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TITLE IX: PART THREE COULD BE THE KEY*

C. PETER GOPLERUD III**

INTRODUCTION

Gender equity in athletics in the educational setting has been the law of the land since Congress enacted Title IX of the Education Act Amendments of 1972.¹ The Act prohibits discrimination based on sex in federally-funded educational programs and activities.²

The short thirty-year history of Title IX has been a volatile, roller coaster ride. It has also been a period of some legitimate improvement in opportunities for girls and women to participate in competitive sports at the scholastic and intercollegiate levels. Several studies have indicated that participation by girls and women in the thirty years since the passage of Title IX has increased significantly. The National Collegiate Athletic Association (NCAA) reported that participation by women at member institutions increased from approximately 30,000 to over 150,000.³ Similarly, the National Federation of State High School Associations reported that the level of participation by girls in high school athletics went from 294,000 in 1971 to 2.8 million in 2002.⁴ But there remains a significant gap between male and female participation, opportunities, and treatment in interscholastic and

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1. 20 U.S.C. §§ 1681-1688 (2000). The act, of course, applied to all educational activities where there is federal funding. Athletics will, however, be the primary focus in this article, just as it has been in society at large for most of the history of the Act.

2. *Id.* Specifically, the statute provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." § 1681.

3. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA YEAR-BY-YEAR SPORTS PARTICIPATION 1982-2001 53, available at http://www.ncaa.org/library/research/participation_rates/1982-2001/009-056.pdf (last visited Nov. 1, 2003); The Secretary of Education's Commission on Opportunity in Athletics, "*Open to All, Title IX at Thirty*" (Feb. 28, 2003) [hereinafter *Open to All*]. The complete text of *Open to All* is included within this publication.

4. NAT'L FED'N STATE HIGH SCHOOL ASS'NS (NFHS), 2002-2003 PARTICIPATION SURVEY 47, available at http://www.nfhs.org/Participation/2003/2002_03_Participation.pdf (last visited Nov. 25, 2003).

intercollegiate athletics.

Criticism of Title IX and, in particular, the proportionality aspect of the so-called Three-Part Test led the Bush Administration, through Secretary of Education Roderick Paige, to establish the Secretary of Education's Commission on Opportunity in Athletics in 2002.⁵ The Commission conducted numerous hearings and ultimately issued a lengthy report early in 2003.⁶ In July 2003, the Assistant Secretary for Civil Rights, Gerald Reynolds, responded to the report with a three-page letter, clarifying a few points of interpretation of Title IX, but largely retaining the status quo regarding its interpretation.⁷

Concurrent with the activities of the Commission, a challenge was brought to the Department of Education's regulations governing Title IX. The focal point of the case, brought by the National Wrestling Coaches Association, was a contention that the regulations artificially limit the number of male athletes and essentially establish an illegal quota system in an effort to attain gender equity.⁸ The United States District Court for the District of Columbia dismissed the action in June 2003, finding among other things, that the plaintiffs did not have standing.⁹ The matter is apparently going to be appealed.

The plaintiffs in this case and other critics of Title IX have argued for years that Title IX is the reason behind the extensive loss of programs in non-revenue sports at NCAA member institutions. The contention has been that the proportionality requirement in the Three-Part Test has made it impossible to comply with the Act without dropping men's programs at many schools. Data from a variety of reputable sources, including the General Accounting Office and the NCAA, confirms that many schools have dropped sports in the last decade.¹⁰ The data indicates that more men's sports than women's have been dropped.¹¹ The data also indicates that many schools have added

5. Several members of the Commission are participants in this Symposium.

6. See U.S. Dep't of Educ., *Charter-Secretary Commission On Opportunity in Athletics* (2002), available at <http://www.ed.gov/about/bdscomm/list/athletics.html> (last visited Nov. 1, 2003) [hereinafter Comm'n Report].

7. Letter from the U.S. Department of Education, Office for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003) [hereinafter 2003 Clarification Letter]. The complete text of the 2003 *Clarification Letter* is included within this publication.

8. Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 263 F. Supp. 2d 82, 85 (D.D.C. 2003).

9. See *id.*

10. U.S. GEN. ACCT. OFF., NO. 01-297, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES' EXPERIENCES ADDING AND DISCONTINUING TEAMS 14 (2001), available at <http://www.gao.gov/new.items/do1297.pdf>.

11. *Id.*

programs during the same timeframe.¹²

The action of the Secretary in sustaining the status quo has not ended the controversy surrounding the interpretation and enforcement of Title IX, in particular the Three-Part Test. The critics remain vocal. Schools are still faced with gender equity and budget issues, the two often on a collision course. Proponents suggest that the proportionality issue is a red herring and that attention should be focused on other aspects of the Three-Part Test and the requirements of Title IX related to treatment and benefits.

This article takes the position that the time is ripe for a focused run at providing better, more meaningful, athletic opportunities for women. The proportionality issue is a distraction at best, and a misdirected, bogus vehicle for certain factions within society and athletics to intentionally or otherwise maintain male dominance in athletics at the intercollegiate and interscholastic levels. It is time for greater emphasis to be placed on Part Three of the Test by the government and by athletic programs at all levels. This part provides that a program is in compliance with the requirement to offer equal participation opportunities if it "can be demonstrated that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."¹³ A cautionary note must also be sounded. The intent of Title IX will not be satisfied with mere lip service paid to the final part of the Test. It cannot be used as a basis for showing women have less interest in sports than men. Use of the third part must be made at the interscholastic level as well as the intercollegiate level for equal opportunity to be the order of the day. There must be thorough and regular surveys of interests at both levels. There must be careful analysis and evaluation of programs available outside the schools. There must be a sincere willingness on the part of the schools to respond affirmatively with the launching of legitimate and well-supported new programs where the appropriate interest is present. Greater use of Part Three can bring about increased and more equitable participation by women in sports. It can be a better vehicle for fiscal responsibility within athletic programs. It can be an effective vehicle for implementing the basic intent of Title IX, as stated over thirty years ago: equality of opportunity.¹⁴

12. *Id.*

13. Title IX of the Education Amendments of 1972; a Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86) [hereinafter Policy Interpretation].

14. Birch Bayh, a former United State Senator instrumental in the drafting and passage of the Act has stated: "The word quota does not appear. . .What we were really looking for was equal opportunity for young women and for girls in the educational system of the United States of America. Equality of opportunity. Equality. That shouldn't really be a controversial subject in a nation that

This article will initially provide a brief history and background on Title IX and the regulatory activity related thereto. Next, will be a brief discussion and analysis of the relevant and significant caselaw, with particular emphasis on the cases construing the Three-Part Test. The next part of the article will look specifically at the Three-Part Test, the controversial interpretive ruling, and clarification of it that guides the enforcement officials. The article will then proceed to provide guidance on the appropriate use of Part Three by institutions, with suggestions for sources of support, data collection, and response to the results obtained. Again, the central thesis is that Part Three must be seen as the most effective means for determining whether equality of opportunity is present in athletic programs.

BACKGROUND AND HISTORY OF TITLE IX

The Act and the Regulatory Action

Much has been written about the history and background of Title IX in the last thirty years, and another version is not appropriate at this juncture.¹⁵ It is important, however, to understand that Title IX provides, in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."¹⁶ Responsibility for promulgation of regulations to implement the programs and goals of the act was delegated to what is now the Department of Education.¹⁷ Failure to comply with Title IX can ultimately lead to termination of federal-funding or denial of future Federal grants for the offending institution.¹⁸

In 1975, the Department of Health, Education and Welfare (HEW), the predecessor agency to the Department of Education (DOE), promulgated the final Title IX regulations.¹⁹ While Title IX applies to any educational

now for 200 years has prided itself in equal justice." *Open to All*, *supra* note 3.

15. In addition, an excellent history of the litigation and regulatory activity associated with Title IX is provided in the court's opinion in the *National Wrestling Coaches Ass'n* case. See generally *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 82 (D.D.C. 2003).

16. 20 U.S.C. § 1681(a).

17. 20 U.S.C. § 1682.

18. 20 U.S.C. § 1681. (Directed the Secretary of Health, Education and Welfare, the predecessor agency to the Department of Education to promulgate regulations implementing the act, including "with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.").

19. 45 C.F.R. §§ 86.1-86.71 (2002).

program, much of the public awareness of the law is related to its application to athletics. The regulations do specifically address its application to athletics. In pertinent part, it requires a recipient of Federal funding to “provide equal athletic opportunity for members of both sexes.”²⁰ In determining whether equal opportunities are available, the Office for Civil Rights (OCR) of the DOE, the agency charged with administration of the action must consider, among other factors, “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”²¹ The regulations provided a three-year grace period that was supposed to allow schools to come into compliance.²² That time period only provided an opportunity for delay and more questions concerning the correct interpretation of Title IX and its regulations.

Following the three-year grace period, HEW issued the now famous 1979 Policy Interpretation.²³ The document focused on various aspects of the regulations, but for purposes of this article, the most important aspect was on effectively accommodating the interests and abilities of an institution’s athletes. The Policy Interpretation thus spawned the so-called Three-Part Test. The Interpretation specifically stated that compliance with this aspect of Title IX can be accomplished by showing:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented

20. 45 C.F.R. § 86.41(c) (2002).

21. *Id.* The other factors for consideration, which are not directly relevant to an analysis of participation opportunities, include:

- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (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; and
- (10) Publicity.

22. 45 C.F.R. § 86.41(d).

23. Policy Interpretation, 44 Fed. Reg. 71,413. While the title speaks to intercollegiate athletics, the document and subsequent readings by the courts have applied the interpretation to interscholastic athletics as well.

among intercollegiate athletes, whether the institution can 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

3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show [a history and] continuing practice of program expansion, [as described] above, whether it can be demonstrated that the interest and abilities of the members of that sex have been fully and effectively accommodated by the present program.²⁴

While this document was illuminating, it did not produce dramatic results on the compliance front. Indeed, what followed was a period of litigation, delay, suspension of activity, more litigation, and unending controversy.

The Supreme Court and Title IX

Less than ten years after enactment of Title IX, the Supreme Court recognized an implied private right of action to enforce it.²⁵ In *Grove City College v. Bell*, the Supreme Court held that Title IX was “program-specific.”²⁶ In other words, it applied only to particular programs of a university or school. Under this interpretation, athletic programs were subject to Title IX scrutiny only if they received federal funding. Since most athletic programs do not receive federal funding directly, the net result of *Grove City* was that Title IX became neglected and ineffective.²⁷ Three years later, Congress put teeth back into Title IX by enacting the Civil Rights Restoration Act of 1987.²⁸ This legislation “extended the full reach of Title IX to any program of any institution or school that accepts federal funding,” essentially overruling *Grove City*.²⁹

The Supreme Court’s final significant ruling regarding Title IX came in *Franklin v. Gwinnett County Public Schools*.³⁰ The Court held that monetary damages are available in actions claiming noncompliance with Title IX where intentional violations are proven.³¹ There has been but one appellate case

24. Policy Interpretation, 44 Fed. Reg. 71,418.

25. Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

26. Grove City Coll. v. Bell, 465 U.S. 555 (1984).

27. RAYMOND L. YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 130 (5th ed. 2003).

28. 20 U.S.C. §§ 1687-1688.

29. YASSER ET AL., *supra* note 27, at 130.

30. 503 U.S. 60 (1992).

31. YASSER ET AL., *supra* note 27, at 130.

finding intentional violations of Title IX.³²

LITIGATION AND THE THREE-PART TEST

The primary focus of Title IX litigation and compliance activities has been on opportunities for participation.³³ The Policy Interpretation and the 1996 Clarification Letter³⁴ attempted to provide institutions guidance on the requirements for compliance with Title IX in relation to participation, and in the case of the 1996 Clarification Letter, examples of methods for compliance. The Policy Interpretation indicates that OCR will measure compliance with the participation opportunities aspect of the regulations by examining the following factors:

- a. The determination of athletic interests and abilities of students;
- b. The selection of sports offered; and
- c. The levels of competition available including the opportunity for team competition.”³⁵

The policy goes on to allow institutions to determine the interests and abilities of their students by any nondiscriminatory method, so long as:

- a. The processes take into account the nationally increasing levels of women’s interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and
- d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.³⁶

The policy also states, “In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the

32. *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000).

33. This is not to overlook other compliance requirements, including those of “equal treatment and benefits,” the other nine factors listed in the regulations. In fact, as actions over participation opportunities begin to diminish it is likely that the spotlight will turn to such things as practice fields, scholarships, uniforms and the like. See 45 C.F.R. § 86.41(c) (2002).

34. Letter from the U.S. Department of Education, Office of Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996) [hereinafter 1996 Clarification Letter].

35. 44 Fed. Reg. 71, 418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

36. *Id.*

opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.”³⁷ The Policy Interpretation then sets forth the Three-Part Test.

As a result of the litigation discussed below and numerous inquiries over the years concerning the various ways in which to comply with the Three-Part Test, the OCR issued a clarification of the policy in 1996.³⁸ In this 1996 Clarification Letter, the OCR confirmed that institutions need only comply with one part of the Three-Part Test. Unfortunately, the letter also indicated that Part One afforded an institution a “safe harbor” for compliance.³⁹ Many institutions interpreted that language to mean that this part was the preferred method of compliance, or even that they *must* take measures to ensure strict proportionality.⁴⁰

The 1996 Clarification Letter did emphasize that schools had flexibility in providing nondiscriminatory opportunities for participation. There were no set formulas and it clearly stated that the OCR did not require quotas. In the transmittal letter accompanying the clarification, Norma Cantu, Assistant Secretary for Civil Rights, stated:

[I]f an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities i.e. that women’s interests and abilities are fully and effectively accommodated.⁴¹

The 1996 Clarification Letter also provided insight into the issue of elimination of teams and capping of rosters. The OCR noted that while a school may choose to eliminate teams or cap rosters, there is nothing in the act, the regulations, or the Policy Interpretation that requires such action. And the OCR added, “In fact, cutting or capping men’s teams will not help an

37. *Id.*

38. 1996 Clarification Letter, *supra* note 34.

39. *Id.*

40. 2003 Clarification Letter, *supra* note 7.

41. 1996 Clarification Letter, *supra* note 34.

institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex.⁴²

The 1996 Clarification Letter also provided detailed examples of methods for complying with each of the three parts, as well as quite detailed clarification of issues raised by the hundreds of interested parties commenting on the Policy and the draft of the clarification. As discussed below, the issues related to Part One were not resolved with sufficient clarity for some critics. Institutions litigated the constitutionality of the Test, the allowable disparity, and even who can be counted for determining proportionality. Clarification and guidance for complying with the use of Part Three proved to be less controversial, and as discussed below, is quite useful for a school choosing this path.

Following the passage of the remedial legislation in 1987, enforcement activities heated up. In the early 1990s, questions regarding the Three-Part Test, particularly Part One began to be litigated. Critics of Title IX and institutions argued that the proportionality requirement was an illegal quota. But during that time, eight federal circuits have upheld the act, its regulations, and specifically, the Policy Interpretation.⁴³ Regardless of the context in which the issue has arisen, the circuits have been consistent in holding that neither the Policy Interpretation nor the 1996 Clarification Letter establish quotas.⁴⁴ There has been consistent deference paid to the Department of Education's interpretation of the statute. The Three-Part Test has also been consistently upheld against charges that it violates the Equal Protection Clause of the Constitution.⁴⁵

Most recently, the regulations and the Policy Interpretation have been upheld in a challenge brought by the National Wrestling Coaches' Association.⁴⁶ The plaintiffs in that case contended that the regulations have effectively reduced opportunities for male athletes by causing the elimination

42. *Id.*

43. *See, e.g.,* Chalenor v. Univ. of N.D., 291 F.3d 1042 (8th Cir. 2002); *Pederson*, 213 F.3d at 858; *Neal v. Bd. of Trs. (Cal. State Univ.)*, 198 F.3d 763 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Bd. Of Trs. (Univ. of Ill.)*, 35 F.3d 265 (7th Cir. 1994); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); and *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993). The opinion in *National Wrestling Coaches Ass'n* provides an excellent history of the Policy Interpretation and the rulings of the circuits. 263 F. Supp. 2d 82 (D.D.C. 2003)

44. *Nat'l Wrestling Coaches Ass'n*, 263 F.Supp.2d at 95.

45. *Cohen*, 101 F.3d at 172-173.

46. *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d. at 82.

of teams in large numbers throughout the country.⁴⁷ Their contention was that OCR's enforcement activities had focused on those schools failing to meet the requirements of the first part of the Three-Part Test.⁴⁸ They also argued that even schools not facing active enforcement actions were consistently choosing to comply with the participation requirements of Title IX by eliminating men's teams in an effort to come into compliance with the proportionality requirement. Their complaint noted several specific examples within the last ten years.⁴⁹ Ultimately, the court dismissed the action, determining the plaintiffs lacked standing to bring the action.⁵⁰ The tone of the court's opinion as it is discussing the history of the regulations and the interpretation can reasonably be read as approving of the Department's stance.

THE COMMISSION ON OPPORTUNITY IN ATHLETICS

Prior to the decision in *National Wrestling Coaches Ass'n*, but with the challenges and other criticisms very present, the Secretary of Education appointed the Commission on Opportunity in Athletics in June, 2002. The charge to the fifteen member Commission was to "collect information, analyze issues, and obtain broad public input directed at improving the application of current federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX."⁵¹ The Commission held four so-called town hall meetings and heard from over fifty expert witnesses. Many were critics and many were ardent proponents of gender equity. Eight months later, the Commission forwarded its report to the Secretary. The Commission made specific findings and developed twenty-three recommendations, fifteen of which were approved unanimously by the Commission. The Commission did, however, have a certain amount of acrimony. A minority report was drafted and circulated by two members of the Commission, attacking the majority's recommendations on several issues related to proportionality and even challenging the claim that certain recommendations were unanimously approved.⁵²

Five months after the submission of the report, a clarification letter was

47. *Id.* at 85.

48. *Id.*

49. *Id.* at 97-98.

50. *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 138.

51. *Open to All*, *supra* note 3, at 2.

52. Donna de Varona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 2003, at 19 [hereinafter *Minority Report*]. The complete text of *Minority Report* is included within this publication.

issued by the Department of Education.⁵³ The essence of the letter was that the Department of Education would maintain the status quo regarding Title IX and the Three-Part Test.⁵⁴ Ironically, the letter came not from Secretary of Education Roderick Paige, but Assistant Secretary for Civil Rights Gerald Reynolds.⁵⁵ The letter did make a few interesting points. It encouraged schools to exercise flexibility and choose the option best suited to their particular situation.⁵⁶ It reiterated that each of the three prongs offers a valid alternative for compliance.⁵⁷ It did clarify that no prong is favored over the other, dispelling the notion carried over from 1996 that the “safe harbor” language either imposed some sort of affirmative requirement or made Part One the favored option.⁵⁸ It reiterated that the OCR does not require quotas and announced that the OCR would undertake an educational campaign to ensure that schools have a better understanding of their options.⁵⁹ The letter also announced that the elimination of teams is a “disfavored practice.”⁶⁰ It will thus be OCR’s policy to “seek remedies that do not involve the elimination of teams.”⁶¹ Finally, the letter stated that OCR will henceforth be aggressively enforcing Title IX, presumably even imposing the heretofore never used sanction of elimination of federal funding.⁶²

Predictably, responses to this pronouncement ranged from laudatory to highly critical. Marcia Greenberger of the National Women’s Law Center called it an “enormous win for women and girls.”⁶³ On the other hand, Eric Pearson of the College Sports Council called it “window dressing to an already bad set of regulations.”⁶⁴ It has been suggested that the ultimate decision was based on a combination of factors, “including the popularity of Title IX a year before the 2004 presidential election, division over reform within the Commission and a growing realization that the law is, in large measure, working.”⁶⁵ The bottom line, then for the present, is that the Three-

53. 2003 Clarification Letter, *supra* note 7.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 2003 Clarification Letter, *supra* note 7.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Mike Terry, *Decision Retains Title IX Status Quo*, L.A. TIMES, July 12, 2003, at D1.

64. *Id.* He added, “The Bush Administration has completely and utterly caved to the gender quota crowd.” *Id.*

65. Valerie Strauss & Liz Clarke, *Sex Bias Ban Upheld for School Athletics*, WASH. POST, July

Part Test is still the law, and proportionality is still a misunderstood, unnecessary aspect of Title IX compliance for most schools.

PART THREE: THE KEY TO EQUAL OPPORTUNITY

What then is next for schools needing to maintain compliance or come into compliance for the first time? How should a school approach use of the Three-Part Test? It is arguable that the intent of Title IX, indeed the essence of the law, is most embodied in the Third Part of the Test. It can be argued that utilization of the Third Part will most benefit women, the institutions, and the spirit of Title IX.⁶⁶ However, some suggest that Part Three is also susceptible to misuse, ultimately perpetuating discriminatory practices. The Minority Report of the Commission, in opposing a proposal related to Part Three, stated:

[T]he use of interest surveys to reduce the basic obligation of educational institutions to provide equal opportunity is invalid and has been unequivocally rejected by the courts. Using interest surveys is a way to force girls and women to *prove* their right to equal opportunity before giving them a chance to play. The proposal rests on the stereotyped notion that women are inherently less interested in sports than men—a notion that contradicts Title IX and fundamental principles of civil rights law.⁶⁷

Other skeptics wonder about the difficulties of determining compliance with the Third Part:

Administrators are fearful that test three means that if two women—this is what you hear all the time in my world—if two women show up and want to start a team, then the interest is there and the women must be accommodated, so how do I decide whether they're really

12, 2003, at A1.

66. Part One, as noted, has been used and abused by schools attempting to comply simply by getting close to proportionality. However, at least one court has determined that proportionality is not necessarily the answer: Title IX does not mandate equal numbers of participants. Rather, it prohibits *exclusion* based on sex and requires *equal opportunity* to participate for both sexes. As appears in the Policy Interpretation, inherent in this prohibition and mandate is knowledge of the *desire to participate*, the *ability to participate*, and the *level of competition involved*. Ceasing the inquiry at the point of numerical proportionality does not comport with the mandate of the statute. *Pederson*, 912 F. Supp. at 914.

67. *Minority Report*, *supra* note 52, at 16. A witness before the Commission, actress and amateur archer Geena Davis apparently shares this view: "I am here to take you on a short ride in Thelma and Louise's car if you think it's fair and just to limit a girl's opportunity to play sports based on her response to an interest survey." Comm'n Report, *supra* note 6, at 8.

supposed to start a team or not?⁶⁸

The response to the critics and the doubters is admittedly a bit hopeful and perhaps even a bit naive. The response must be that institutions, in order to comply with Part Three, must embark on a broad based thorough analysis of the athletic climate within their domain. Internally, the first step will be to conduct a thorough gender equity audit. This will involve looking at all aspects of a school's athletic program to determine compliance with all the requirements of Title IX. This audit would necessarily include a questionnaire given to administrators, coaches, athletes, and non-athlete students asking, among other things, whether there are sports not now offered in which you or others you know would be interested in participating. Such a question is the first, and only the first, step in the appropriate Part Three evaluation of whether there is:

- “(a)unmet interest in a particular sport;
- (b)sufficient ability to sustain a team in the sport; and
- (c) a reasonable expectation of competition for the team.”⁶⁹

Careful analysis and thorough investigation of these three criteria will be key to successful use of Part Three.

How does an institution determine if there is “unmet interest?” It cannot be overemphasized that thoroughness is critical. The Clarification Letter indicates that the OCR will look to see if an institution has considered the following indicators:

1. requests by students and admitted students that a particular sport be added;
2. requests that an existing club sport be elevated to intercollegiate team status;
3. participation in particular club or intramural sports;
4. interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
5. results of questionnaires of students and admitted students regarding interests in particular sports; and
6. participation in particular interscholastic sports by admitted

68. *Open to All*, *supra* note 3, at 9 (statement of Debbie Corum, Associate Commissioner of the Southeastern Conference).

69. 1996 Clarification Letter, *supra* note 34.

students.⁷⁰

If an institution using this part of the test initially determines there is no unmet interest, caution and skepticism should be the guide. Further analysis should be conducted. As the court in *Cohen* stated:

We view Brown's argument that women are less interested than men in participating in intercollegiate athletics, as well as its conclusion that institutions should be required to accommodate the interests and abilities of its female students only to the extent that it accommodates the interests and abilities of its male students, with great suspicion. To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities.

Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The Policy Interpretation recognizes that women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports. See 44 Fed. Reg. at 71,419 ("Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men.").⁷¹

In order for an institution to have the appropriate perspective it must conduct regular audits. It must conduct any surveys and evaluations of unmet interest on a regular basis. It must look at participation rates in high schools, in its geographic area, and its natural recruitment areas.⁷² It must thoroughly evaluate participation rates and sports offered by amateur athletic associations and community recreation programs. If it is found that a significant number of high schools from a relevant region offer a sport for girls that is not part of a women's program at the institution, the institution must be prepared to offer a strong reason for not offering that sport. The same would be true if there is wide spread participation in a sport in amateur athletic associations or community recreation programs. Institutions are advised not only to evaluate participation rates in these programs, but also to survey participants regarding the nature of their interest in these programs. Participants should be asked at

70. *Id.*

71. *Cohen*, 101 F.3d at 178-79.

72. 1996 Clarification Letter, *supra* note 34.

what age they began to play this sport, how long they have played, what level of expertise they have, and what expectations of playing the sport at the intercollegiate level they have. It will also be valuable to know how long the school or organization has offered the sport.⁷³

Finally, a school should not hope to satisfy the Third Part by merely providing statistics purporting to show a lack of interest in the area traditionally recruited by the school. The *Cohen* court set the tone for such an analysis:

Thus, there exists the danger that, 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 women's lack of opportunity to participate in sports. Prong three requires some kind of evidence of interest in athletics, and the Title IX framework permits the use of statistical evidence in assessing the level of interest in sports. [footnote omitted] Nevertheless, to allow a numbers-based lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX.

We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men. Furthermore, such evidence is completely irrelevant where, as here, viable and successful women's varsity teams have been demoted or eliminated. We emphasize that, on the facts of this case, Brown's lack-of-interest arguments are of no consequence. As the prior panel recognized, while the question of full and effective accommodation of athletics interests and abilities is potentially a complicated issue where plaintiffs seek to create a new team or to elevate to varsity status a team that has never competed in varsity competition, no such difficulty is presented here, where plaintiffs seek to reinstate what were successful university-funded teams right up until the moment the teams were demoted.⁷⁴

In other words, the use of surveys or statistics standing alone will do nothing more than "freeze prior discrimination into place."⁷⁵ Use of multiple

73. The latter two questions will inform the institution when it arrives at the next two issues embedded in the Third Part of the test.

74. *Cohen*, 101 F.3d at 179-80.

75. *Minority Report*, *supra* note 52, at 17. One need only look at the growth in participation in

tools and constant vigilance, however, can provide an accurate nondiscriminatory snapshot of true unmet interest.

Unmet interest alone will not trigger the requirement to add a sport. The answer to the question raised by the athletic administrator about being approached to add a team is that there must be sufficient ability to sustain a team and a reasonable expectation of competition for the team.⁷⁶ The 1996 Clarification Letter provides explicit guidance for the determination of "sufficient ability to sustain an intercollegiate team."⁷⁷ A school, if it desires to satisfy Part Three, should evaluate:

1. the athletic experience and accomplishments—in interscholastic, club or intramural competition—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; and
3. if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.⁷⁸

This does not mean that the interested students must be good enough to instantly produce a team with a winning record. Neither does it mean that a school can avoid supporting a team if it will not compete at the same level of established sports in the school's athletic program. The interested students or admitted students need only "have the potential to sustain an intercollegiate team."⁷⁹

Expressions of interest and demonstrated ability in a total vacuum will not necessarily require the provision of a new sport. There should be "a reasonable expectation of intercollegiate competition . . . in the institution's normal competitive region."⁸⁰ This will include schools against which the

women's sports since the passage of Title IX to be instantly dubious of claims that there is a lack of interest in participating in sports on the part of girls and women that is unrelated to prior discriminatory practices.

76. The Policy Interpretation provides:

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

44 Fed. Reg. at 71, 418.

77. 1996 Clarification Letter, *supra* note 34.

78. *Id.*

79. *Id.*

80. *Id.*

institution now competes and those in the area against which the school does not currently compete. The OCR has also indicated that it may require schools to actually go out and encourage the creation of competitive opportunities where opportunities within its normal region “have been historically limited.”⁸¹

There are numerous schools that cannot satisfy either Part One or Part Two of the Test. The number of females in college nationally is significantly higher than males.⁸² Schools that offer football have historically had proportionality problems. A move away from attempts to satisfy proportionality and to seriously address the interests and abilities of girls and women is consistent with the intent and spirit of Title IX. Obsession with proportionality has led to the creation of women’s teams for the purpose of developing numbers only and not to truly address the interests. Schools have, needlessly in some cases, eliminated men’s and women’s teams in an effort to satisfy Part One.

To be sure, a school using Part Three must engage in serious, costly investigations and evaluations. A school using this part of the test must be prepared to “face the music” and offer a new sport if unmet interest and abilities are found. The colleges must encourage the high schools to engage in the same evaluations and surveys, for there is considerable evidence that rampant discrimination still exists at that level.⁸³ Institutions must be mindful that the purpose of Title IX is to

provide for the women of America something that is rightfully theirs - an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.⁸⁴

A central aspect of the Act is to encourage women to participate in athletics,

81. *Id.*

82. U.S. CENSUS BUREAU, SCHOOL ENROLLMENT IN THE UNITED STATES-SOCIAL AND ECONOMIC CHARACTERISTICS OF STUDENTS 7 (1999), at <http://www.census.gov/prod/2001pubs/p20-533.pdf> (last visited Nov. 1, 2003).

83. Ray Yasser & Samuel J. Schiller, *Gender Equality in Athletics: The New Battleground of Interscholastic Sports*, 15 CARDOZO ARTS & ENT. L.J., 371, 372 (1997). While Title IX has increased opportunities at the intercollegiate level, the new battleground is high school and middle school levels. *Id.* “Without concomitant progress for younger girls in interscholastic sports, the promise of full and meaningful athletic opportunities for intercollegiate women will remain theoretically problematic and practically unrealistic.” *Id.* See also Lynne Tatum, *Girls in Sports: Love of the Game Must Begin at an Early Age to Achieve Equality*, 12 SETON HALL J. SPORT L. 281 (2002) (asserting that if a girl has not participated in sports by the time she is 10, there is only a 10% chance she will participate when she is 25).

84. 118 CONG. REC. 5808 (daily ed. Feb. 28, 1972) (statement of Sen. Birch Bayh).

not to find ways to prevent them from participating.⁸⁵

It is incumbent upon the intercollegiate athletic programs, led by the institutions' presidents, to be the leaders. The OCR has not been effective in providing enforcement with teeth, and there is no indication that the Bush Administration has an interest in changing this pattern, despite a throw-away line in the most recent clarification. The effort will be costly and time consuming.⁸⁶ Institutions, particularly NCAA Division I schools, would have to exercise responsible fiscal management of their programs. But, the effort would be consistent with the notion that

Title IX is a dynamic statute, not a static one. It envisions continuing progress toward the goal of equal opportunity for all athletes and recognizes that, where society has conditioned women to expect less than their fair share of the athletic opportunities, women's interest in participating in sports will not rise to a par with men's overnight.⁸⁷

Providing athletic opportunities to satisfy the unmet interests and abilities of women is the heart of Title IX and the key to compliance is the responsible, thorough use of Part Three of the Three-Part Test.

85. *Neal*, 198 F.3d at 768.

86. Perhaps the cost of the investigations and surveys aimed at satisfying Part Three could be borne directly or indirectly by Nike or Adidas or Reebok. They would benefit, after all, from increased participation opportunities and it would be great public relations.

87. *Neal*, 198 F.3d at 769.