "substantial proportionality," the court in Cohen v. Brown University

[^2]:    determined that an $11 \%$ gap between participation opportunities for females and their respective enrollment was not substantially proportional. See Cohen v. Brown Univ., 991 F.2d 888, 897-899 (1 ${ }^{\text {st }}$ Cir. 1993).
    ${ }^{12}$ Eric Irick, NCAA Sports Sponsorship and Participation Rates Report 1981-82-2011-2012 (2012), available at http://www.nwcaonline.com/nwcawebsite/docs/saving-wrestling-files/pdf-.pdf?sfvrsn=0 (last visited Aug. 20,
    2013).
    ${ }^{13}$ Id.
    ${ }^{14}$ See Katie Thomas, College Teams, Relying on Deception, Undermine Gender Equity, N.Y. Times, Apr. 25, 2011, available at http://www.nytimes.com/2011/04/26/sports/26titleix.html?pagewanted=2\&_r=3\&emc=eta1.
    ${ }^{15}$ See supra note 9.
    ${ }^{16}$ Pederson v. La. State Univ., 912 F. Supp. 892, 916-17 (M.D. La. 1996).

[^3]:    ${ }^{17}$ Id.
    ${ }^{18}$ See Norma V. Cantú, Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test, U.S. Dept. of Educ. (Jan. 16, 1996), available at http://www.nacua.org/documents/1996ClarificationIntercollegiateAthleticsPolicyGuidance.pdf.
    ${ }^{19}$ See Ali, supra note 2.

[^4]:    ${ }^{20}$ Id.
    ${ }^{21}$ See supra note 16 at 916-917.
    ${ }^{22}$ See Letter from Thomas J. Hibino, Regional Director, Office of Civ. Rights, to Christopher Hopey, President, Merrimack College (Sept. 28, 2012), available at $\underline{\text { http://www2.ed.gov/about/offices/list/ocr/docs/investigations/01106001-a.pdf. }}$
    ${ }^{23}$ Adding the six teams ultimately brought Merrimack College into compliance with Part One because there would be substantial proportionality between its enrollment and its athletic opportunities. Christopher E. Hopey, Merrimack College Resolution Agreement Compliance Review No. 01-10-6001 (Sept. 27, 2012), available at http://www2.ed.gov/about/offices/list/ocr/docs/investigations/01106001-b.pdf .

[^5]:    ${ }^{24}$ See supra note 17.
    ${ }^{25}$ Id.
    ${ }^{26}$ See Intercollegiate Athletics Policy: Three-Part Test - Part Three (Apr. 16, 2010), available at http://www2.ed.gov/about/offices/list/ocr/docs/title9-qa-20100420.html.
    ${ }^{27} I d$.

[^6]:    ${ }^{28}$ See Russlyn Ali, Dear Colleague Letter, U.S. Dept. of Educ. (Apr. 20, 2010) at 6-7, available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf.

[^7]:    ${ }^{29}$ The survey would be sent to female students if there are fewer athletic participation opportunities for females at your institution. If your institution has fewer athletic participation opportunities for males, the survey would be sent to all undergraduate male students and admitted male students.

[^8]:    ${ }^{30}$ Note that the survey should include all the NCAA women's sports even if your institution already offers some of the women's sports. Current participation in one of the intercollegiate sports by a female athlete may translate into the ability to participate in another sport not currently offered (e.g., a current soccer player on the women's soccer team who has an interest in playing women's field hockey, which your school does not offer, may be shown at least peripherally to have potential ability to participate in women's field hockey). After determining there is unmet interest in a particular sport, the next step is to determine whether there is sufficient ability to sustain a team, and these survey answers of current and past participation in intercollegiate athletics will be one method of making this determination. Additionally, even though as mentioned above, a Florida school would not be expected to add women's skiing as a sport even if there is unmet interest, it is important to list each sport in the survey for the same reason above of being able to gauge athletic ability.

