

A New Frontier For Women's Sports (Beyond Title IX)

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Abstract This study examines and evaluates the problems associated with the current Title IX regulations. It examines and gives examples of many inequities with the current three part test utilized by the Department of Education to determine compliance. A major reform in the Title IX regulations is advocated in order to establish a new era of equity and fairness for female athletes in intercollegiate sports. These new regulations involve not only participation, but also scholarships, operating budgets, recruiting budgets, and coaching salaries.

Keywords Title IX · Gender equity · Intercollegiate athletics · Regulations · The three part test of compliance · Court cases · Equity in athletics disclosure act

It is now estimated that more than three million girls participate in interscholastic sports in high school and nearly 200,000 college women play sports. In 1972, there were less than 300,000 high school girls and fewer than 32,000 college women playing sports. 1972, of course, is the year in which Title IX was enacted.

This bill ushered in a real change of opportunity for women in all fields of American society. It was described by Ralph Nader as “one of the most important and successful civil rights laws in US history.”¹

For instance, at the 25th anniversary of Title IX in 1997, the number of women enrolled in advanced degree programs had dramatically increased. As an example the number of women in medical schools had increased from 9 to 41%. The increases were similar in dental, law, business, and engineering schools. Today, the

¹ Nader [7].

average undergraduate enrollment for women in colleges throughout the country is nearly 57%. This enormous increase has also been very evident regarding the number of girls and women on the playing fields. Female athletic participation has increased by 904% in high schools and 456% in colleges, since the enactment of Title IX in 1972.

However, this success on the playing fields has generated considerable criticism, controversy, and outright opposition. The US Department of Education convened a Commission on Opportunity in Athletics in 2002 to consider changes to Title IX policies and regulations.

Although the commission declined to make any changes, more recently in 2005, the Department issued an *Additional Clarification* of its athletic policies, which permit colleges and high schools to use e-mail surveys as a measure of girls' and women's interest in sports. This is considered a major loophole through which schools can evade their responsibility to provide girls and women with opportunities in athletics.

It should be noted that this continuing controversy was omnipresent in the beginning and should not be surprising. Caspar W. Weinberger, the Secretary of HEW, quipped in 1974, after the Department received 9,700 comments regarding the proposed regulations to Title IX, that "he had not been aware that the most pressing issue facing higher education was the preservation of football."²

Amidst this controversy, several interesting books have been published on the debate over Title IX.

- *A Place on The Team: The Triumph and Tragedy of Title IX* by Welsh Suggs (Princeton University Press, [11]). This is an inside story of how Title IX revolutionized sports in the US. It chronicles the law's successes, failures, and opportunities for women.
- *Let Me Play: The Story of Title IX—The Law That Changed the Future of Girls in America* by Karen Blumenthal (Atheneum Books for Young Readers, [1]). Although primarily intended for young readers, it is extremely useful for the general public and the many soccer moms and softball dads, who are spending their weekends cheering their daughters in sports. It reviews the history of Title IX through Player Profiles, Instant Replay of individuals, events and stories. Scorecards tracking progress and Editorial Cartoons providing commentary make for interesting reading.
- *Encyclopedia of Title IX and Sports* by Nicole Mitchell and Lisa A. Ennis (Greenwood Press, [6]). This book "is intended to provide an overview of Title IX and its impact on sports to a broad new range of readers, while serving as a starting point for further research and exploration."³ It provides summaries of the major court cases, organizations, and individuals involved in the struggle to promote women's sports.
- *Women and Sports in the United States—A Documentary Reader* edited by Jean O'Reilly and Susan K. Cohn (Northeastern University Press, [8]). It "presents a

² Suggs [11], 69–70.

³ Mitchell and Ennis [6], xv.

selection of essays and documents to help readers explore and understand conflicting interpretations of gender and sport in the past, present, and projected future.”⁴

- *Equal Play: Title IX and Social Change* edited by Nancy Hogshead-Makar and Andrew Zimbalist (Temple University Press, [3]). This book explores the governmental processes that form and continue to shape all public policy, including Title IX ... The importance of the interconnectivity of the three branches of government and of strategic initiatives in each branch to form public policy is thereby revealed.⁵

All five of these books in their own unique way do an exceptional job of capturing the long struggle of Title IX’s march to the 21st century. The common thread in all books is the huge amount of governmental activity involved. The constant conflict and continual controversies became manifest in the public hearings (conducted either by congressional committees, the education department, or the presidential commissions), congressional laws, the HEW and DOE regulations, and the court cases.

It is very obvious that Title IX would not have succeeded were it not for the court cases. Some of the most significant cases include *Franklin v. Gwinnett County Public Schools*, *Cohen v. Brown*, *Brentwood v. Tennessee Secondary School Athletic Association*, *Communities for Equity v. Michigan High School Athletic Association*, *National Wrestling Coaches Association v. US Department of Education*, *Jackson v. Birmingham Board of Education*, et al.

The lack of enforcement of the laws and regulations, however, has been one of the major problems with the current Title IX regulations. This has long been a major complaint of Donna Lopiano, the former Athletic Director at Texas and formerly the Executive Director of the Women’s Sports Foundation. She wrote in 2002, “The Office of Civil Rights hasn’t done a good job, but there have been a number of lawsuits and a number of media articles that have put pressure on schools to make progress. But progress has been slow and steady.”⁶

Ralph Nader reiterated the same point, “Title IX has never been adequately enforced ... The Office of Civil Rights has never initiated a single proceeding to remove federal funds from ... any college that fails to comply.”⁷

It was even before the passage of Title IX, however, that advocates for women’s sports suffered one of their most egregious setbacks. In 1971, in a New Haven State Court, Judge John Clark Fitzgerald ruled against a sophomore in high school, Susan Hollander, who wanted to run on the school’s cross-country and track teams. The Judge wrote, “Athletic competition builds character in our boys. We do not need that kind of character in our girls.”⁸ The next year the Connecticut Interscholastic Athletics Association changed its rules and allowed her to run.

⁴ O’Reilly and Cohn [8], xix.

⁵ Hogshead-Makar and Zimbalist [3], 2.

⁶ “Title IX,” *Houston Chronicle*, June 23, 2002, 1A.

⁷ Ralph Nader, *Op cit.*

⁸ Blumenthal [1], 31.

Much of the continued controversy involves the *1975 Title IX Regulations* and the *1979 Policy Interpretation: Title IX and Intercollegiate Athletics*, both issued by the Department of Health, Education, and Welfare: Office for Civil Rights, and the *1996 Clarification of Intercollegiate Athletic Policy Guidance: The Three-Part Test*, issued by the US Department of Education: Office of Civil Rights. The test involves the following points:

1. Are Participation Opportunities Substantially Proportionate to Enrollment?
2. Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?
3. Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

The availability of the three-part test has been frequently litigated. “It has been upheld by every one of the eight federal appeals courts that have considered its legality.”⁹ In its ruling in the case of *NCAA v. Califano*, the federal district court noted that the case “might be the most over-briefed presentation in the court’s recent experience.”¹⁰

Additionally, in a Colorado case (*Roberts v. Colorado State University, 1993*) the 10th Circuit US Court of Appeals ruled that the Education Department’s regulations deserved *great deference*, but also commented that, “substantial proportionality between athletic participation and an undergraduate enrollment provides a *safe harbor* for recipients under Title IX.”¹¹

This “safe harbor” language was adopted by the Department of Education in its accompanying letter to the *Clarification of Intercollegiate Athletic Policy Guidance: The Three Part Test (1996)* and in the *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (2003)*.

This clarity, as expected, was very short lived, when the US Supreme Court ruled on the case of *Jackson v. Birmingham Board of Education*. Rodney Jackson, the girls basketball coach at Ensley High School, complained of a variety of inequities in the treatment of the girls’ and boys’ teams. These inequities involved facilities, equipment, transportation and monetary support. He was subsequently relieved of his coaching duties. He immediately filed suit claiming “that the school board had violated Title IX by retaliating against him for making an accusation of discriminatory practices.”¹²

In 2005 the Supreme Court upheld Jackson’s claim and ruled that Title IX provided protection for individuals reporting sex discrimination. The Court established four basic principles that would tremendously impact the future if Title IX: “(1) that its language should be broadly construed; (2) that retaliation for reporting discrimination is, itself, considered discrimination; (3) that guarding

⁹ Hogshead-Makar, *Op. cit.*, 54.

¹⁰ Hogshead-Makar, *Op. cit.*, 53.

¹¹ Suggs, *Op. cit.*, 107.

¹² Mitchell, *Op. cit.*, 62.

against retaliation is essential for ensuring Title IX's effectiveness; and (4) that the law protects indirect, as well as direct, victims of discrimination."¹³

This ruling has led to a series of lawsuits by individuals alleging retaliation and suing for monetary damages in Title IX cases. Fresno State University in California, in particular, has been a hot bed of litigation involving complaints by coaches and staff about inequities in facilities, staffing and fairer treatment of male and female athletes.

There were several cases involving Fresno State that attracted national attention. The three cases involved Lindy Vivas, the women's volleyball coach, Stacy Johnson-Klein, the women's basketball coach, and Diane Milutinovich, a former associate athletic director.

Vivas had been fired in 2004, after a winning season, and after filing a complaint against Fresno State in 2003 and a retaliation complaint, with the Department of Education's Office of Civil Rights (OCR). She filed a discrimination lawsuit against Fresno State in 2006 alleging "she was fired because of her advocacy for gender equity and her perceived sexual orientation."¹⁴ In July, 2007, the jury awarded her \$5.85 million. It was later reduced by the judge to \$4.52 million plus \$660,000 in legal fees.

Johnson-Klein had been fired in March, 2005. The university claimed she had "inappropriately obtained pain medication from students and staff, engaged in deceptive and improper fiscal actions, lied and was insubordinate."¹⁵ In October, 2005, she also filed a discrimination lawsuit against the university claiming that she was fired after she complained about her program's lack of resources. In December, 2007, the jury awarded Johnson-Klein \$19.1 million. It was later reduced by the judge to \$6.6 million plus \$2.5 million in legal fees. Fresno State is appealing both of these verdicts.

Also in 2007, the university reached a settlement with Milutinovich. She was granted \$3.5 million and given a new title, associate athletics director emeritus. Milutinovich had been involved in either a litigation or complaints with the OCR since 1995 and had been fired twice by Fresno State. In December, 2006, she filed a lawsuit against the school claiming "she was fired both times due to her advocacy for Title IX and gender equity."¹⁶

Additionally, Maggie Wright, the current softball coach, has also filed a complaint with the OCR accusing the college of retaliation against her for advocating equal treatment of female athletes.

It should be noted that prior to all this Fresno State had drafted a corrective action plan in response to a DOE-OCR investigation that found Fresno State out of compliance with Title IX in the early 1990s. Additionally, as Fresno State

¹³ *Ibid.*, 63.

¹⁴ "Timeline of Gender Equity Issues at Fresno State," USATODAY.COM/SPORTS/COLLEGE/2008-05-12-FRESNO-TIMELINE, 2.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

contended, “... according to a 2007 report by the Women’s Sports Foundation, it ranks high in matching the proportionality of female athletes to female students.”¹⁷

However, Diane Milutinovich, the former associate athletic director, made the point that “the University still lags behind others in its treatment of female athletes.”¹⁸ My studies actually confirm *both* of these points. As shown in my “The Gender Equity Scorecard V,” Fresno State actually ranked 16th in the country on the *proportionality* test, the first point of the Department’s three-part test, with a score of +0.54. The school was one of only 18 colleges among the 115 Division 1-A colleges in my study for the 2005–2006 academic/athletic year to finish with a positive score—meaning the percentage of female athletes was proportionately higher than the percentage of female students.

Additionally, Fresno State scored better than the Western Athletic Conference (WAC) average of −4.48, which was the second highest ranked conference. The school also scored significantly better than the national average, which was −7.29. On the proportionality test, Fresno State finished second in the WAC behind only Nevada. It should be noted that Nevada was the national champion on my Gender Equity Scorecards III and IV, covering the 2003–2004 and 2004–2005 academic/athletic years. Nevada finished second for the 2005–2006 season behind North Texas.

Interestingly, Fresno State has also demonstrated a consistent pattern of improvement over the past 4 years on the proportionality standard. The Bulldogs have improved from −8.86 in 2002–2003 to +0.54 in 2005–2006. See the following chart.

Fresno State’s scores on proportionality

Year	Score ± 0.0
2005–2006	+0.54
2004–2005	+0.23
2003–2004	−3.00
2002–2003	−8.86

It almost begs the question, if Fresno State scores so high on the proportionality score (the safe harbor part of the test)—higher than 99 other Division 1-A colleges—how could the school not be in compliance and lose a Title IX lawsuit?

The answer may be found in the fact that Fresno State ranked only 62nd in the country with a grade of C− and a score of −37.32 on “The Gender Equity Scorecard V.” Note: “The Gender Equity Scorecard and my other articles and studies on women’s sports and gender equity may be viewed at <http://www2.yk.psu.edu/~clk8/articles>. It must be recognized that the scorecard goes beyond the current Title IX criteria. It evaluates the colleges’ commitments to gender equity by also examining the four financial criteria of *scholarship money*, *operating expenses*, *coaches’ salaries*, and *recruiting expenses*. It is based on the simple but all-important principle, as best enunciated in the movie *Jerry Maguire*, “Show me the

¹⁷ Lipka [4], A30.

¹⁸ *Ibid.*

money.” It simply defies common sense to claim that any college is adequately, effectively and legally supporting women’s sports, if the college is not providing sufficient financial support for the women’s athletic programs. The best way to determine this support is by including various financial indicators into the Title IX compliance equation.

It should be noted that in my proposal the participation factor has not been eliminated, but it is now one of five criteria to determine compliance with Title IX. The scorecard is based on the criteria utilized by *The Chronicle of Higher Education* in its study on “gender equity” in 2007.¹⁹ All of the statistics in *The Gender Equity Scorecard V* were obtained from the *Chronicle’s* study, according to data submitted to the US Department of Education, as required by the Equity in Athletics Disclosure Act (EADA) of 1994.

One of the major problems with the proportionality criteria, which is used as the “safe harbor” of compliance by many schools, is that it does not accurately or fairly measure the full extent of a college’s compliance with the spirit of Title IX.

For instance, of the eighteen colleges in my study that had a positive compliance score on proportionality, eight of the eighteen colleges actually had scores of C or lower on *The Gender Equity Scorecard V*. Additionally, four of the colleges received an F grade. These colleges were, in descending order: Cincinnati, Clemson, West Virginia, and Oklahoma State. The exact score, grade, and rank of these four colleges is contained in the following chart:

College	Score	Grade	Rank from 1 to 115
Cincinnati	−51.56	F	99
Clemson	−54.78	F	104
West Virginia	−60.05	F−	108
Oklahoma state	−69.32	F−	114

Note: Grades of F− were given to schools that finished with a score below −60.0.

The other four colleges were Kansas, Fresno State, Southern California, and Georgia Tech. Their exact score, grade, and rank is contained in the following chart:

College	Score	Grade	Rank from 1 to 115
Kansas	−33.30	C	50
Fresno State	−37.32	C−	62
Southern California	−45.66	D	89
Georgia Tech	−49.09	D−	96

Five of the eighteen colleges received an A grade. North Texas and Nevada had an A+. Oregon State, Utah, and Toledo received an A−. San Diego State received a B+ and Purdue, Central Florida, Miami, and Minnesota received Bs on the Scorecard.

¹⁹ “Annual Report on Gender Equity,” *The Chronicle of Higher Education*, May, 2007, CHRONICLE.COM/STATS/GENDEREQUITY/2007.

This wide range of scores should raise serious concerns in the use of the proportionality standard as a fair and accurate measure of compliance with Title IX.

It also should raise the question: If Fresno State with a high score on the proportionality criteria and a score of -37.32 (a grade of C–), and a national ranking of 62 of 115 colleges on *The Gender Equity Scorecard*, can lose several Title IX lawsuits, then what about the other 56 colleges that scored lower than Fresno State? This question particularly applies to the eight colleges with a grade of F and the 11 colleges with a grade of F–.

It must be emphasized that a college can have a high score on the participation criteria and still drastically short change its women athletes on the economic related items of operating expenses, coaches' salaries, number of coaches, recruiting expenses, travel and hotels, etc.

There are also several examples of gross inequities at the other end of the spectrum in reliance on the proportionality criteria. There were 65 colleges with a score of -5.0 or lower on proportionality; however, 20 of these schools actually had scores of C+ and higher on *The Gender Equity Scorecard V*.

The most flagrant examples involve Eastern Michigan, Kent State, and Ohio University of the Mid-American Conference (MAC). Eastern Michigan actually ranked 108 of 115 colleges on the proportionality scale with a score of -20.76 ; only seven schools had a worse compliance rate. Nevertheless, the school ranked 6th in the country with a grade of A– and an overall score of -15.02 on *The Gender Equity Scorecard V*.

Similarly, Kent State ranked 106th in the country with a proportionality score of -18.42 . Yet when the broader gender equity factors of scholarships, coaches' salaries, operating expenses, and recruiting budget were also considered with proportionality; Kent State received a grade of B+, a rank of 12th in the nation—narrowly missing the Top ten by only -0.80 with a score of -22.0 .

Likewise, Ohio University received a B grade on the scorecard and ranked 17th in the country with a score of -23.29 . However, on the proportionality score alone, Ohio received a -10.27 score and a rank of 87th in the country.

Of the other 17 schools with a grade of C+ and higher on the scorecard, yet below -5.0 on proportionality, 11 received a B or B– grade and six received a C+.

Fresno State is not the exception to the rule. Since 2005, gender equity lawsuits have been filed against Montana State, Hawaii, and Florida Gulf Coast Universities. California continues to be the hotbed of the controversy, however, California-Davis, Sonoma State, and California-Berkeley have paid \$4.5 million in jury awards or settlements to the plaintiffs.

The California-Berkeley case involved Karen Moe Humphreys, a former Olympic swimmer and the head coach of the California women's swimming team from 1978 to 1992. She was laid off in 2004 and filed a gender discrimination and retaliation lawsuit in 2004. She claimed she lost her job for complaining about the treatment of women by the athletic department. In 2007, the university settled for \$3.5 million, reimbursement of legal costs, reinstatement and back pay.

Moe Humphreys still contends that “women's rights are still not taken seriously. I think that gender discrimination is not taken seriously. And I think Title IX compliance is one piece of that ... My experience has been, when there was a

complaint about race discrimination, or if there was a complaint about a discrimination about Americans with Disabilities, the campus took that very seriously.”²⁰

Additionally, there are 13 other lawsuits, complaints or appeals pending against colleges in California. One of these involves a complaint against Southern California (USC) to the OCR that has been pending for 9 years. The complaint “alleges discrimination against female athletes in terms of sports offered for women, athletic scholarships, coaching and tutoring services, assignment and compensation of coaches and tutors, and recruitment.”²¹

This trend is a movement beyond the proportionality requirements of Title IX with its emphasis on *equal opportunities to participate* toward *equal treatment for female athletes*.

This was the essence of the US District Court’s ruling in the Slippery Rock case in western Pennsylvania. The judge ruled that, “The defendants have failed to give their female athletes equal treatment in coaching and training, equipment and supplies, publicity, promotion materials and events, playing fields, locker rooms, and other facilities.”²²

It should also be emphasized that in my 2005 study, *Title IX and College Sports in Pennsylvania*, Slippery Rock ranked 3rd in the West Division of the Pennsylvania State Athletic Conference (PSAC). This again begs the obvious question, if Slippery Rock has failed to give their female athletes equal treatment, then what about the schools that finished below Slippery Rock?

One of the schools that finished below Slippery Rock was Lock Haven, which finished 4th in the PSAC West. Ironically, Lock Haven actually ranked 1st in the PSAC West regarding gender equity among coaches salaries.

The Lock Haven University field hockey coach filed a suit in US District Court in central Pennsylvania, claiming her civil rights were violated, because she was paid \$15,000 less than her male counterparts. This also begs the question, if Lock Haven is liable, what about the other teams in the PSAC?

This new era in women’s sports appears to be an attempt to move beyond the proportionality requirements of the Title IX three-part test. This new era is calling for equity and fairness in the allocation of resources for school sports. In addition to funding, other factors that should be considered include uniforms, scheduling of practices and games, and practice sites.

This is not a revolutionary or novel concept. This principle of equity and fairness in the allocation of resources is clearly affirmed in all of these DOE Rulings: the 1975 *Title IX Regulations*, the 1979 *Policy Interpretation*, the 1996 *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test*, and the 1998 *Letter from the U.S. Department of Education to Bowling Green State University*.

²⁰ Jill Liber Steeg, “Title IX Q&A with Karen Moe Humphreys, *USA TODAY*, *USA TODAY*, USATODAY.COM/SPORTS/COLLEGE/2008-05-12-TITLE-IX-QANDA.

²¹ Jill Liber Steeg, “Lawsuits, Disputes Reflect Continuing Tension Over Title IX,” *USA TODAY*, USATODAY.COM/SPORTS/COLLEGE/2008-05-12-TITLE-IX-COVER.

²² Ward [12], B4.

For instance, the 98 letter states, “Title IX recognizes the uniqueness of intercollegiate athletics by permitting a college or university to have separate athletic programs and teams for men and women ... The statute requires institutions to provide equitable opportunities to both male and female athletes in all aspects of its two separate athletic programs.”²³

The 1996 *Clarification* clearly states, “OCR considers the effective accommodation of interests and abilities (prong three of the Three-Part Test) in conjunction with equivalence in the availability, quality, and kinds of other athletic benefits ... These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others.”²⁴

The OCR concluded “An institution’s failure to provide nondiscriminatory participation (the first prong) opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.”²⁵

The 1979 *Policy Interpretation* and the 1975 *Regulations* itemize the factors the Department will examine to determine if the institution does provide equal athletic opportunities for members of both sexes. The factors of equal athletic opportunity are: “provision and maintenance of equipment and supplies, scheduling of games and practice times, travel and per diem expenses, opportunity to receive coaching and academic tutoring, assignment and compensation of coaches and tutors, provision of locker rooms, practice, and competitive facilities, provision of medical and training services and facilities, provision of housing and dining services, and facilities, and publicity.”²⁶

The state of California may already be moving beyond Title IX and establishing a new era for determining compliance with Title IX. State Senator Dean Florez (D-Fresno), the Chair of the newly created Senate Select Committee on Gender Discrimination and Title IX Implementation, recommends stricter gender equity standards. Under his plan, *California Title IX*, “all public colleges in California should undergo an annual certification process, based upon state-mandated guidelines covering men’s and women’s athletic participation, budgets, and scholarships ... any colleges that failed to meet those guidelines would have percentages of their athletic funds revoked.”²⁷

He advocates that the state would take 20% of any college’s athletic funding, that failed to comply with Title IX, for two consecutive years. The Select Committee on Gender Discrimination is now examining compliance by other California schools, including the state’s 109 community colleges, and plans to look at high schools. The Committee has held hearings to question officials at the California State University system and the University of California system regarding their compliance with Title IX.

²³ Hogshead-Makar, *Op. cit.*, 164–165.

²⁴ *Ibid.*, 153.

²⁵ *Ibid.*, 153.

²⁶ *Ibid.*, 73.

²⁷ Lipka [5], A29.

This new era of Title IX enforcement is essentially back to the future. It is simply to enforce the current regulations and adhere to the true meaning and intent and spirit of Title IX—to provide equal opportunity for boys and girls and men and women athletes.

With even a casual review of the regulations, is it any wonder why juries are unanimously awarding the plaintiffs huge awards in the sex discrimination cases.

In his article on the Johnson-Klein case, Brad Wolverton wrote in *The Chronicle of Higher Education*, “Legal experts say the latest ruling sends a clear warning to colleges across the country to treat women equally and to adhere to federal gender equity law.”²⁸

If colleges are going to be faced with the specter of increased lawsuits, negative media articles, and the potential of athletic sanctions, then the colleges will soon be clamoring for reform of Title IX. Over the past 3 years the American Association of University Women has noted an increasing number of lawsuits by coaches referred to its legal advocacy fund.

This problem with increased litigation is underscored and compounded by the simple fact that the other two criteria in the DOE-OCR’s three-part test (history of expanding opportunities and accommodating interests) are entirely too vague.

Deborah Yow, the Athletic Director at Maryland and a member of the Secretary’s Commission on Opportunity in Athletics, made the point that her school’s lawyers advise her to use the proportionality test because the other two are too vague.

In discussing the diverse and opposing views of the members of the Secretary’s Commission, Joseph White wrote that there would be no problem “reaching a consensus on at least one topic: The Department of Education must do a better job explaining Title IX guidelines to colleges and high schools.”²⁹

It is very obvious that any law or regulation or rule that is vague and needs explanation or clarification will inevitably lead to litigation and still more litigation.

The obvious light at the end of the tunnel in the search for gender equity is the need for the development of a new test and standards for compliance with Title IX. This is the *new frontier* of gender equity. Even the Secretary’s Commission recommended “that the government come up with ways that the schools can comply with the law beyond the three-part test.”³⁰

It must be recognized that arguably it should not have to be the responsibility of the US Education Department’s Office of Civil Rights, or the Congress, or the US District Courts, or the California State Senate to initiate action. The National Collegiate Athletic Association could and should be in the forefront of leadership on the development of new Title IX standards and criteria. Nancy J. Latimore, the Athletic Director at Elizabethtown College, a Division III college in south-central Pennsylvania, stated, “I’ve been disappointed that through the years the NCAA hasn’t stepped up and put pressure on colleges to be in compliance with Title IX.”³¹

²⁸ Wolverton [13].

²⁹ Phillips [10], C1.

³⁰ Fletcher and Sandoval [2], D1.

³¹ Phillips [9], C1.

The system could work the same as the NCAA's Academic Progress Rate (APR). The APR is a new academic point system, which requires teams to meet minimum requirements or face the potential loss of scholarship money when academically ineligible athletes leave school. The establishment of the APR represents a major and significant move by the NCAA to hold not just individual players, but entire college teams responsible for poor performance in the classroom. This is merely an extension of the hammer of ineligibility policy over entire college athletic programs.

The same policy could and should apply to gender equity. The NCAA needs to provide the leadership and make gender equity in athletics on college campuses a reality.

The fairest and most equitable approach to this new frontier of gender equity is to adopt the criteria of *The Gender Equity Scorecard* of participation, scholarships, operating expenses, coaches' salaries, and recruiting expenses as the new criteria for compliance with the spirit and intent of Title IX.

An example of how the *Scorecard* system would work is contained in the following:

Participation is one of the three federal guidelines for a college to determine if they are providing enough participation opportunities for female athletes. In this test the percentage of female athletes should be proportional to the percentage of women in the student body. The score is based on how close the college reaches the optimal proportionality of 0.0.

For instance, at my school, Penn State, women comprised 45.49% of the total undergraduates and 41.77% of all athletes in 2005–2006 for a difference of -3.72 . Thus, Penn State's score on the scorecard would be -3.72 .

For **Scholarship** the Education Department's Office for Civil Rights has specified that colleges must award the same proportions of aid to female athletes as there are women participating in varsity sports. The score is based on the "same proportion" principle, so it would be 0.0. Penn State would score $+2.99$.

For **Operating Budget**, a standard of 40% was established as the goal to be achieved. This is based on the findings by *The Chronicle of Higher Education* that the median for operating expenses for women's teams for 2003–2004 was 38% for all Division I teams. Penn State would score -9.03 .

For the **Recruiting Budget**, the 40% standard was again selected as the goal. It should be noted that *Check It Out*, the National Women's Law Center's booklet about Title IX, recommends that the recruiting budget should be roughly equal to participation rates. I would suggest that the 40% goal is more than reasonable. The score for Penn State was -7.23 .

For **Coaching Salaries**, the 40% standard is again used. In light of the extremely high expenses in Division 1-A (bowl subdivision) football, as well as the potential huge profits that can be made in both Division 1-A football with the BCS bowl games and Division 1 basketball with March Madness and the NCAA tournament, I would propose that both advocates and opponents of Title IX could accept the 40% standard as a reasonable, initial goal. The score for Penn State was -4.80 .

Penn State's combined scores equaled -22.39 . This gave the Nittany Lions a grade of B+ and a rank of 16th among the 115 Division 1-A schools in the study.

The Lions also were crowned Gender Equity Champions of the Big Ten for the second time in the last 3 years.

For teams that have low compliance rates (Ds & Fs), the penalties are many and varied. In addition to cuts in scholarships, there could also be cuts in operating expenses, number of coaches, and recruiting expenses. Conversely, schools with high compliance rates could be awarded increases. Or, if the NCAA really wanted to send a message, the organization could implement bans on TV and postseason appearances.

The alternative to decisive action by the colleges and the NCAA will be to leave the decisions to the District Courts, Congress, the US Department of Education, or the California State Senate. The decision should be an easy one!

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