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## Title IX - Tipping the Scales of Equality

# **Title IX- Tipping the Scales of Equality**

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## I. Introduction

“Title IX” refers to Title IX of the Education Amendments of 1972. The purpose of Title IX is to ensure that women and men have an equal opportunity to participate in all aspects of their college education at all universities that receive federal funding. The most controversial area affected is intercollegiate athletics. While the application of Title IX has created many more opportunities for women to compete in college sports, the cost of funding women’s programs has created much turmoil within tightly-budgeted athletic departments across the country.<sup>1</sup>

Title IX was originally written to balance the scale of sexism in athletics. The scale has again tipped, but this time in favor of women. Balancing the number of women’s athletic programs is taking precedent over retaining athletic programs for men. Instead of dividing spending between men’s and women’s sports to accommodate the expansion of women’s programs, universities are simply eliminating men’s teams entirely.

This article examines three aspects of Title IX. First, it discusses the history of Title IX and how it is regulated. Second, it reviews the positive and negative effects that Title IX has had on intercollegiate athletics, including the effect on men’s programs. Lastly, it examines the pros and cons of the recently adopted “interpretation” to Title IX legislation which allows computer-based surveys for colleges in order to determine if there is interest in women’s athletics prior to eliminating any opportunities for men.

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<sup>1</sup> Susan M. Shook, Note, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Team Join Women Athletes in the Scramble for Survival*, 71 Ind. L.J. 773 (1996).

## **II. History of Title IX**

Title IX was originally written into the Education Amendments of 1972 to avoid using federal monies to support discrimination and to provide individuals protection against discrimination.<sup>2</sup> While it has been very successful in many areas of academia, it has also been the source of turmoil in the area of college athletics. The expansion of women's programs has created an increasing deficit for many universities, and the strict enforcement of Title IX has left very little room for negotiation. As a result, Title IX has become synonymous with controversy.

### *A. Legislative History*

In the 1960's and 1970's, the civil rights movement began exposing the inequalities of women in many areas of the law. One of the primary areas of concern was discrimination in the education system, whether it was in the classroom or on the playing field. Oregon Representative Edith Green introduced a higher-education bill that included provisions regarding gender equality to Congress and created the first steps towards Title IX legislation.<sup>3</sup>

Beginning in 1971, Congress began to receive several proposals regarding sexual discrimination in the educational setting.<sup>4</sup> A House-Senate Conference Committee merged over 250 different educational bills into one, and on July 1, 1972

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<sup>2</sup> *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

<sup>3</sup> U.S. Department of Education, *Title IX: A Sea Change in Gender Equity in Education*, at <http://www.ed.gov/pubs/TitleIX/part3.html> (Last Updated July 10, 1997).

<sup>4</sup> *Id.*

Title IX took effect.<sup>5</sup>

*B. Compliance with Title IX*

Title IX provides that “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”.<sup>6</sup> As stated, this clause applies to “any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education”.<sup>7</sup>

Title IX is enforced by the United States Department of Education’s Office of Civil Rights (“OCR”). Title IX is part of the Code of Federal Regulations, which sets forth a number of factors that are considered in deciding if a school is in compliance with Title IX.<sup>8</sup> For instance, the quality and number of facilities, such as locker rooms and gymnasiums, must be equal.<sup>9</sup> Also, the scheduling of games, the travel per diem and the coaching and academic tutoring are factors that the OCR will consider when looking at equal opportunities.<sup>10</sup>

The method to determine whether a program is complying with Title IX is a three-part test originally established by the OCR<sup>11</sup> and used in the landmark case Cohen v.

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<sup>5</sup> *Id.*

<sup>6</sup> 20 U.S.C. § 1681(a) (2005).

<sup>7</sup> 20 U.S.C. § 1681(c) (2005).

<sup>8</sup> See 34 C.F.R. §§ 106.37, 106.41 (2005).

<sup>9</sup> See 34 C.F.R. § 106.41(c)(7) (2005).

<sup>10</sup> See 34 C.F.R. § 106.41(c)(3)-(5) (2005).

<sup>11</sup> 44 Fed Reg. 71.418. [ed note: The OCR was originally part of the U.S. Department of Health, Education and Welfare (“HEW”). However, HEW was divided in 1979 into the Department of Health and Human Services, and the Department of Education.]

Brown University.<sup>12</sup> The test is entitled by the OCR as “Measuring Effective Accommodation”, and is commonly known as the “three-part test”. It states that universities can meet any one of these three standards to comply with Title IX:

(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 ... 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...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.<sup>13</sup>

In the first test, the courts essentially look at the numbers of students of each gender enrolled in the educational program and compare this number with the number of opportunities for each gender to participate in athletics. The other two tests are considered proper excuses for not having a balanced program based on various factors.

### **III. Repercussions of Title IX**

Since instated, Title IX has dramatically expanded the participation of women in all areas of their collegiate experience, especially college athletics. However, the equality of women has unfortunately come at the expense of men. The lack of funding to support the continued growth of women’s athletics has resulted in the complete elimination of men’s athletics at some schools. Now, instead of leveling the field of opportunity and participation, Title IX’s strict enforcement has created another unequal shift; a shift that is unequal for men.

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<sup>12</sup> *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993).

<sup>13</sup> *Id.*

A. *Benefits of Title IX*

Obvious benefits have resulted from the instatement of Title IX. Women's participation in college athletics has increased dramatically. In 1971, 294,000 women competed in interscholastic athletics; in 2003, 2.8 million women competed.<sup>14</sup> The number of women competing in intercollegiate athletics has also risen from less than 32,000 in 1971 to over 160,000 in 2004.<sup>15</sup> A classic example of the improvements in women's sports is Olympic gold medalist swimmer Donna de Varona, a woman who could not obtain a college swimming scholarship to attend any university in 1964, simply because for women, scholarships did not exist.<sup>16</sup> In 1997, women received "about one-third of all athletic scholarship dollars."<sup>17</sup>

The increase in numbers at the college level has been contagious within all areas of women's sports. Interest in women's professional sports is rapidly increasing. Currently there are professional women's football, basketball, boxing, volleyball, golf, lacrosse and soccer leagues, as well as many different semi-professional leagues in many different sports.

The success also trickles down to increasing participation at the high school level. In 1971, a year before Title IX was implemented, there were only 300,000 women participating in high school athletics.<sup>18</sup> Twenty-five years later, there are 2.4 million women who participate at the high school level.<sup>19</sup>

Female plaintiffs in Title IX cases have also had continued success. In Roberts

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<sup>14</sup> Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U. J. GENDER SOC. POL'Y & L. 453, 455 (2004).

<sup>15</sup> *Id.*

<sup>16</sup> *Achieving Success Under Title IX* (June 1997), at <http://www.ed.gov/pubs/TitleIX/part5.html>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*



v. Colorado State University, the plaintiffs sued because the university had chosen to eliminate the women's softball program.<sup>20</sup> While the university had also eliminated the men's baseball program because of budget constraints, the plaintiffs won the case and the softball program was reinstated.<sup>21</sup> Without the softball team, a 10.5% disparity in substantial proportionality would have existed at Colorado State.<sup>22</sup> This means that 10.5% more opportunities exist for men than women when compared to enrollment. A disparity, in any extent, is not wholly acceptable under Title IX. The 10.6% disparity in this case was compared to an 11.6% disparity in Cohen and considered inequitable under Title IX.<sup>23</sup> Thus, softball was reinstated at Colorado State, while the men's baseball program was not.

In another case, Favia v. Indiana University of Pennsylvania, an athletic program was under financial constraint and was forced to eliminate their gymnastics and field hockey programs.<sup>24</sup> The women from these teams sued because the elimination of these teams left the university unable to comply with Title IX. As a defense, the university claimed financial hardship as their reasoning for eliminating the women's teams.<sup>25</sup> The court scolded the university by saying that "financial concern alone cannot justify discrimination."<sup>26</sup> The court held that the university's athletic budget or lack thereof, is not an excuse for non-compliance with the Title IX three-part test; as a result, both of the teams were reinstated.<sup>27</sup>

The numbers show the success of Title IX. The increase in the amount of

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<sup>20</sup> Roberts v. Colo. State Univ., 814 F. Supp. 1507, 1509 (D. Colo. 1993).

<sup>21</sup> *Id.* at 1514, 1519.

<sup>22</sup> *Id.* at 1512.

<sup>23</sup> *Id.* at 1513.

<sup>24</sup> Favia v. Ind. Univ. of Pa., 812 F. Supp. 578 (D. Pa. 1992), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

<sup>25</sup> *Id.* at 580.

<sup>26</sup> *Id.* at 585.

<sup>27</sup> *Id.*

women in sports, the increase in female sport programs, and the successful lawsuits by female athletes all support the original intentions of Title IX, including an immense step towards eliminating discrimination against women in all aspects of society. However, what these figures fail to display is that in many cases, the cost of supporting a women's program, especially in a time of extreme budget constraints, is the elimination of men's programs and a tipping of the scales of equality against men.

*B. Costs of Title IX*

Between 1981 and 1999 university athletic departments cut 171 men's wrestling teams, 84 men's tennis teams, 56 men's gymnastics teams, 27 men's track teams, and 25 men's swimming teams.<sup>28</sup> Nearly 400 teams no longer exist because college athletic programs are desperately searching for ways to create opportunities for women. According to General Accounting Office Data, "although opportunities for women to play sports jumped 16 percent from 1985 to 1997, opportunities for men dropped 12 percent."<sup>29</sup>

In Chalenor v. University of North Dakota, a male wrestler was awarded a scholarship to compete at the University of North Dakota only to find that the program had been eliminated prior to his attendance.<sup>30</sup> In this case, the wrestling program was eliminated in order to create opportunities for women again in the wake of budget constraints.<sup>31</sup> The court concluded that this was an acceptable way to create funding so

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<sup>28</sup> Andrew J. Boyd, Note, *Righting the Canoe: Title IX and the Decline of Men's Intercollegiate Athletics*, 37 J. Marshall L. Rev. 257, 257 (2003).

<sup>29</sup> *Men's Sports Jeopardized by Title 9* (1999), at <http://www.ncpa.org/pi/edu/pd080999b.html>.

<sup>30</sup> *Chalenor v. Univ. of North Dakota*, 291 F.3d 1042, 1044 (8th Cir. 2002).

<sup>31</sup> *Id.* at 1046.

that the university could adhere to the Title IX ruling.<sup>32</sup> As a result, Chalenor was left without a college wrestling scholarship and the wrestling program became mere history.

In Boulahanis v. Board of Regents, a similar ruling was upheld.<sup>33</sup> Here, the university eliminated both the men's wrestling and soccer programs in order to allocate funding to a women's soccer team.<sup>34</sup> The university argued that their budget constraints forced the deletion of the men's programs because it was the only way to fund a women's program while complying with Title IX restrictions.<sup>35</sup> The court agreed, again stating that allocating funds for women through dissolving a men's program is permissible in order to remain Title IX compliant.<sup>36</sup>

Numerous similar cases have been decided and the result has been consistent. Title IX is being enforced in the same manner as reverse discrimination. Rather than increasing the size of the pie and allowing current men's programs to co-exist with new women's programs, men's programs have been sliced to allow room for women athletes. It has become a tool to excuse the unfair elimination of one gender's athletics for the others. Soon, men's athletics will not be the only ones to suffer. Universities will next be forced to eliminate popular women's programs to create smaller teams that are less expensive. Title IX is already in desperate need of reform.

Title IX states that "no *person*, on the basis of gender, may be excluded from participation..."<sup>37</sup> It does not say that no man shall participate at the expense of a woman. Title IX is written to create equality. Completely eliminating a men's program

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<sup>32</sup> *Id.* at 1047.

<sup>33</sup> *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 639 (7th Cir. 1999).

<sup>34</sup> *Id.* at 636.

<sup>35</sup> *Id.* at 635-36.

<sup>36</sup> *Id.* at 638-39.

<sup>37</sup> 20 U.S.C. § 1681(a) (2005) (emphasis added).

to create a women's is not a proper way to extend equality or the intentions of this amendment.

#### **IV. New Legislation**

The strict rules of compliance surrounding the three-part test have been the main source of controversy surrounding Title IX. In March 2005, the OCR released the *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three* (“Additional Clarification”) in order to assist schools in further complying with Title IX.

##### *A. Changing the compliance with the three-part test*

The purpose of the Additional Clarification, according to the OCR, is to provide “further guidance” of each school’s obligations under Title IX.<sup>38</sup> The OCR also intends to falsify the view that the test is very narrowly interpreted and instead help “institutions to further appreciate the flexibility of the (three-part) test.”<sup>39</sup>

The main thrust of the Additional Clarification is for the OCR to outline different ways for a school to comply with the part three of the Title IX three-part test. The part of the test known as “substantial proportionality” says, “even if women athletes are underrepresented and athletic programs for women aren't growing, female students’ interests and abilities have been accommodated by the present program.”<sup>40</sup> This has been “clarified” by allowing a new means of gauging the actual interests of students, especially women, on college campuses. A school may remain in compliance under

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<sup>38</sup> U.S. Department of Education Office of Civil Rights, *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three* (2005), available at [www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html](http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html).

<sup>39</sup> *Id.*

<sup>40</sup> *Too Lax on Title IX*, WASH. POST, April 2, 2005, at A20, available at <http://www.washingtonpost.com/wp-dyn/articles/A20070-2005Apr1.html>.

the new flexible guidelines and eliminate or avoid adding a sport if they can show that the sport meets three conditions:

- a) an unmet interest sufficient to sustain a varsity team in the sport
- b) insufficient ability to sustain an intercollegiate team in the sport; and
- c) reasonable expectation of intercollegiate competition for a team in the sport within the school's normal competitive region.<sup>41</sup>

### *B. Internet-Based Surveys*

Schools are now permitted to use an internet survey to determine if an athletic program is in compliance with Title IX under the above guidelines.<sup>42</sup> The internet surveys will be used as a way to scientifically gauge the demand from women and men for athletic opportunities.<sup>43</sup> The surveys are used to allow schools to avoid adding athletic opportunities if there is no interest in these opportunities.<sup>44</sup>

The OCR has provided a strict and extensive set of guidelines for administering the surveys. For example, the surveys are to be conducted periodically by universities and targeted at all undergraduates.<sup>45</sup> However, schools must make sure to specifically focus on underrepresented students, which presumably would be women.<sup>46</sup> The surveys must be conducted in a manner that is widely publicized in order to yield the

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<sup>41</sup> U.S. Department of Education Office of Civil Rights, *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three* (2005), available at [www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html](http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> U.S. Department of Education, National Center for Education Statistics. (2005). *User's Guide to Developing Student Interest Surveys Under Title IX* (NCES 2005-173).

<sup>46</sup> *Id.*

largest response possible.<sup>47</sup> If women are not interested in more athletic opportunities for their gender, or if there is no response at all, then schools may assume that they are in compliance with Title IX.<sup>48</sup>

### *C. Effects of the Change*

"This is not a new way of doing business," said James Manning of the Education Department's Office for Civil Rights. "We're trying to help schools."<sup>49</sup> The OCR further contends that they hope the "Additional Clarification will help reinforce the flexibility of the three-part test and will facilitate application of part three for those schools that choose to use it to ensure Title IX compliance."<sup>50</sup>

Many coaches appear to agree with the change. Eric Pearson, Chairman of the College Sports Council (a group of college coaches that wants restrictions on Title IX) praised the department's move.<sup>51</sup> He called the change an "important milestone" and described the former proportionality system as an "artificial quota system."<sup>52</sup>

However, there has been much protest regarding the new change. Women's groups feel that the Department of Education is giving schools a loophole to avoid Title IX compliance.<sup>53</sup> Many feel that this is not an appropriate way to deal with the problems with Title IX. "Who responds to e-mail surveys, period?" said Neena Chaudhry, Senior

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Kathy Kiely, *Surveys can be used to show Title IX compliance*, USA TODAY, March 22, 2005, available at [http://www.usatoday.com/sports/college/2005-03-22-title-ix-survey\\_x.htm](http://www.usatoday.com/sports/college/2005-03-22-title-ix-survey_x.htm).

<sup>50</sup> U.S. Department of Education Office of Civil Rights, *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three* (2005), available at [www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html](http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html).

<sup>51</sup> Michael Dobbs, *Title IX Web Surveys Criticized by NCAA*, WASH. POST, March 24, 2005, at D01, available at <http://www.washingtonpost.com/wp-dyn/articles/A61507-2005Mar23.html>.

<sup>52</sup> *Id.*

<sup>53</sup> Erik Brady, *Women's groups, OCR spar over Title IX surveys*, USA TODAY, May 16, 2005, available at [http://www.usatoday.com/sports/2005-05-16-title-ix\\_x.htm](http://www.usatoday.com/sports/2005-05-16-title-ix_x.htm).

Counsel at the National Women's Law Center. "I think it's really irresponsible, and it's giving schools the easy way out."<sup>54</sup>

Complaints have also risen regarding the base of students being surveyed. Leslie Annexstein, Director of the Legal Advocacy Fund for the American Association of University Women, said e-mail surveys would provide a far "too narrow" gauge of interest in women's sports.<sup>55</sup> "If you only talk to existing students, and ignore the interests of prospective students, then your college will become stagnant," she said.<sup>56</sup>

National Collegiate Athletic Association (NCAA) President Myles Brand summarized the uneasy feelings about the new legislation when he stated that an e-mail survey would not provide "an adequate indicator of interest among young women" in college sports.<sup>57</sup> The new guidelines, he added, "will likely stymie the growth of women's athletics and could reverse the progress made over the last three decades."<sup>58</sup>

## **V. Conclusion**

Title IX was created to ensure that both men and women had an equal opportunity to participate in all areas of and in all levels of education. This legislation has had a particularly large effect on athletics, especially at the college level. On one hand, the number of women that participate in sports, at the college level and beyond, has increased more than 400% since the instatement of this act. However, this positive increase for women is resulting in a scramble for funding in athletic programs at many

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<sup>54</sup> *Title IX Proof of Compliance Changes Made*, March 22, 2005, at <http://www.cstv.com/sports/w-baskbl/stories/032205abd.html>.

<sup>55</sup> Michael Dobbs, *Title IX Web Surveys Criticized by NCAA*, WASH. POST, March 24, 2005, at D01, available at <http://www.washingtonpost.com/wp-dyn/articles/A61507-2005Mar23.html>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

schools. In order to comply with Title IX's strict guidelines, many schools are creating opportunities for women the only way that they can: by removing opportunities for men's teams and eliminating men's sports altogether.

The OCR, in searching for remedies, notes the importance of the fact that "nothing in Title IX or the three-part test requires the cutting or reduction of opportunities for the overrepresented sex," and that this is an attempt by the OCR "to seek remedies that do not involve the elimination of opportunities."<sup>59</sup> The Additional Clarification is an attempt to restructure the guidelines for interpreting the regulations of Title IX. In theory, allowing input from the actual athletic participants and supporters will result in schools increasing their ability to correctly gauge where the athletic program needs improvement, and therefore funding, and where the schools can decrease funding without such a negative impact on men's sports.

It is too early to tell if the computer survey solution will create equality in both men's and women's athletic opportunities. However, the realization that the current interpretation of Title IX was an issue and that men's sports were suffering, has already created a much needed shift in the response to the Title IX legislation and will hopefully result in the final shift that balances the scales of equality in men's and women's athletics.

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<sup>59</sup> U.S. Department of Education Office of Civil Rights, *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three* (2005), available at [www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html](http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html).