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Re: Title IX Compliance: “If You Don’t Respond, You Must Not Be Interested”

By R. Scott Phillips

INTRODUCTION

In 1972, Congress passed Title IX, mandating gender equality in higher education.¹ Congress delegated authority to the Department of Education’s Office for Civil Rights (OCR)² to administer Title IX and to promulgate regulations.³ Seven years later, the OCR drew upon their rule making power and fashioned a three-pronged test. This test established the standard for evaluating Title IX compliance in intercollegiate athletics. To show compliance, universities typically rely on the test’s third prong. It requires the schools to “fully and effectively” accommodate the underrepresented gender’s interests and abilities in university athletic offerings.⁴

Recently, the OCR altered its interpretation of this third prong. The OCR’s 2005 Additional Clarification expressly approved web-delivered student-interest surveys as a means of showing compliance.⁵ The Additional Clarification outlines a “model survey” that, if administered according to OCR specifications, establishes a presumption of Title IX compliance, provided the statistics reflect no unmet female athletic interests.⁶ The interpretation was deemed necessary as a response to universities’ desire for an objective test. The OCR believed its 2005 Additional Clarification would “elevate the third prong of the test [for Title IX compliance] by providing a standardized measure of interest.”⁷

¹ Education Amendment Act, 20 U.S.C. §§1681-1688 (1972).

² See *Infra* pp. 3-4 (Title IX’s administering agency, the Department of Education is the successor of the disbanded Department of Health, Education, and Welfare).

³ See Department of Education Organization Act, 20 U.S.C. § 3441(a)(3) (1979).

⁴ A Policy Interpretation; Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71413 (1979) *available at* <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html> [hereinafter Policy Interpretation].

⁵ U.S. DEPT. OF EDU., OFFICE FOR CIVIL RIGHTS, ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST- PART THREE 7 (2005) *available at* <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter 2005 ADDITIONAL CLARIFICATION].

⁶ *Id.* at 6.

⁷ Michelle B. Hosick, *Title IX Advocates Rally Communication Effort to Rethink Clarification*, NCAA NEWS ONLINE, Apr.25, 2005, http://www.ncaa.org/wps/portal/newsdetail?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/NCAA/NCAA+News/NCAA+News+Online/2005/Association-wide/Title+IX+advocates+rally+communication+effort+to+rethink+clarification+-+4-25-05+NCAA+News.

Reaction to the 2005 Additional Clarification has been largely negative. Critics oppose the model survey's methodology. Shortly after its issuance, more than 140 congressional Democrats wrote to President George W. Bush, decrying the OCR's interpretation.⁸ Their chief complaint was that the survey "creates a major loophole and lowers the standard for Title IX compliance, jeopardizing the number of athletic opportunities available to women and girls in schools across the country."⁹ The National Collegiate Athletics Association (NCAA) has also expressed concern regarding the statistical evidence. The NCAA believes reliance on such data could adversely affect program expansion pursuant to Title IX mandates and urged its "members to decline use of the procedures set forth in the Additional Clarification."¹⁰

The purpose of Title IX and its ensuing regulations is to remedy gender discrimination in American universities while creating a framework for universities to assess their compliance. The 1979 three-prong test, for better or worse, has become the principal method for determining universities' Title IX compliance.¹¹ The vague language of the third prong invites an objective standard, but the new OCR interpretation relies too heavily upon university discretion and self-reporting. The OCR's express approval of an email-delivered survey method is tantamount to endorsing low response rates. The 2005 Additional Clarification is inconsistent with prior court decisions and legislative intent. Its legal viability is uncertain and vulnerable to a challenge.

The model survey ultimately fails to accomplish the stated goal of Title IX, which demands full gender equality in athletics. Although the OCR has unwisely adopted an inherently inaccurate survey, on its own accord, this is insufficient to successfully challenge the 2005 Additional Clarification. This article will critically analyze the model survey and ultimately attempt to answer the question of what the 2005 Additional Clarification means for Title IX compliance and provide guidance for litigants who wish to challenge the OCR's interpretation.

⁸ Letter from Nancy Pelosi, Minority Leader, House of Representatives, to George W. Bush, President of the United States, (June 22, 2005) available at <http://www.house.gov/pelosi/press/releases/June05/TitleIX.html>.

⁹ *Id.*

¹⁰ Press Release, National Collegiate Athletic Ass'n, In Honor of Title IX Anniversary (June 22, 2005) available at http://www2.ncaa.org/media_and_events/press_room/2005/june/20050622_titleixanniv.html.

¹¹ Policy Interpretation, *supra* note 4, at 71413.

PASSAGE OF TITLE IX

Title IX is a subpart of the Education Amendment Act of 1972 (EAA), which mandates gender equality in higher education.¹² The EAA's statutory language provides, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."¹³ In the late 1960s, prior to Title IX's enactment, Congress began investigating university administrators' discriminatory attitudes and practices.¹⁴ At the behest of Oregon Congresswoman Edith Green in 1970, Congress conducted various hearings concerning gender-discrimination in higher education.¹⁵ The most astonishing information gleaned from the hearings were candid admissions, by university administrators, that a higher grade point average was required for admitting female applicants.¹⁶ Thereafter, Congress entertained five competing bills aimed at combating gender-discrimination.¹⁷ The EAA won majority support in both houses of Congress and gender equality became mandated by law.

Although Title IX's broad language did not expressly include intercollegiate athletic programs, the need for equality in sports was self-evident. Prior to Title IX, female student athletes were a rare commodity, representing only two percent of all intercollegiate athletes. Women's sports were similarly allocated only two percent of athletic budgets.¹⁸ Furthermore, women's sports were entirely excluded from oversight by the NCAA, the principal governing body for intercollegiate athletics. Women's sports did not have an equivalent governing body until 1971, when the Association of Intercollegiate Athletic Women (AIAW) was founded.

The Javits Amendment of 1974 put to rest any doubt as to whether Title IX applied to intercollegiate athletics. The amendment specifically authorized the Department of Health, Education and Welfare (HEW), through its Office for Civil Rights (OCR), to promulgate regulations with respect to Title IX and intercollegiate athletics.¹⁹ That year, Congress also

¹² 20 U.S.C. §§ 1681-1688.

¹³ *Id.* at § 1681(a).

¹⁴ U.S. DEPT. OF EDU., SEC'S COMM'N FOR OPPORTUNITY IN ATHLETICS, OPEN TO ALL: TITLE IX AT THIRTY 14, 46 (2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf> [hereinafter OPEN TO ALL].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ OPEN TO ALL, *supra* note 14, at 14.

¹⁹ 20 U.S.C.A § 1681.

rejected a competing bill proposed by Texas Senator John Tower and endorsed by the NCAA. The “Tower Amendment” aimed to amend Title IX’s statutory language regarding education programs and activities. It would have expressly excluded any sport from Title IX calculations if it generated revenue for the university.²⁰

Title IX has since endured some bureaucratic restructuring. In 1979, Congress disbanded the HEW and reassigned its duties between the newly created Department of Health and Human Services (HHS) and the Department of Education (DOE).²¹ Even though the HHS technically had authority to promulgate Title IX regulations, both agencies had authority to regulate higher education. For several years the agencies, confusingly, promulgated overlapping, and occasionally conflicting, regulations.²² Congress recognized the need to end the inconsistency and transferred all educational functions from the HHS to the DOE in 1980.²³ The Office for Civil Rights within the DOE is the sub-agency that now administers Title IX.²⁴

REGULATORY INTERPRETATIONS OF TITLE IX

Initial Regulation and the Three-Prong Test

The original regulations from the HEW era provided, “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently... or otherwise be discriminated against in ... intercollegiate... athletics.”²⁵ On its face, the language is simple but tantalizingly vague. In an attempt to clarify the regulation, the OCR listed ten 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 time;
- (4) Travel and per diem allowance;

²⁰ J. Brad Reich, *All The [Athletes] are Equal, but Some are More Equal Than Others: An Objective Evaluation of Title IX’s Past, Present, and Recommendations for its Future*, 108 PENN ST. L. REV. 525, n.26 (2003) (citing Amend. 1343 to S. 1539, 129 Cong. Rec. 15, 322 (1974)).

²¹ Department of Education Organization Act, 20 U.S.C. §§3401-3510 (1979).

²² *Compare* Prohibition on Discrimination on the Basis of Sex in Education, 45 C.F.R. § 86 (1974), *with* Nondiscrimination on the Basis of Sex in Education Programs or Activities, 34 C.F.R. § 106 (1974); *See* Bernard H. Friedman, Note, *Title IX Does Not Apply to Faculty Employment*, 1981 DUKE L.J. 566, n.2 (1981).

²³ 20 U.S.C. § 3441(a)(1).

²⁴ *Id.* at (a)(3); *see also* 20 U.S.C. § 3505(a).

²⁵ 34 C.F.R. § 106.41(a).

- (5) Opportunity to receive coaching and academic tutoring;
- (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;
- (10) Publicity.²⁶

The regulation's vague language smothered the OCR with over one hundred discrimination complaints, claiming Title IX violations by more than fifty schools.²⁷ Prompted by the tremendous increase in litigation, the OCR issued its 1979 Policy Interpretation. This was an attempt to dissuade unwarranted complaints and to offer students, universities, and other interested persons a better understanding of the regulation.²⁸ The Policy Interpretation also marked the birth of the now notorious "three-prong test." The test deems a university compliant with Title IX if it satisfies any of the following:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;
- (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.²⁹

The first prong is an objective test, and a university is deemed compliant if it proves the percentage of female athletes, relative to male athletes, mirrors the composition of the university's student body. The OCR interprets its language "substantially proportionate," as a gender variance of no greater than five percent between the ratio of student athletes and the general student body.³⁰ Essentially, the first prong is a safe harbor if the university can

²⁶ 34 C.F.R. § 106.41(c).

²⁷ *Cohen v. Brown Univ.*, 991 F. 2d 888, 896 (1st Cir. 1993).

²⁸ Policy Interpretation, *supra* note 4, at 71413.

²⁹ *Id.*

³⁰ Letter from Norma V. Cantu, Ass't Sec'y, Office of Civil Rights, to Dear Colleague (Jan. 16, 1996) (letter for Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test) available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter Dear Colleague Letter Norma V. Cantu].

demonstrate gender proportionality.³¹ Unfortunately, only a few universities satisfy this prong. Between 1992 and 2002, the OCR investigated 130 universities (1992-2002 Investigations) and found only 36 of those schools could demonstrate compliance with the proportionality test.³² Considering the enrollment of women in America's universities is surpassing the enrollment of men, this test is becoming less useful and proportionality is even more difficult to achieve.

The second prong, on the other hand, is a subjective analysis that permits universities to show compliance by proving they are actively and consistently expanding programs for the underrepresented gender. The policy provides relief for a university that is working toward gender equality in its athletic offerings. The subjective nature of this analysis, however, makes it impossible for a university to ascertain its Title IX status.

A university that defends against a Title IX enforcement action by asserting compliance under the second prong has a heavy burden to overcome.³³ It must find the narrow window between having insufficient opportunities which validate the enforcement action and demonstrating a sufficient history to show its good faith efforts to comply with Title IX. In other words, a compliant university must sufficiently prove a history of expanding its athletic programs, even though it still lacks a sufficient number of women's sports. It is more likely that the disproportionate numbers will be viewed as the result of the university's insufficient history and be deemed noncompliant. A defense by a university of compliance with the second prong leaves its good-faith assertion wide open to attack: A plaintiff could easily make the argument that the university has had thirty years in which to demonstrate progress, and if it actually had taken significant steps during that time to further gender-equality in athletics, proportionality would have already been accomplished. It is no surprise, then, that during the 1992-2002 Investigations, only eight universities persuaded the OCR that they satisfied the second prong.³⁴

If neither the first nor second prong offers relief, Title IX compliance may still be obtained pursuant to the third prong. Even if a university cannot show proportionality or a history of program expansion, it can still satisfy Title IX's mandate by showing the "interests and

³¹ *Cohen*, 991 F.2d at 897.

³² 2005 ADDITIONAL CLARIFICATION, *supra* note 5, at User's Guide 3.

³³ John J. Almond & Daniel A. Cohen, *Navigating into the new "Safe Harbor": Model Interest Surveys as a new Tool for Title IX Compliance Programs*, 8 VAND. J. ENT. & TECH. L. 1, 7 (2005).

³⁴ 2005 ADDITIONAL CLARIFICATION, *supra* note 5, at User's Guide 3.

abilities” of the underrepresented gender have been “fully and effectively accommodated”³⁵ For example, a university can demonstrate Title IX compliance, even if it has 1000 student athletes, 980 of whom are male, provided the university has met the interests of its female students who have the ability to compete in intercollegiate athletics. The OCR presumes noncompliance when it finds an “unmet interest” in an un-offered sport if the university has “sufficient ability to sustain a team in the sport” and the team has a “reasonable expectation of competition.”³⁶ Noncompliance is also presumed whenever a university eliminates a women’s sport. The university may rebut this presumption only by proving the interest, ability, or a reasonable expectation of competition is no longer present.³⁷ Despite the difficult burden of overcoming the OCR presumptions, the bulk of Title IX litigation is fought over this third prong. During the 1992-2002 Investigations, eighty-six schools successfully demonstrated Title IX compliance pursuant to the third prong.³⁸

THE ADDITIONAL CLARIFICATION AND THE MODEL SURVEY

The 2005 Additional Clarification

In June, 2002, the Secretary of Education’s Commission on Opportunity in Athletics (Commission) heard testimony from university administrators explaining the practical application of the three-prong test.³⁹ They suggested that the second and third prongs were too ambiguous and unreliable and only the first prong’s proportionality test offered an absolute “out” for showing Title IX compliance.⁴⁰ Publishing its findings in February, 2003, the Commission planted the seed for the OCR’s 2005 Additional Clarification.⁴¹ It recognized that “there should be an additional effort to designate [prongs] two and three as safe harbors along with [prong] one.”⁴² The Commission concluded:

The Office for Civil Rights should allow institutions to conduct continuous interest surveys on a regular basis as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men’s and

³⁵ Policy Interpretation, *supra* note 4, at 71413.

³⁶ See Dear Colleague Letter Norma V. Cantu, *supra* note 30.

³⁷ *Id.*

³⁸ 2005 ADDITIONAL CLARIFICATION, *supra* note 5, at 3.

³⁹ OPEN TO ALL, *supra* note 14, at 23.

⁴⁰ *Id.*

⁴¹ *Id.* at 46-47.

⁴² *Id.* at 24.

women's interest in athletics over time, and (3) stimulating student interest in varsity sports. The Office should specify the criteria necessary for conducting such a survey in a way that is clear and understandable.⁴³

The Commission encouraged the OCR to consider student-interest surveys to show compliance under the third prong.⁴⁴ After reviewing the Commission's findings, the OCR issued a new interpretation of the three-prong test, entitled, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*. The OCR stated:

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.⁴⁵

The 2005 Additional Clarification fulfilled the OCR's promise to provide universities with additional guidance for assessing Title IX compliance and incorporated the Commission's recommendation for student-interest surveys.⁴⁶ For purposes of determining athletic interests and abilities, the agency detailed a "model survey" that a university could administer to its undergraduate student body.⁴⁷

The Model Survey

The 2005 Additional Clarification effectively made the third prong an alternative safe harbor for universities wishing to demonstrate Title IX compliance. The OCR also asserted that while each prong is an independent safe harbor, the OCR does not favor any particular prong.⁴⁸ The Additional Clarification declared that the OCR will presume Title IX compliance and refrain from reviewing any university who administers the model survey (or an equivalent survey), if the results indicate an insufficient interest among the underrepresented gender.⁴⁹ The OCR's

⁴³ *Id.* at 38.

⁴⁴ *Id.* at 39.

⁴⁵ Letter from Gerald Reynolds, Ass't Sec'y, Office of Civil Rights, to Dear Colleague (July. 11, 2003) (letter for Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance) *available at* <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

⁴⁶ See 2005 ADDITIONAL CLARIFICATION, *supra* note 5.

⁴⁷ *Id.* at 5.

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 6.

explicit approval of statistical evidence offers an objective standard for universities when assessing Title IX compliance.

The model survey embraces the efficiency of modern technology.⁵⁰ The web-delivered survey is considered properly administered if it is periodically distributed to the entire undergraduate student body; compliance is not presumed if the survey is merely submitted to a sample population.⁵¹ Universities are not required to accommodate the athletic interests of “potential, part-time, or graduate students.”⁵² Survey participants must be given the entire list of sports detailed in the model survey,⁵³ including all twenty-three of the NCAA championship sports and seven emerging sports.⁵⁴

The OCR also attempted to address the common problem of low response rates to web-delivered surveys. Unfortunately, however, the suggested solution for combating low response rates is, at best, circular – universities are instructed to administer the survey in a manner that will generate a high rate of response.⁵⁵ “Thus, schools may either require students to complete the census or provide the census in a context in which most students will complete it.”⁵⁶ For example, a university could administer the survey during class registration.⁵⁷ The OCR also suggested that emailing a link to the survey would sufficiently generate a high rate of response, if a university had “accurate email addresses, students have access to email, and the school takes reasonable steps to follow-up with students who do not respond.”⁵⁸ Interestingly, the OCR considers a student’s non-response as an indication of her lack of interest.⁵⁹

Critique of the Model Survey

The model survey, as an idea, represents a step in the right direction. Universities truly need an objective test to gauge their Title IX compliance under the third prong. Unfortunately, the model survey falls short of effectuating Title IX’s overarching policy. It broadly grants a

⁵⁰ *Id.* at User’s Guide 13.

⁵¹ *Id.* at 6.

⁵² *Id.*

⁵³ *Id.* at 7.

⁵⁴ *Id.* at User’s Guide 19.

⁵⁵ *Id.* at User’s Guide 6.

⁵⁶ *Id.*

⁵⁷ *Id.* at User’s Guide 7.

⁵⁸ *Id.*

⁵⁹ *Id.*

university the benefit of presumed compliance by merely following the minimal requirements outlined in the OCR's "User's Guide" which accompanies the 2005 Additional Clarification.⁶⁰ The User's Guide sets forth specific criteria for collecting the requisite information, determining appropriate sample size, and survey delivery method.⁶¹

The model survey's chief shortcoming is its failure to accurately capture the true interests of a university's underrepresented gender. Its excessive reliance on self-reporting makes the model survey prone to capturing the views of only a small segment of the student population and, as a consequence, generating skewed data and erroneous results. Additionally, the OCR's survey affords too much discretion to university administrators and is vulnerable to delivery problems. If the goal of the model survey is to provide a university with sufficient information to gauge the interests and abilities of its students, more must be done to accurately assess the athletic potential of its female student body. Inevitably, statistics derived from the model survey will mislead the university and the OCR, erring in favor of Title IX compliance. Although the model survey provides the desired guidance for universities, it also creates a real risk of nullifying Title IX's mandates. If broadly adopted, the survey will cause more harm than good, ultimately resulting in the failure to achieve the statute's goal of obtaining gender equality in intercollegiate athletics.

Traditionally, courts have criticized a university for relying solely on statistical evidence to show Title IX compliance.⁶² These opinions are problematic for the OCR and its blanket presumption of compliance based entirely on statistics obtained from the model survey. While courts tend to give deference to OCR regulations, the Additional Clarification was not validated by formal rule making procedures.⁶³ Consequently, it is unlikely to survive judicial scrutiny if the right litigant challenges the model survey. If the challenge is successful, the defendant-university will ultimately bear the financial burden because it relied on the OCR's misguided advocacy of inaccurate statistical evidence.

⁶⁰ *Id.* at User's Guide 6.

⁶¹ *Id.* at User's Guide 10-13.

⁶² *Cohen v. Brown Univ.*, 101 F.3d 155, 179-80 (1996).

⁶³ *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (suggesting that opinion letters and policy interpretations of an agency's own regulations are not entitled to the same amount of deference as agency interpretations of a statute); *See Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002) (holding three-prong test is entitled to substantial deference because it was the result of formal rule-making).

Previous Court Rulings are Skeptical of Statistical Evidence

The problems associated with the model survey are best understood when viewed in light of prior court opinions. These holdings illustrate the lack of sound judgment exercised by the OCR when it imprudently adopted student-interest surveys. Courts have deemed reliance on similar statistical evidence to be inherently inaccurate and a threat to the nation's goal of gender equality.⁶⁴

The seminal case interpreting the third prong is the First Circuit's opinion in *Cohen v. Brown University* and its subsequent appeals. In *Cohen*, Brown University (Brown) argued that universities should only have to meet the interests and abilities of the underrepresented gender to the extent it also meets the interests and abilities of the majority.⁶⁵ In other words, Brown suggested that it satisfied the third prong by maintaining the ratio between the athletic interests of men (majority) and the interests of women (underrepresented), despite the number of capable female students expressing an interest in athletics.

The First Circuit did not take kindly to Brown's proposition. The court focused on the third prong's plain language, which requires a university to "fully and effectively" accommodate the interests and abilities of the underrepresented gender.⁶⁶ Critical of using statistical evidence to show compliance,⁶⁷ the First Circuit voiced its concern that statistics derived from surveys offer nothing more than a snapshot of the status quo. "Given...the survey...begin[s] under circumstances where men's...teams have a considerable head start.... [S]uch a rule [of using statistical evidence to show compliance]...certainly blunt[s] the exhortation that schools should 'take in account the...increasing levels of women's interests and abilities'...[and it disadvantages the] underrepresented sex."⁶⁸

Three years later, in a subsequent *Cohen* appeal, the First Circuit reasserted its concern about using statistics for establishing Title IX compliance. "Rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for

⁶⁴ *Cohen*, 101 F.3d at 179-80.

⁶⁵ *Cohen*, 991 F.2d at 899.

⁶⁶ *Id.*

⁶⁷ *Id.* at 900.

⁶⁸ *Id.*

women's lack of opportunity to participate in sports."⁶⁹ The court concluded that statistical evidence "standing alone, cannot justify providing fewer athletics opportunities for women than men."⁷⁰

The Model Survey Fails to Accurately Measure Students' Interests

The *Cohen* opinions quarrels with the OCR's model survey. If the model survey is widely adopted, it is inevitable that the First Circuit's fears will be realized. The survey's methodology will ultimately result in the compilation of inaccurate statistics. The likelihood of this result is underscored when one considers such factors as a university's broad discretion to administer and interpret the survey, the probability that the survey will capture the views of only a skewed target population, and the substantial reliance on self-reporting by participants. The OCR's email delivery method increases the likelihood of non-response, thus failing to reflect the true interests and the abilities of the underrepresented gender.⁷¹ The end result will be continued gender discrimination and inequality in intercollegiate athletics.

The Additional Clarification Affords Universities Too Much Discretion

The risk of a survey producing results unfavorable to the university is virtually nil, given that it is athletic directors and coaches who determine the threshold criterion of what degree of "interest is sufficient to sustain a varsity team."⁷² Thus, the university, rather than the OCR, has the power to determine Title IX compliance. The OCR gives deference to a university's interest level determination, premised on the belief that coaches and other university personnel have unique skills for assessing the requisite interests and abilities capable of supporting a new program.⁷³ The only control imposed on a university is that it must satisfy the less-than-stringent "high response rate" criterion.⁷⁴ Given the OCR's endorsement of email delivery as a suitable method for generating a high rate of response, it seems the only conceivable method which

⁶⁹ *Cohen*, 101 F.3d at 179.

⁷⁰ *Id.* at 180.

⁷¹ See, e.g., Press Release, National Collegiate Athletic Ass'n, Statement from NCAA President Myles Brand Regarding Department of Education Title IX Clarification (Mar. 22, 2005) available at http://www2.ncaa.org/portal/media_and_events/press_room/2005/march/20050322_brand_stmtnt_titleix_survey.html; see also, Erin E. Buzuvis, *Survey Says...A Critical Analysis of the new Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 841-42 (2006).

⁷² 2005 ADDITIONAL CLARIFICATION, *supra* note 5, at 9-12.

⁷³ *Id.*

⁷⁴ *Id.* at 6-7.

would *not* be appropriate would be a signup sheet in the student union. However, considering the overwhelming amount of junk-email received each day in university email accounts, a student signup sheet could actually engender greater student response.

Another accuracy problem is created by the model survey's reliance on self-reporting. Survey participants must rate their own athletic ability. This is a truly difficult task, especially where the university fails to offer the particular sport, as an interested female student would not have any meaningful standard by which to gauge her ability. In Erin Buzuvis' article, *Survey Says...A Critical Analysis of the new Title IX Policy and a Proposal for Reform*, she suggests that the years of gender inequality have skewed society's perception of an athlete.⁷⁵ Thus, while some students may overestimate their athleticism, a survey participant is far more likely to conclude that she lacks the necessary ability to compete in intercollegiate athletics. A female student, knowing that she possesses exceptional athleticism, could nonetheless be unaware that she fits the mold of a collegiate athlete.

American universities are highly selective when recruiting student athletes. Only the nation's most elite will earn an opportunity to compete at the collegiate level. This hierarchy dictates that most athletes, regardless of gender, lack the competitive skill to compete during their first academic year. Limited to four years of varsity competition, student athletes will often use a "red-shirt year" to preserve eligibility. Athletes must work hard during this year to be rewarded with upward mobility in their sport.⁷⁶ They must become stronger, faster and more precise to compete in collegiate athletics. Essentially, athletes who choose to red-shirt will preserve eligibility for the forthcoming years when they are more likely to be competitive. Thus, most recruited athletes initially lack the ability to compete at the university level. This makes it even less probable that a humble female student would assert that she possesses the ability to compete at the collegiate level.⁷⁷ The OCR poses a question that, in reality, is virtually impossible to honestly answer in the affirmative.

⁷⁵ Buzuvis, *supra* note 71, at 845.

⁷⁶ *Id.*

⁷⁷ *Id.*

The Target Population is Skewed in Favor of Title IX Compliance

The OCR's target population for the model survey undermines the survey's accuracy. While the target population includes all full-time undergraduate students, it excludes potential and part-time students.⁷⁸ Students with the required interest and ability for a given sport, who would have attended the university but for the university's failure to offer the opportunity, are excluded from that university's statistics. Such results embrace "preferences [for] a population that is self-selected to be satisfied with the university's existing athletic offerings."⁷⁹ The likelihood of finding an unmet interest and ability is extremely low when the interested population is attending another university. Likewise, an increasing number of students are working throughout their college life, attempting to offset the burden of the rising tuition fees.⁸⁰ An underprivileged female student, though possessing exceptional athletic ability and interest, might easily find herself funneled into the part-time category and excluded from the survey's calculations. On the other hand, a similarly situated male student is more likely to enjoy an athletic scholarship to offset the financial burden.

Finally, despite the OCR's acknowledgment that email surveys have a high likelihood of low response rates, it has perplexingly endorsed email as an acceptable mode to deploy surveys.⁸¹ This contradiction raises the question of whether the method, absent the OCR's endorsement, would have ever satisfied the standard for a high response rate. The risk of students failing to check their email accounts or simply ignoring the survey link, is not only possible, but highly probable. A thorough review of all incoming email is an impossible task, especially considering the rapid rate at which inboxes are filled with spam, mass email blasts by the university, and other forms of junk mail.⁸² The OCR's presumption that a non-response is tantamount to a lack of interest, suspiciously, skews survey results toward Title IX compliance. Suggesting that the presumption is justified merely because the students were informed of the survey, and thus had an opportunity to respond, grossly disregards the gravity of problems

⁷⁸ 2005 ADDITIONAL CLARIFICATION, *supra* note 5, at 6.

⁷⁹ Buzuvis, *supra* note 71, at 844.

⁸⁰ Debbie Goldberg, *Reading, Writing and Working*, WASH. POST, Oct. 25, 1998 at R1.

⁸¹ 2005 ADDITIONAL CLARIFICATION, *supra* note 5, at 7.

⁸² Buzuvis, *supra* note 71, at 842.

inherent to email surveys. Nevertheless, the OCR has endorsed this premise. They assert student athletes must devote considerable time and energy to their sport, and that those who choose not to respond must simply lack the requisite interest and devotion for pursuing a collegiate athletic career.⁸³

THE FUTURE OF THE 2005 ADDITIONAL CLARIFICATION

Wading in the Murky Waters of Administrative Law

The most important case in all of administrative law, decided by the United States Supreme Court in 1984, is the infamous and often misconstrued *Chevron U.S.A. v. Natural Resources Defense Council*.⁸⁴ Pursuant to *Chevron*, lower courts afford substantial deference to an administrative agency's interpretation, provided that Congress delegated its authority to the agency.⁸⁵ The interpretation must also be reasonable and the plain language of the statute must be sufficiently ambiguous.⁸⁶

The Supreme Court limited the breadth of an agency's *Chevron* deference in *Christensen v. Harris County*.⁸⁷ The Court in *Christensen* held that an agency's interpretation only commands substantial judicial deference if it carries the force of law.⁸⁸ These decisions strike the distinction between actual agency rule promulgation and mere policy interpretations. The latter does not carry the force of law and, therefore, does not demand *Chevron* deference. While deference is not mandated for an agency's policy interpretation which has not been validated by notice and comment proceedings, a court may give it respect.⁸⁹ Regardless of whether formal procedures were used, an agency's interpretation of an ambiguous regulation may also demand judicial deference.⁹⁰

⁸³ 2005 ADDITIONAL CLARIFICATION, *supra* note 5, at User's Guide 18.

⁸⁴ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Christensen*, at 576.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

The Supreme Court has not yet ruled on the three-prong test, but lower courts consistently afford deference to the interpretation.⁹¹ The reasons given, however, vary among the circuits. The First Circuit gave the three-prong test *Chevron* deference and determined that the test is an interpretation of Title IX's statutory language⁹² and found that 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."⁹³ On the other hand, the Sixth and Eighth Circuits both afford deference, believing it to be an interpretation of the agency's ambiguous regulation.⁹⁴ The Sixth Circuit, however, mistakenly conflated the deference standards, suggesting the three-prong test was the product of notice and comment rule-making.⁹⁵

Uncertainty Remains Without Judicial Guidance

It is uncertain how much deference will ultimately be afforded to the 2005 Additional Clarification. The degree of deference granted depends on how the courts pigeonhole the test in the chaotic body of administrative law. The 2005 Additional Clarification is neither an interpretation of a statute, nor is it an interpretation of a regulation -- it merely piggybacks onto the OCR's 1979 Policy Interpretation of the three-part test.⁹⁶ Thus, it is an interpretation of an interpretation. Neither the 2005 Additional Clarification nor the 1979 Policy Interpretation has endured the arduous procedures of notice and comment rulemaking to justify judicial deference.⁹⁷ The 2005 Additional Clarification does not command *Chevron* deference, nor does the agency action deserve deference for interpreting a prior ambiguous regulation.

Finding Relief for the Underrepresented Interest

There is no clear answer as to how courts will treat the 2005 Additional Clarification. This uncertainty raises some interesting questions with respect to its validity as a tool for

⁹¹ *Miami Univ. Wrestling Club*, at 615; *Chalenor v. Univ. of N. Dakota*, 291 F.3d 1042, 1045-47 (8th Cir.2002); *Neal v. Bd. of Trustees of the Cal. State Univs.*, 198 F.3d 763, 769-72 (9th Cir.1999); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 637-38 (7th Cir.1999); *Cohen*, 101 F.3d at 172-73; *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 274-75 (6th Cir.1994).

⁹² *Cohen*, 991 F.2d at 895.

⁹³ *Id.*

⁹⁴ *Miami Univ. Wrestling Club*, at 615; *Chalenor*, at 1045-47.

⁹⁵ *Miami Univ. Wrestling Club*, at 615.

⁹⁶ 2005 ADDITIONAL CLARIFICATION, *supra* note 5, at 2.

⁹⁷ Catherine Pieronek, *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*, 32 J.C. & U.L. 105 (2005).

demonstrating Title IX compliance. An array of parties, including, but not limited to, members of Congress, the NCAA, and various universities have expressed their opposition to use of the Model Survey. This opposition, coupled with the Additional Clarification's shaky legal foundation, should create sufficient leverage to compel the OCR to reevaluate the policy. If the OCR subjects the 2005 Additional Clarification to notice and comment proceedings, opponents would receive an opportunity to highlight the flaws in the survey's methodology. A sufficient number of adverse and compelling comments may persuade the OCR to change the interpretation.

The NCAA and its member institutions also have the power to rectify the problematic 2005 Additional Clarification. As the governing body for intercollegiate athletics, the NCAA may require more stringent standards and it could disregard the agency's standard, adopting in its place a policy that would accurately reflect female athletic interests. Likewise, a university that has a genuine desire to accurately measure their students' athletic interests, could independently look beyond the survey's statistics for assessment. To truly generate a higher response rate, a university could administer a survey in a more reliable manner by actually speaking with some of their female students in order to ascertain their interest and abilities.

CONCLUSION

The model survey as designed by the OCR, has more than its fair share of problems. Its survival depends upon how the 2005 Additional Clarification fares in court. The OCR's promise to give survey results deference delegates too much discretion to university administrators, and the survey itself gives a university the power to determine its own Title IX fate. It is unlikely that a survey will reveal any unmet interests among the underrepresented gender. Flaws in the accuracy of the results, combined with the 2005 Additional Clarification's unsound legal foundation, fashions a real opportunity for litigants to challenge the survey's legal viability. Undoubtedly, it is simply not enough to assert the model survey fails to achieve Title IX's goals. A litigant must first overcome the court's deference, whatever it may be, to the agency interpretation. Any challenge to the model survey requires the litigant to wade into the murky waters of administrative law in order to craft an argument that could set a new precedent.

While the NCAA has proclaimed opposition to the model survey, its members are not prohibited from relying on the survey. It is still too early to estimate how many universities will adopt the model survey as their sole means for establishing Title IX compliance. If the 2005 Additional Clarification prevails and the model survey becomes the standard, universities will likely deem themselves Title IX compliant. If the industry standard for measuring athletic interests becomes the email delivered survey, destined to grow mothballs in a student's junk mail folder, the result will be an abundance of non-responses. Inevitably, interested female students will mistakenly be deemed as lacking athletic interest. Hopefully, our nation's universities desire a more accurate method for assessing Title IX compliance, and view the model survey as a crutch for those institutions that lack an aspiration to fulfill Title IX's goal of achieving full gender equality in university athletic programs.