



UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 PENNSYLVANIA AVE NW, SUITE 1150, WASHINGTON, DC 20425
www.usccr.gov

Dear President Obama:

We write today in our individual capacities as three members of the eight-member U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, concerning media reports that the Department of Education plans to release new guidelines concerning the application of Title IX to academic science.¹ While we realize that this document has not yet been released and that your staff may be working out the details, media reports indicate the new policy is intended to mimic closely the policy on Title IX athletics.² That would raise serious concerns and problems. We therefore write to urge you not simply to apply the current athletic policy to academic science programs. We believe that approach is mistaken even when applied to athletics. But to apply the same thinking to academic science could have more serious consequences.

Title IX of the Education Amendments of 1972 requires that “[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.”³ Title IX is best known for its impact on athletics—and perhaps rightly so, since athletics is the only area that is routinely segregated by gender in education today. Issues of discriminatory resource allocation are bound to present themselves when athletic opportunities are sex specific. By contrast, since any student, regardless of gender, can ordinarily register and attend a chemistry or physics class, issues of discriminatory resource allocation do not arise easily in the context of science courses or degree programs.

Interestingly, issues of equal opportunity in athletics barely made it into the legislative history.⁴ Nonetheless, in 1979 the Department of Health, Education, and Welfare issued a guidance document that would eventually transform the way schools and colleges structure and fund their athletic programs. This document stated that, in interpreting Title IX, it would apply

¹ Lauren French, “White House Expands Title IX Support to Science, Tech,” Reuters, June 20, 2012, *available at* <http://in.reuters.com/article/2012/06/20/usa-whitehouse-titleix-idINL1E8HKJNC20120620>.

² See, e.g., Amisha Sisodia, “WH Celebrates 40th Anniv. of Title IX; Bridging Gender Gaps Then and Now; From Sports to STEM,” Campus Progress, June 22, 2012, *available at* http://campusprogress.org/articles/wh_celebrates_40th_anniv._of_title_ix_bridging_gender_gaps_then_and_no/ (last accessed December 27, 2012.)

³ 20 U.S.C. 1681(a).

⁴ While Senator Birch Bayh made a few offhand remarks about football and shared locker rooms before the Senate, members of the 92nd Congress were not focused on equality of athletic opportunity. On the other hand, the bill’s sponsors were clear that they did not intend Title IX to impose gender quotas on universities. Bayh said on the floor of the Senate that gender quotas were “exactly what this amendment intends to prohibit,” and that the “thrust of the amendment is to do away with every quota.” In the House, Rep. Albert Quie said that Title IX “would provide that there shall be no quotas in the sex anti-discrimination title.” See Alison Somin, “The Obama Administration: Changing the Rules of the Title IX Game?,” 11 Engage 26-32 (Dec. 2010).



the following test to determine if an institution is providing non-discriminatory participation opportunities for individuals of both sexes:

- (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 among intercollegiate athletes, 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, the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program.⁵

The three elements of this guidance are often referred to as “prongs,” and a school is in compliance with Title IX if it is in compliance with any prong. But while the three prongs appear to give schools choices regarding how to comply with Title IX, schools can only be confident about their legal obligations if they are in compliance with the first prong.⁶ For example, a university is theoretically in compliance under prong two if it can show “a history and continuing practice of program expansion.” But in a world in which resources are scarce, few if any universities can afford to continue expanding athletic programs indefinitely.⁷ Universities hoping to comply under prong two are thus left to wonder: how much continuous expansion is enough? In practice, the answer becomes: when proportional representation is achieved under prong one.⁸

In theory, prong three is supposed to offer schools a safe harbor: even if athletic offerings are unequal, a school is in compliance so long as the unequal offerings were produced by insufficient interest by female students rather than by an unwillingness on the part of the school to fund athletic opportunities for them at the same level as for male students. Achieving compliance under prong three—by demonstrating that “the interests and abilities” of the underrepresented

⁵ 44 Fed. Reg. at 71418.

⁶ See, e.g., Jessica Gavora, *Tilting the Playing Field: Schools, Sports, Sex, and Title IX* 32-3 (2002).

⁷ Complicating the picture further, the typical college added many sports in the 1970s and early 1980s and has not added any in more recent years. See Jill K. Johnson, Note: “Title IX and Intercollegiate Athletics: Current Judicial Interpretation and Standards for Compliance,” 74 B.U. L. Rev. 553, 583 (May 1994), citing William E. Thro & Brian A. Snow, “Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics,” 84 Educ. L. Rep. (West) 611, 625 (1993). A wave of news stories published after the 2008 financial crisis also indicates that budget cuts are becoming quite common. See, e.g., “Editorial: University Budget Cuts are a Reality Check,” *The Athens Banner-Herald*, March 4, 2010, available at http://www.onlineathens.com/stories/030410/opi_570347902.shtml (describing budget cuts at the University of Georgia); Noa Naftali, “Budget cuts, fee increases draw anger at University of California,” *The Tufts Daily*, March 2, 2010, available at <http://www.tuftsdaily.com/budget-cuts-fee-increases-draw-anger-of-university-of-california-students-1.2175778>; Rohan Mascarenhas, “Rutgers University students protest higher education cuts from Governor Chris Christie’s budget,” *The Newark Star-Ledger*, April 13, 2010, available at http://www.nj.com/news/index.ssf/2010/04/rutgers_university_protest_hig.html.

⁸ See Gavora, *supra* note 6, at 36.



sex have been fully and effectively accommodated— is, however, extremely difficult. The Department of Education issued a clarification document in 1996 that listed six different indicators that its Office for Civil Rights (“OCR”) might use to determine that discrimination did not produce any inequalities. The relevant excerpt from this guidance document reads in full:

OCR will determine whether there is sufficient unmet interest among the institution’s students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others: requests by students and admitted students that a particular sport be added; requests that an existing club sport be elevated to intercollegiate team status; participation in particular club or intramural sports; interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports; results of questionnaires of students and admitted students regarding interests in particular sports; and participation in particular interscholastic sports by admitted students. In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).⁹

The document conspicuously does not explain how OCR might analyze a case in which some of the listed indicators show unmet interest and others do not, indicating that this list is too vague to give universities useful guidance. In effect, the safe harbor isn’t so safe. In particular, the claim that OCR would look to “participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students” is problematic, as determining what is the relevant area from which an institution draws its students can be quite difficult.¹⁰ Some of the largest and most selective national universities, for example, commonly recruit from a national or even international pool

⁹ Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test, The U.S. Department of Education, January 16, 1996, available at <http://ed.gov/about/offices/list/ocr/docs/clarific.html#two> (last accessed Jan. 21, 2013).

¹⁰ ED earlier promulgated a Model Survey that universities could administer to students to assess male and female interest in different sports, which might have made it easier for some universities to demonstrate that they are in compliance under prong three of the 1979 Guidance. In 2010, ED rescinded the Model Survey.

The guidance document accompanying the former Model Survey made a similar point: “An alternative to surveying the entire student population is to survey a catchment population consisting of both the entire student population and potential applicants. However, the use of a catchment population is very problematic. The size of the catchment area is dependent on the student population served by a specific institution. The catchment area might be local for a rural community college, national for a small state college, and international for large 4-year and doctoral institutions. Even if definable, such a large target population is almost surely unreachable in any meaningful way and thus is not recommended here.” Additional Clarification at 36.



of students. Because of these problems, rarely if ever have schools faced with a Title IX complaint been able to demonstrate compliance with the law under this third prong.¹¹

It is true that the number of women playing sports has increased since Title IX was passed and has increased still more since the 1979 guidance and the 1996 clarification were adopted. But it is harder to tell if this de facto substantial proportionality requirement has been an important causal factor. Female athletic participation was rising before Title IX, and participation rates would likely have continued going up had the statute never passed. They almost certainly would have continued to rise without the 1979 guidance and the 1996 clarification.¹²

The downsides of this de facto substantial proportionality requirement, on the other hand, have been much clearer. Such a requirement assumes that in the absence of discrimination, female students and male students would opt for athletic opportunities at the same rate. But what if this is not true?¹³ Schools wishing to comply with the substantial proportionality requirement have two choices. They can reduce their athletic opportunities for males or they can increase their athletic opportunities for females. If they opt for the latter and the assumption that female students in fact desire substantial proportionality, the result will be overcapacity. The resources for this have to come from somewhere. Often this approach has led to cuts in men's teams. It also comes from cutting extracurricular activities that female students disproportionately favor, from choral singing to theater to student government.¹⁴

Note that Title IX (as interpreted) makes men's sports very expensive. For every men's sports team, the university needs an equivalent number of female athletes—unless the school can

¹¹ Between 1992 and 2000, the Clinton DOE's Office of Civil Rights investigated 44 Title IX complaints. In only three of these cases was the school found compliant under prong two. None of the schools investigated could successfully demonstrate compliance under prong three. Gavora, *supra* note 6, at 37.

¹² The numbers of women had been rising before Title IX was passed and rose sharply during the year before its enactment. See Jessica Gavora, *supra* note 6, at 32-33 (2002).

¹³ An article appearing in the *New York Times* discussed at length ways in which colleges and universities rely on phantom players (i.e. students who do not in fact show up for team events to compete) to fill out the rosters of its women's teams. The author appears to view this as a somewhat sinister practice. But what if it is simply a result of the priorities of female students? See Katie Thomas, "College Teams Relying on Deception, Undermine Gender Equity," *New York Times*, April 25, 2011; Robert O. Deaner et al., "A Sex Difference in the Predisposition for Physical Competition: Males Play Sports Much More Than Females Even in the Contemporary U.S.," *PLoS ONE* 7(11): e49168. doi:10.1371/journal.pone.0049168.

¹⁴ In inner city high schools, budget choices can be particularly difficult. If it's true that inner city high school boys have a deeper love for sports and can therefore be persuaded to stay in school and earn diplomas if athletic opportunities are available, then providing that opportunity should be a priority. If other things—like the availability of child care or vocational training in cosmetology—are more likely to be effective in persuading girls to stay in school, it is a shame to force schools to spend their limited budgets on girls' athletic programs. This is why we favor measures like the Model Survey, which allow schools to directly assess male and female interest in sports without fear that their judgment will be second guessed. See note 10.



prove that women do not want these opportunities. When universities face budget crunches, Title IX makes cutting a men's team more attractive than cutting a women's team.¹⁵

It is less than clear to us that this regulatory model should be applied to science courses and programs. Measuring female interest in the sciences is easier than it is in athletics. Most college sports teams are open only to students of one sex. When deciding what sports teams to field, a university administrator has to make guesses about how many students of each sex are likely to be interested in playing each sport. Sometimes, bias or stereotypes may skew such administrators' thinking, leading administrators to offer fewer female athletic slots than women actually want. A female student cannot sign up for a team that doesn't exist. But the same issue is not likely to occur in mathematics or science departments because these classes are generally not segregated by sex. Low female enrollment in these departments is extremely unlikely to reflect an administrator's wrong-headed guess about how many women are interested in these fields. The administrator doesn't have to choose correctly. The students choose for themselves by enrolling in science courses or applying to graduate school in the sciences.

So what role should Title IX play? Or more precisely, what role should the OCR play in ensuring that schools do not discriminate on the basis of sex in science education? Should it mandate that women's scientific interests receive equal funding as men's scientific interests if, for example, men tend to be more interested in physics and women in biology? We cannot think of a worse idea. Unlike athletics, science is in no sense only a game. Graduates of science programs play a critical role in driving the technological innovation that leads to economic prosperity for all of us. Funding should not be a matter of some bureaucrat's concept of "gender fairness." It should be a matter of sound academic, scientific, and business judgment. Rather than impose a one-size-fits-all approach from inside the Beltway, these judgments should remain decentralized.

Judgments of this kind can be tricky. It is important to remember that a male-dominated field of science or engineering that seems unfashionable or expendable may become quite the opposite very quickly. For example, nuclear engineering might seem a field past its heyday—until petroleum shortages abruptly create newfound demand for nuclear power plants and

¹⁵ Jerome Kravitz, a consultant to the U.S. Department of Education and professor at Howard University, testified at a meeting of the federal Title IX commission that from 1982 to 2001, women gained 2,046 teams and 51,967 athletic opportunities. During the same period, men lost 1,434 teams and between 57,100 and 57,700 participation opportunities. Many witnesses also testified before the Commission that they believed the teams on which they participated were cut due to concerns about Title IX compliance. Rita J. Simon, ed., *Sporting Equality: Title IX Thirty Years Later* (2006).

Critics sometimes claim that budgetary issues, rather than Title IX, actually drove these cuts to men's teams. In some cases, these claims appear particularly dubious—at UCLA, the university athletic department claimed that it cut its men's gymnastics team for budgetary reasons—but then added a women's soccer team the same year. These critics also fail to recognize that these causes are not mutually exclusive. Title IX (as interpreted) makes men's sports very expensive. For every men's sports team, the university needs an equivalent number of female athletes—unless the school can prove that women do not want these opportunities.



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engineers to design them, whatever their sex. Or pharmaceutical deregulation might lead suddenly to a proliferation of new drugs and job opportunities for biochemists. It is thus especially unwise for the federal government to adopt a regulatory regime that could lead to cuts in science and engineering programs that, while low in demand today, could prove of crucial economic importance tomorrow.

Thank you for your attention. In light of the foregoing concerns, we strongly urge your administration not to follow a model similar to the 1979 Guidance regarding athletics with regard to Title IX and the sciences.

Sincerely,

Handwritten signature of Gail Heriot in black ink.

Gail Heriot
Commissioner

Handwritten signature of Todd Gaziano in black ink.

Todd Gaziano
Commissioner

Handwritten signature of Peter Kirsanow in black ink.

Peter Kirsanow
Commissioner

Cc: Representative John Kline (Chair, U.S. House of Representatives Committee on Education and the Workforce)

Representative George Miller (Ranking Member, U.S. House Committee on Education and the Workforce)

Senator Tom Harkin (Chair, U.S. Senate Health, Education, Labor, and Pensions Committee)

Senator Michael Enzi (Ranking Member, U.S. Senate Health, Education, Labor, and Pensions Committee)