

TITLE IX AT THIRTY: UNANSWERED QUESTIONS

WILLIAM C. DUNCAN*

Title IX of the Education Amendments of 1972 (Title IX)¹ is one of the most significant civil rights laws in the United States. Enacted to respond to serious concerns about sex discrimination in higher education,² it is now widely regarded as a major factor in opening opportunities for women in colleges and universities. In 2002, when the law reached its thirtieth anniversary, it was not entirely without controversy. Two issues were still major subjects of debate. First, had Title IX fulfilled its promise of ending sex discrimination in education? Second, had the enforcement of Title IX created any unintended consequences for men's opportunities? Much of the controversy swirled around the participation of men and women in intercollegiate athletics.

The focus on intercollegiate athletics is not particularly surprising, since much of Title IX enforcement has been directed towards college athletics³ and the heated discussion over Title IX takes place within the specific cultural context of the national obsession with sports. Although Title IX applies to much more than college sports,⁴ Title IX's application to sports has garnered attention due to the fact that issues involving college sports participation are almost inherently interesting to a wide range of people. This national obsession with sports can be attributed to a number of factors. For instance, it has long been recognized that athletic achievement enhances the status of an athlete in a way that other kinds of achievement do not.⁵

* Visiting Professor and Executive Director, Marriage and Family Law Research Grant, J. Reuben Clark Law School, Brigham Young University.

1. Pub. L. 93-318, §§ 901-05, 86 Stat. 373-75 (1972) (codified as amended at 20 U.S.C. §§ 1681-1688 (2000)).

2. U.S. DEP'T OF EDUC., *Title IX: A Sea Change in Gender Equity in Education*, in TITLE IX: 25 YEARS OF PROGRESS (June 1997), <http://www.ed.gov/pubs/TitleIX/part3.html> (last visited Nov. 26, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

3. See *infra* note 31 (noting major Title IX lawsuits, nearly all of which involve post-secondary enforcement). Ironically, few people are affected by Title IX's application to athletics. NCAA statistics indicate that only about 343 student-athletes per member institution are affected by Title IX. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA SPORTS SPONSORSHIP AND PARTICIPATION - NUMBER OF PARTICIPANTS: 1982-2001 135 (2002).

4. Title IX also governs admissions policies, financial aid, and sexual harassment. 20 U.S.C. §§ 1681-1688 (2000).

5. See James S. Coleman, *The Adolescent Subculture and Academic Achievement*, 65 AM. J. SOC. 337, 339 (Jan. 1960) (suggesting that athletic achievement is more important than academic ability in achieving popularity in peer groups).

Furthermore, the sports industry has a considerable corner on the national market. "In 1988 the GNSP [Gross National Sports Product] was \$63.1 billion. This places the sport GNP twenty-second on the list of top 50 industry GNP, ahead of the automobile, petroleum, and airline industries."⁶ Spending on sports sponsorship alone "is closing in on the gross domestic product of Namibia" at \$7.21 billion.⁷ Much of the national obsession with sports may also be understood by noting the "symbiotic relationship" between the media and sports in which "the media play a dominant role because sport is primarily directed by commercial guidelines."⁸

Accompanying this preoccupation with sports is a belief in the possibility that a true meritocracy without gender distinctions may be possible in athletics, based on the principle that nothing succeeds like success. The idea is that racial, gender or other distinctions will not be important in sports since the athletic performance of the individual is what matters. As long as an individual is fast, strong or coordinated, his or her gender or ethnicity will hardly matter. Thus, it could have been assumed that once laws like Title IX gave women equal opportunities to participate in sports, women's subsequent success in sports would make further gains easier.

These realities - the American preoccupation with athletics and the promise of women's success in athletics - underlay the debate that led to the creation of the Secretary of Education's Commission on Opportunity in Athletics (Commission),⁹ a debate that promises to continue into the indefinite future. The debate will continue partly because of its importance and effect on a vast number of people, and partly because the Commission's work left many crucial questions open, not the least of which are the effects of Title IX and the role of current enforcement in creating or denying opportunities to participate in college athletics.

This article is meant to give context to the most recent round of debates over Title IX by addressing what caused the debate, how the Commission carried out the debate and the questions the Commission left unanswered. Part I of this article provides the background to the

6. James H. Frey & D. Stanley Eitzen, *Sport and Society*, 17 ANN. REV. SOC. 503, 508 (1991).

7. Michael Hiestand, *Sports Sponsorship Appears to Be on Endurance Run*, USA TODAY, Jan. 2, 2003, at C3.

8. Frey & Eitzen, *supra* note 6, at 509-10.

9. THE SEC'Y OF EDUCATION'S COMM'N ON OPPORTUNITY IN ATHLETICS, "OPEN TO ALL": TITLE IX AT THIRTY 2 (Feb. 28, 2003) [hereinafter COMMISSION REPORT], available at <http://www.ed.gov/about/bdscomm/list/athletics/index.html> (last visited Nov. 26, 2003).

debate by briefly reviewing Title IX and the history of its enforcement. The next section, Part II, describes the work of the Commission, its conclusions and the criticism it faced. The article argues in Part III that the Commission left open some very important questions about the effect of the law, its purpose and its continuing role, which must still be resolved. The most important of these questions relates to the actual effect of Title IX enforcement on men's and women's athletic opportunities and the appropriate aim of Title IX, specifically whether Title IX is meant to be a non-discrimination statute or a social engineering device. The article concludes with some speculations about the possibility of future agreement and what is required to make that happen.

I. BACKGROUND

To give context to the work of the Commission, it is necessary to provide a brief overview of Title IX, its regulations and its enforcement, paying particular attention to the substantial proportionality prong of the three-part test for Title IX compliance,¹⁰ which has become the focus of the debate.

Prior to the enactment of Title IX, Congress found widespread discrimination against women in education.¹¹ University officials sometimes employed higher admittance standards for women than for men, and in some cases even imposed direct quotas to limit the number of women admitted into certain schools.¹² Title IX was meant to have a broad application to educational institutions. This intent was reflected in the remarks of the primary sponsor of the legislation, Senator Birch Bayh, who said,

[O]ne of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women. It is clear to me that sex discrimination reaches into all facets of education -

10. Under the "substantial proportionality" prong, an institution can establish compliance with Title IX by showing that the male/female ratio of athletic participation is roughly equivalent to the male/female ratio in undergraduate employment. *See* 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) [hereinafter 1979 Policy Interpretation].

11. *See* Comment, *Implementing Title IX: The HEW Regulations*, 124 U. PA. L. REV. 806, 806 (1976).

12. U.S. GEN. ACCOUNTING OFFICE, GAO-01-128, GENDER EQUITY: MEN'S AND WOMEN'S PARTICIPATION IN HIGHER EDUCATION 21 (Dec. 2000).

admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales. Indeed, the recent "Report on Higher Education" . . . concluded,

Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community.¹³

Title IX was signed into law June 23, 1972.¹⁴ The core portion of the statute provides, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."¹⁵ Thus, Title IX applies to all educational institutions or organizations that provide educational opportunities supported by federal financial assistance.

In 1974, Congress directed the Department of Health, Education and Welfare (HEW) to promulgate regulations on Title IX compliance.¹⁶ HEW's Office for Civil Rights (OCR) mentioned athletics briefly in its 1975 regulations,¹⁷ by requiring that educational institutions provide equal opportunity in athletics by "effectively accommodat[ing] the interests and abilities of members of both sexes."¹⁸ This was one of ten factors used to determine whether athletic programs would be in compliance with Title IX.¹⁹

In a 1979 Policy Interpretation, HEW further clarified the requirement to "effectively accommodate" by identifying three general

13. Comment, *supra* note 11, at 806 (quoting 118 CONG. REC. 5803 (1972) (remarks of Sen. Birch Bayh)).

14. COMMISSION REPORT, *supra* note 9, at 14.

15. 20 U.S.C. § 1681(a) (2000).

16. 20 U.S.C. § 1682 (2000). HEW later was divided into the Department of Health and Human Services and the Department of Education. *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993). The Department of Education became the primary agency charged with enforcing Title IX. *Id.*

17. 40 Fed. Reg. 24,128 (June 4, 1975) (codified at 45 C.F.R. pt. 86 & 34 C.F.R. § 106.41).

18. 34 C.F.R. § 106.41(c)(1) (2002).

19. The other factors to be considered are:

- (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; (10) Publicity.

34 C.F.R. § 106.41(c) (2002).

areas of responsibility for schools in regards to Title IX: (1) financial assistance, (2) benefits and opportunities and (3) accommodation of interests and abilities.²⁰ To determine a school's compliance with the third area of responsibility, "interests and abilities," HEW established a three-part test, which is the focus of interest in this article. Under this approach, a school's compliance with Title IX depends on

[1] [w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

[2] [w]here the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

[3] [w]here the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.²¹

This test gives schools a way to establish that they are satisfying Title IX's legal requirements if they ever face complaints of discrimination.

Title IX became a significant tool for private plaintiffs and pressure groups in 1979, when the Supreme Court ruled in *Cannon v. University of Chicago*²² that Title IX included an implied private right of action.²³ In *Cannon*, the Court ruled that a woman who had been denied admission to two medical schools could seek personal redress without waiting for HEW to take up her cause.²⁴ However, a few years later, in *Grove City College v. Bell*,²⁵ the Court held that Title IX only applied to specific programs at an institution that directly receive

20. 1979 Policy Interpretation, *supra* note 10, at 71,415-19.

21. *Id.* at 71,418.

22. 441 U.S. 677 (1979).

23. *Id.* at 717.

24. *Id.*

25. 465 U.S. 555 (1984).

federal funding.²⁶ This significantly limited Title IX's application to athletics, since few athletic programs received direct federal funding at that time.²⁷

This situation changed in 1987 with the passage of the Civil Rights Restoration Act of 1987,²⁸ in which Congress specified that Title IX applies to all activities of an institution receiving federal funding, even if those particular activities do not receive federal money directly.²⁹ Congress' intent in enacting the law was to expressly reverse the narrow reading of Title IX evident in *Grove City College* so that colleges would have to comply with Title IX in all of their programs.³⁰ In recent years, a series of federal court cases tested the application of Title IX regulations in the athletic context.³¹ The courts' decisions did not make substantive changes to Title IX enforcement though, because they applied the well-established principle of deference to established administrative regulations.³²

The next administrative development in Title IX enforcement came in 1996, when the OCR issued a "Clarification of Intercollegiate Athletics Policy Guidance" (1996 Clarification),³³ which specifically

26. *Id.*

27. *Id.* at 570-74.

28. Pub. L. 100-259 § 3(a), 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1687 (2000)).

29. 20 U.S.C. § 1687 (2000).

30. See S. REP. NO. 100-64, at 11 (1989).

31. *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002); *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996); *Kelley v. Bd. of Trs.*, 35 F.3d 265 (7th Cir. 1994); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993). See also *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993).

32. *Chalenor*, 291 F.3d at 1046-47 (holding Department of Education's Policy Interpretation controlling in challenge to university cancellation of men's wrestling program); *Neal*, 198 F.3d at 770 (deferring to agency interpretation of Title IX requirements in cancellation of men's wrestling program); *Cohen*, 101 F.3d at 173 (relying on "substantial proportionality" test in challenge to university decision to give certain women's teams club rather than varsity status); *Kelley*, 35 F.3d at 270 (deferring to Department of Education interpretation of Title IX requirements in rejecting challenge to university's cancellation of men's swimming program); *Roberts*, 998 F.2d at 828 (relying on "substantial proportionality" test to find that discontinuation of women's softball team violated Title IX). See also *Pederson*, 213 F.3d at 877-78 (relying on Department of Education's interpretation of Title IX in successful suit to force universities to field women's softball and soccer teams); *Horner*, 43 F.3d at 273 (relying on Department of Education's Policy Interpretation in action by female athletes challenging state board of education's decision not to sanction girls' fast-pitch softball); *Williams*, 998 F.2d at 171 (relying on Title IX regulations rather than Equal Protection clause for decision that question of fact existed in challenge to boy's exclusion from girl's field hockey team).

33. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (Jan. 16, 1996) (transmitted by letter

designated the first prong of the three-part test as a “safe harbor” for demonstrating compliance with Title IX.³⁴ Schools are considered to be in “safe harbor” if they can show that the percentage of men in their enrollment is proportional to the percentage of men participating in athletics at the school.³⁵ If schools can demonstrate substantial proportionality, they are not subject to any further scrutiny by the OCR as to whether their program complies with Title IX.³⁶ This test provides a relatively certain way for educational institutions to demonstrate compliance with the law because colleges need only show that the numerical gender ratio of athletes is proportional to the gender ratio of enrollment, rather than trying to satisfy the subjective athletic interests of women in their student bodies. Thus, schools have little incentive to comply with the other two prongs of the three-part test, since they may be challenged again in the future if they still fall short of the substantial proportionality prong.

In January 2002, the immediate background for the Commission’s establishment was put into place when the College Sports Council and National Wrestling Coaches Association (NWCA) filed suit against the U.S. Department of Education, alleging that the Title IX regulations were created in violation of appropriate administrative procedure and that the substantial proportionality prong violates the express statutory provisions of Title IX.³⁷ The federal district court rejected these claims for lack of standing.³⁸

The NWCA lawsuit illustrates how the substantial proportionality prong of the three-part test has become the focus of the controversy over Title IX. Opponents of substantial proportionality claim that it forces schools to artificially limit men’s opportunities in order to ensure that the ratio of male athletes is similar to the ratio of male undergraduates.³⁹ Supporters of the substantial proportionality prong maintain that a numeric formula is necessary to pressure otherwise hesitant schools to comply with the law.⁴⁰ They believe that

from Norma V. Cantu, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ.), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> (last visited Nov. 26, 2003).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Nat’l Wrestling Coaches Ass’n v. U.S. Dep’t of Educ.*, 263 F. Supp. 2d 82, 127 (D.D.C. 2003) (alleging violations of APA in promulgating Title IX regulations and that “substantial proportionality” discriminates against men on the basis of sex).

38. *Id.* at 129. After the ruling, the Association announced it would appeal. Mark Walsh, *Judge Dismisses Lawsuit Against Title IX Rules*, EDUC. WK., June 18, 2003, at 32.

39. *Nat’l Wrestling Coaches Ass’n*, 263 F. Supp. 2d at 129.

40. COMMISSION REPORT, *supra* note 9, at 63.

without the target number, schools would support only revenue-producing sports to the exclusion of all others.⁴¹ This debate over the fairness of a heavy reliance on the substantial proportionality prong provided the backdrop and possibly the motivation for the next significant effort to clarify the enforcement of Title IX: the creation of the Secretary of Education's Commission on Opportunity in Athletics.

II. THE SECRETARY OF EDUCATION'S COMMISSION

On June 27, 2002, the Secretary of Education, Rod Paige, announced the creation of the Secretary of Education's Commission on Opportunity in Athletics.⁴² The Commission was created to commemorate the thirtieth anniversary of Title IX,⁴³ to assess advancement in meeting the promise of the law⁴⁴ and to resolve the debate surrounding the fairness of the substantial proportionality prong of the three-part test.⁴⁵ The Commission consisted of fifteen Commissioners and was co-chaired by Cynthia Cooper, chief executive officer of ProHaven, Inc.,⁴⁶ and Ted Leland, athletics director at Stanford University.⁴⁷ The Commission was comprised of five university athletics directors, two current or former professional athletes, a university president, the Southeastern Conference Commissioner, a former Olympic athlete, a basketball coach, a university general counsel, a former state superintendent of public schools and two college professors.⁴⁸

The Commission's Charter directed the Commissioners to gather information "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."⁴⁹ The Charter also asked the Commission to submit a report with

41. See generally Robert C. Farrell, *Title IX or College Football?*, 32 HOUSTON L. REV. 993 (1995).

42. COMMISSION REPORT, *supra* note 9, at 1.

43. *Id.* at 46.

44. *Id.*

45. *Id.*

46. ProHaven Inc. is a sports marketing company. *Id.* at 53. Ms. Cooper was also a former star player in the Women's National Basketball Association. *Id.*

47. *Id.* at 53.

48. *Id.* at 53-56. Interestingly, two former leaders of the Women's Sports Foundation (an organization strongly critical of any effort to modify the current enforcement scheme) were included on the Commission but no one from the College Sports Council (a group strongly critical of the substantial proportionality requirement) was included.

49. *Id.* at 46.

recommendations of “whether those standards should be revised, and, if so, how the standards should be revised.”⁵⁰ The Charter focused the Commission’s task by asking it to address seven specific questions.⁵¹

To fulfill its Charter, the Commission held a series of four town hall meetings in Atlanta, Chicago, Colorado Springs and San Diego.⁵² The Commission was also besieged with phone calls, email messages, letters and faxes from concerned citizens.⁵³ In meetings in Philadelphia and Washington, D.C., the Commission finalized its report to the Secretary of Education and submitted it on February 26, 2003.⁵⁴ Supplemented with additional material such as appendices and a background section, the Commission’s report, “‘Open to All’: Title IX at Thirty,” consisted of fourteen findings and twenty-three recommendations.⁵⁵

A. *The Commission’s Findings*

Nearly all of the Commission findings were approved by a consensus of the Commission.⁵⁶ These findings are important because they indicate issues on which a diverse group of Commissioners could agree regarding Title IX enforcement. They are also important because they have opened up a national discussion on Title IX.⁵⁷

One major theme that emerged from the Commission’s findings was that while Title IX has created great advances for women in athletics, there is still much to be done to end discrimination against women and to ensure that Title IX enforcement does not contribute to

50. *Id.* at 47.

51. *Id.* at 48. The Commission was asked to address: 1) whether Title IX standards are working to promote equal opportunities in athletics; 2) whether there is adequate Title IX guidance for athletic programming at colleges and in school districts; 3) whether further guidance is needed at the junior and senior high-school levels; 4) the role of cheerleading and bowling in analyzing equitable athletic opportunity; 5) the effect of revenue producing and large-roster sports on equal athletic opportunities; 6) how other sports venues interact with the obligations of colleges and school districts to provide equal athletic opportunity, and; 7) whether there are other efforts to promote athletic opportunities that the Department of Education could support. *Id.*

52. *Id.* at 50-52.

53. *Id.* at 7.

54. *Id.* at 1.

55. An additional recommendation was defeated in a tie vote, but was included in the Commission’s report as “Recommendations Which the Commission Neither Approves nor Disapproves.” *Id.* at 40.

56. *Id.* at 59-60.

57. *Id.* at 6 (noting the thousands of letters, messages, and testimony on Title IX received by the Commission).

losses of opportunities for men.⁵⁸ Another major theme of the Commission's findings was that there is a lot of confusion about Title IX standards among practitioners.⁵⁹ This includes a common belief that the substantial proportionality prong actually requires "strict proportionality" as the only way for schools to effectively demonstrate compliance with the law.⁶⁰ This belief, combined with other factors such as budget cuts, has caused some schools to reduce men's teams and athletic opportunities in order to comply with Title IX.⁶¹

B. The Commission's Recommendations

Of the Commission's recommendations, fifteen were approved by consensus.⁶² On the day the Commission submitted its report, the Secretary of Education announced that only the consensus recommendations would be pursued.⁶³ Four of the recommendations were non-regulatory. For example, these recommendations called on the Department of Education to urge Congress to simplify the Equity in Athletics Disclosure Act form,⁶⁴ encouraged the NCAA to review its guidelines related to athletic opportunity⁶⁵ and called for a dissemination of the OCR's guidelines for determining what activities constitute athletic opportunities.⁶⁶

58. *See id.* at 21-22 (Question 1, Finding 1).

59. *See id.* at 25-27 (Question 2, Finding 1).

60. *Id.*

61. *See id.* at 24-25 (Question 1, Finding 4).

62. *Id.* at 59-60.

63. Press Release, U.S. Dep't of Educ., Paige Issues Statement Regarding Final Report of Commission on Opportunity in Athletics (Feb. 26, 2003), <http://www.ed.gov/news/pressreleases/2003/02/02262003a.html> (last visited Nov. 20, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

64. COMMISSION REPORT, *supra* note 9, at 35 (Recommendation 9). The EADA report is the federal government's data collection tool on Title IX matters. 20 U.S.C. § 1092 (2000). It collects information on male and female enrollment, athletic participation and other matters. *Id.* It is also made publicly available so that potential students and others can assess gender equity at reporting universities. *Id.*

65. COMMISSION REPORT, *supra* note 9, at 36-37 (Recommendation 13). The NCAA is the entity that determines allowable scholarships for various sports. This recommendation was presented in the hopes that the NCAA might consider ways in which it could encourage gender equity in its allowances for scholarships in various sports.

66. *Id.* at 35-36 (Recommendation 10). The OCR has specific guidance for universities trying to assess whether a specific opportunity (such as cheerleading) they provide, might be factored into their assessment of compliance with Title IX.

Several other recommendations implicated possible regulatory adjustment. These recommendations included:

- an invitation for clarification of Title IX requirements, including an educational effort and consistency in enforcement across OCR regions,⁶⁷
- a call for the Department of Education (Department) to make clear that cutting teams to “demonstrate compliance with Title IX is a disfavored practice,”⁶⁸
- a call for stricter enforcement of Title IX,⁶⁹
- a request that the Department clarify the meaning of “substantial proportionality” to accommodate reasonable variances in the ratio of male and female participation in athletics,⁷⁰
- a request that the Department encourage institutions wishing to add walk-on athletes to show Title IX compliance under the second or third prongs of the three-part test,⁷¹
- a recommendation that the Department remove the characterization of substantial proportionality as a “safe harbor” for demonstrating compliance with Title IX,⁷²
- a request that the Department consider reshaping the test for compliance which allows institutions to show they are working to comply,⁷³ and
- an invitation for the Department to consider additional changes as demographics and enrollment levels change.⁷⁴

Even some of the consensus recommendations, though, raised fears among Commission critics that the substantial proportionality prong of the three-part test would be undermined.

In July 2003, the Assistant Secretary for the OCR issued a “Further Clarification” letter to address the recommendations of the

67. *Id.* at 33-34 (Recommendation 3).

68. *Id.* at 34 (Recommendation 5).

69. *Id.* at 34 (Recommendation 6). The Commission left open the possibility that federal funding could be denied to schools who fail to comply with Title IX, although it noted that, to date, no school had been denied federal funding for failure to comply. *Id.* There should be little surprise that the Department of Education has not withdrawn federal funding from a university, since that would have exceedingly far-reaching affects on the school and its student body far beyond the athletic program.

70. *Id.* at 37 (Recommendation 14).

71. *Id.* at 37-38 (Recommendation 16).

72. *Id.* at 39 (Recommendation 21).

73. *Id.* at 40 (Recommendation 22).

74. *Id.* (Recommendation 23).

Commission and concerns about Title IX's enforcement.⁷⁵ This Further Clarification incorporated the earlier 1996 Clarification,⁷⁶ but it also suggested some changes in policy. First, the letter clarified that cutting teams to comply with Title IX is a disfavored practice.⁷⁷ Second, the letter expressed the intent of Title IX that it be enforced aggressively.⁷⁸ Finally, the letter assured schools that OCR guidance would not vary by region.⁷⁹ Thus, although the new letter referenced the Commission's work, it did not adopt the Commission's recommendations.

C. General Observations

Even though the OCR decided not to pursue any substantive changes suggested by the Commission's report, it is still useful to make some general observations about the Commission's work. First, the Commission seemed uncomfortable with competing ideological arguments about Title IX enforcement, namely that the Department of Education should retract all of the regulatory guidance so that only the text of Title IX remains, or that Title IX enforcement should be left in exactly the same position as it was before the Commission began its work.⁸⁰

Second, if there were any bias in the Commission's outlook, it would seem to be a bias in favor of making compliance practical for institutions, rather than in favor of "weakening" Title IX enforcement, as some critics charged.⁸¹ For instance, at the Commission's final meeting, a Commissioner proposed a recommendation that would have done away with the proportionality test.⁸² At an earlier meeting, another Commissioner proposed a finding that

75. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY REGARDING TITLE IX COMPLIANCE (July 11, 2003) [hereinafter FURTHER CLARIFICATION] (transmitted by letter from Gerald Reynolds, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ.), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> (last visited Nov. 26, 2003).

76. *Id.* at 2.

77. *Id.*

78. *Id.* at 3.

79. *Id.*

80. See COMMISSION REPORT, *supra* note 9, at 6-11 (noting competing arguments made to the Commission).

81. See DONNA DE VARONA & JULIE FOU DY, MINORITY VIEWS ON THE REPORT OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS 20 (Feb. 2003) [hereinafter MINORITY REPORT], available at <http://www.womensportsfoundation.org/cgi-bin/iowa/issues/rights> (last visited Nov. 26, 2003).

82. The Secretary's Commission on Opportunity in Athletics Full Business Meeting (Washington, D.C., Jan. 30, 2003) (copy of transcript on file with MARGINS: Maryland's

[t]he three-part test adopted by the Department of Education is flexible and gives schools three independent ways to comply with Title IX's requirements for equal participation opportunities. All three prongs of the test have been used successfully by schools to comply with Title IX and each is necessary to give schools flexibility and structure in their athletic programs while guarding against freezing discrimination into place.⁸³

The Commission rejected both of these proposals, however.⁸⁴ Instead, the Commission report emphasized more mundane compliance issues. For instance, the Commission expressed an interest in simplifying the Equity in Athletics Disclosure Act,⁸⁵ which may reflect the day-to-day concerns of college administrators more than of athletes or activists.⁸⁶ The Commission also expressed an interest in the development of "written guidelines" for enforcement, a national education initiative,⁸⁷ a wider numerical target for proportionality,⁸⁸ greater leeway for using walk-on athletes⁸⁹ and phasing out the second prong of the three-part test for compliance.⁹⁰ The Commissioners also shied away from urging the draconian penalty of withdrawal of federal funds for schools judged to be out of compliance with Title IX in athletics, suggesting instead that "other mechanisms" for encouraging compliance be pursued, perhaps recognizing the disaster such a punishment would create for non-athletes at colleges and universities.⁹¹ These recommendations emphasized clarity, consistency and predictability – all of which would

Law Journal on Race, Religion, Gender and Class), at 107 ("The Office of Civil Rights should not use numeric formulas to determine whether an institution is in compliance with Title IX.").

83. The Secretary's Commission on Opportunity in Athletics Full Business Meeting (Philadelphia, Pa., Dec. 4, 2002) (copy of transcript on file with: Maryland's Law Journal on Race, Religion, Gender, and Class), at 56.

84. COMMISSION REPORT, *supra* note 9, at 24 (Question 1, Finding 4) ("Although, in a strict sense, the proportionality part of the three-part test does not require opportunities for boys and men be limited, it has been a factor, along with other factors, in the decision to cut or cap teams."); *id.* at 64 (noting 4-11 vote against removing numerical formulas).

85. 20 U.S.C. § 1092 (2000).

86. COMMISSION REPORT, *supra* note 9, at 36.

87. *Id.* at 33-34 (Recommendation 3).

88. *See id.* at 37 (Recommendation 14).

89. *See id.* at 37-38 (Recommendations 15 & 16).

90. *Id.* at 40 (Recommendation 22).

91. *Id.* at 34 (Recommendation 6).

make implementation at the individual school level easier and less fraught with opportunities to incur liability.

An additional fact that supports the notion that the Commission was concerned with practical implementation rather than grand statements of principle is the observation that the two Commissioners who publicly distanced themselves from the Commission's report were athletes rather than educators or educational administrators.⁹² These athletes, who were participants in groups critical of the effort to modify Title IX regulations,⁹³ may not have been as concerned with these practical implementation issues as would the college administrators among the group, who are forced to deal with the practical questions regarding Title IX compliance on a daily basis. Indeed, the dissenting Commissioners' participation in interest groups with a specific ideology related to Title IX enforcement may have also decreased their interest in more mundane administrative matters.

A final observation of the Commission's work is that the Commission seemed willing to live with some form of the substantial proportionality prong of the three-part test, but also signaled that it would be open to seeing modifications.⁹⁴ This is clear from the rejection of a proposal to abolish substantial proportionality.⁹⁵ The Commission's ambiguous response, however, failed to address two critical issues: the actual effects of Title IX enforcement and what model of Title IX enforcement - social engineering or nondiscrimination - the proportionality test is meant to advance. Since the Commission failed to seriously address these matters, it is useful to explore them both in some depth.

92. See MINORITY REPORT, *supra* note 81, at 16.

93. For instance, Julie Foudy sits on the Board of Trustees and Donna de Varona sits on the Board of Stewards of the Women's Sports Foundation. See <http://www.womensportsfoundation.org/cgi-bin/iowa/about/serv/article.html?record=16> (last visited Nov. 26, 2003) (on file with: Maryland's Law Journal on Race, Religion, Gender, and Class). Donna de Varona was also the first president of that organization. See COMMISSION REPORT, *supra* note 9, at 54.

94. See, e.g., COMMISSION REPORT, *supra* note 9, at 37 (urging the Department of Education to consider clarifying the meaning of substantial proportionality).

95. *Id.* at 63 (Vote 17).

III. CONTINUING CONTROVERSIES AND QUESTIONS

The Commission's failure to clarify the actual effects of Title IX enforcement and the underlying purpose of the substantial proportionality prong contributed to a national discussion of those issues. This discussion will likely continue to dog enforcement of Title IX in the foreseeable future. Therefore, it is useful to consider each of these unresolved matters in turn.

A. What Are the Effects of Title IX?

The first question on which much disagreement over Title IX rests involves the real or perceived effect Title IX has on women's opportunities and men's sports. The Commission acknowledged that the testimony presented to it was nearly unanimous in praising Title IX as a good law that has brought great benefits to female athletes.⁹⁶ This seems to be supported by statistics noted by the Commission, which indicate that athletic participation opportunities for women involved in NCAA and National Association of Intercollegiate Athletics (NAIA) member institutions increased from 30,000 in 1972 to 157,000 in 1998, and from 90,000 in 1981 to 163,000 in 1999.⁹⁷

The discussion of possible effects of Title IX enforcement on men's athletic participation was more contentious. The Commission received much evidence and testimony related to changes in male athletic participation since Title IX's enactment. The Commission's report also cited a report from the General Accounting Office (GAO), which indicates a modest decline in male participation in athletics between 1972 and 1998 from 248,000 to 234,000.⁹⁸ An early draft of the Commission's report was criticized for not using information from a more recent 2001 GAO study that shows a growth in men's participation from 220,000 in 1981 to 232,000 in 1999.⁹⁹ However, since the 2001 study ignores statistics on athletic participation from 1972 to 1981, during which men's participation fell, it is not clear how

96. *Id.* at 1.

97. U.S. GEN. ACCOUNTING OFFICE, GAO-01-128, GENDER EQUITY: MEN'S AND WOMEN'S PARTICIPATION IN HIGHER EDUCATION 15 (Dec. 2000) [hereinafter 2000 GAO REPORT]; U.S. GEN. ACCOUNTING OFFICE, GAO-01-297, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES' EXPERIENCES ADDING AND DISCONTINUING TEAMS 7 (Mar. 2001) [hereinafter 2001 GAO REPORT].

98. 2000 GAO REPORT, *supra* note 97, at 15.

99. 2001 GAO REPORT, *supra* note 97, at 7.

its use would have helped the Commission answer the question about Title IX's effect on participation.

The attempt to provide some clarity to the issue at the Commission's San Diego meeting only added more confusion. The Director of Research and Education Services at the NCAA testified that overall participation for men and women increased at NCAA member schools but that *per institution*, average numbers of men's teams and male athletes had declined from 1981 to 2000.¹⁰⁰ Since the NCAA statistics were limited because they did not consider increases in the number of institutions belonging to the NCAA,¹⁰¹ Jerome Kravitz, a professor at Howard University and consultant to the U.S. Department of Education, conducted a statistical analysis controlling for this factor. His findings indicate that between the years 1982 and 2001, the number of women's teams increased between 2,046 to 2,384, and the number of athletics opportunities increased by 51,967; meanwhile, men lost between 1,290 to 1,434 teams and 57,100 to 57,700 participation opportunities.¹⁰²

Even if there had been agreement on the statistics of change in teams and participants, the matter of causation would have remained very much in question. As noted at the beginning of this article, some organizations believe that schools are cutting teams in order to decrease male participation numbers to show substantial proportionality without adding any new teams.¹⁰³ However, the critics of the Commission, who advocate for no change to existing Title IX regulations, assert that "between 1994 and 1998, more than two-thirds of the schools investigated by the OCR complied with Title IX's participation requirements under prong two or prong three" of the Title IX regulations.¹⁰⁴ This statistic implies that the substantial proportionality prong of the three-part test should not be blamed for cuts to men's teams and athletic opportunities.

Unfortunately, this statistic tells us little or nothing about causation in the loss of men's teams, since the GAO report upon which critics rely derived its data from 139 complaints and compliance

100. Testimony of Corey Bray, The Secretary's Commission on Opportunity in Athletics Town Hall Meeting 30 (San Diego, CA, Nov. 20, 2001) (copy of transcript on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

101. *Id.* at 29.

102. COMMISSION REPORT, *supra* note 9, at 24 (Question 1, Finding 4).

103. See College Sports Council, *Title IX of the Education Amendments Act of 1972* (Sept. 24, 2002), <http://www.savingsports.org/sports/wrapper.jsp?PID=2081-20&CID=2081-092402B> (last visited Nov. 26, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

104. MINORITY REPORT, *supra* note 81, at 5.

reviews processed between 1994 and 1998, which involved Title IX athletic issues.¹⁰⁵ Of these 139 cases, only 74 were relevant to the three-part test of the regulations.¹⁰⁶ The GAO report does not state at any point that these 74 cases, a small sample at best, are representative of educational institutions in the United States. Since the vast majority of these cases arose from complaints rather than compliance reviews, it is almost impossible to assume this information is representative.¹⁰⁷ The reported information tells us nothing about how the vast majority of schools demonstrate compliance or noncompliance with Title IX. In addition, the report only relays which particular prong of the three-part test institutions subjectively believed they could use to establish compliance.¹⁰⁸ In fact, until the completion of the compliance reviews, the information presented in the report was provisional and subject to change.¹⁰⁹

The Commission's conclusion that the proportionality prong of the three-part test "has been a factor, along with other factors, in the decision to cut or cap teams,"¹¹⁰ satisfied neither the plaintiffs in the lawsuit against the Department of Education, who believe that the proportionality requirement is the most significant cause of the loss of men's minor sports opportunities, nor the vociferous critics of the Commission, who demand a hands-off approach to examining the law.¹¹¹ This conclusion reflects the Commission's inability to answer the question regarding the effect of Title IX on men's and women's intercollegiate athletic opportunities. The Commission's report also left open questions about the effect that increased spending on revenue producing sports had on decisions to cut teams, and the posited differences in levels of athletic interest between men and women.

105. 2001 GAO REPORT, *supra* note 97, at 39-40. During this period, the Office for Civil Rights acted on 166 complaint and compliance cases involving athletics issues, but concluded that 27 complaint cases were inappropriate for review. *Id.* at 39.

106. *Id.*

107. 2001 GAO Report, *supra* note 97, at 39.

108. *Id.* at 40-41.

109. *Id.* at 40 ("In each case *the school* selected which part of the three-part test the school would *most likely* meet.") (emphasis added).

110. COMMISSION REPORT, *supra* note 9, at 24 (Question 1, Finding 4).

111. See Letter from College Sports Council to Education Secretary Paige (Feb. 28, 2003), <http://www.savingsports.org/sports/wrapper.jsp?PID=2081-20&CID=2081-030303A> (last visited Nov. 26, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class); Press Release, Women's Sports Foundation, Women's Sports Foundation Responds to Commission on Opportunity in Athletics (Jan. 31, 2003), <http://www.womenssportsfoundation.org/cgi-bin/iowa/about/media/press.html?record=62> (last visited Nov. 26, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

B. What is the Role of Substantial Proportionality?

The more basic and ultimately foundational issue the Commission failed to address is the role of substantial proportionality in establishing compliance with Title IX. The stated purpose of Title IX is to end the discrimination against women in education.¹¹² However, the substantial proportionality prong of the three-part test allows schools to demonstrate compliance with Title IX if they can show that the male/female ratio of their undergraduate enrollment is proportional to the male/female ratio of athletic participation.¹¹³ This regulation assumes that all things being equal, there is no difference in the level of interest in athletics between men and women. In this sense, the regulation seems to be aimed more at achieving social engineering than it is at simply opening up sports participation opportunities for women. The Commission expressed support for “substantial proportionality” rather than “strict proportionality,”¹¹⁴ but declined to urge the removal of the proportionality requirement from the regulations,¹¹⁵ leaving the question regarding the role of the test in Title IX compliance unanswered.

Opponents of substantial proportionality argue that this prong of the three-part test is not a proper anti-discrimination measure under Title IX, since the test is not used as an indicator of discrimination in other academic programs that have a gender imbalance in participation.¹¹⁶ Indeed, by focusing solely on the relative levels of men’s and women’s athletic participation, the requirement resembles disparate impact analysis,¹¹⁷ which the Supreme Court has rejected as the sole measure of discrimination in equal protection analysis.¹¹⁸ Like disparate impact analysis, the substantial proportionality prong

112. 20 U.S.C. § 1681(a) (2000) (“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.”).

113. 1979 Policy Interpretation, *supra* note 10.

114. COMMISSION REPORT, *supra* note 9, at 37 (Recommendation 14).

115. *Id.* at 64 (Vote 17).

116. See JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX* 142-43 (2002).

117. Disparate impact analysis posits that discrimination can be proved if a policy has a greater impact on one group than another, absent a showing of discriminatory intent. See *Washington v. Davis*, 426 U.S. 229, 240 (1976).

118. *Nguyen v. I.N.S.*, 533 U.S. 53, 82 (2001) (O’Connor, J., dissenting) (“But facially neutral laws that have a disparate impact are a different animal for purposes of constitutional analysis than laws that specifically provide for disparate treatment. We have long held that the differential impact of a facially neutral law does not trigger heightened scrutiny . . .”).

assumes that an outcome in which members of a certain group participate in activities out of proportion to their representation in the general population indicates discrimination.

Defenders of the requirement note that the context of athletics is different because teams are generally segregated by sex.¹¹⁹ Thus, a numerical formula is necessary to ensure fairness.¹²⁰ Furthermore, they argue that weakening or eliminating the substantial proportionality prong would allow schools to perpetuate the stereotype that women are inherently less interested in playing sports than men, a gender-based stereotype that violates basic principles of civil rights law.¹²¹

If the purpose of Title IX is merely meant to ensure non-discriminatory athletic decision-making, the substantial proportionality prong may not be an appropriate means of ensuring this result. If, however, Title IX is “a statute that promotes social change,”¹²² as Andrew Zimbalist, an economist at Williams College, described it,¹²³ the substantial proportionality prong may be a rational attempt at social engineering. In other words, it may be aiming to ensure that men and women develop the same level of interest in athletics despite any other factors. This is different from a simple anti-discrimination approach in which fairness is implied as long as barriers to participation on the basis of sex are removed. A social engineering approach seeks equality not in opportunity but in outcome.

The plain language of Title IX suggests that it is intended as an anti-discrimination measure:

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity,

119. Alisa Solomon, *Playing Games*, VILLAGE VOICE, Apr. 9-15, 2003, at 37, available at <http://www.villagevoice.com/issues/0315/solomon.php> (last visited Dec. 22, 2003)

120. *Id.*

121. See, e.g., Jocelyn Samuels, *Reviewing the Play: How Faulty Premises Affected the Work of the Commission on Opportunity in Athletics and Why Title IX Protections Are Still Needed to Ensure Equal Opportunity in Athletics*, 3 MARGINS 233, 252-53 (2003).

122. Testimony of Andrew Zimbalist, The Secretary's Commission on Opportunity in Athletics Town Hall Meeting 111 (San Diego, Cal., Nov. 20, 2001) (copy of transcript on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

123. *Id.*

in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.¹²⁴

On the other hand, the long use of substantial proportionality in Title IX compliance may indicate the opposite because it focuses on the question of outcomes more than on barriers to opportunity. While the anti-discrimination approach is the right one for Title IX, there are clearly many who feel that the goal should go far beyond equalizing opportunity by ensuring that men and women's athletic participation is more closely aligned. Either way, there is a serious potential conflict between current practice and statutory language that needs a resolution.

The idea that Title IX should be viewed as an anti-discrimination statute has been criticized as promoting "merely formal equality," which one commentator, Alisa Solomon, describes as offering the same treatment to people who are alike.¹²⁵ Solomon seems to prefer viewing Title IX's substantial proportionality prong as a mechanism for social engineering, since it pursues "substantive equality," which she describes as "equality in the access to opportunities accorded athletes of both sexes."¹²⁶ The irony of this approach is that a numerical system creates formal inequality in order to advance a non-quantifiable belief that, all things being equal, men and women will have exactly the same level of athletic interests. The failure of this thesis to be demonstrated in practice¹²⁷ can only be explained away by suggesting that if women indicate less interest in sports, it is because they are conditioned to do so by social pressures. However, differences in men's and women's participation rates could just as readily be explained by other nondiscriminatory factors such as a higher involvement by women in other extracurricular activities.¹²⁸

One final point on this matter is in order. If social engineering is the intent of Title IX, advocates should ask whether focusing social engineering around sports is wise. There are serious critiques of sports

124. 20 U.S.C. § 1681(b) (2000).

125. Solomon, *supra* note 119, at 37.

126. *Id.*

127. For example, it is believed that women are less likely to "walk on" teams than men. COMMISSION REPORT, *supra* note 9, at 30 (Question 5, Finding 2) ("Although no statistical analysis of this issue has been performed . . . [a] number of witnesses have told Commissioners that male athletes currently walk-on to teams at greater levels than do females.").

128. *Id.* at 30 (Finding 2).

as a social phenomenon.¹²⁹ Others argue that an inordinate emphasis on sports at educational institutions severely undercuts colleges' educational missions.¹³⁰ The prestigious Knight Foundation report on intercollegiate athletics charges that "academic transgressions, a financial arms race and commercialization" have worsened recently.¹³¹ In addition, there are even questions about the highly touted socialization effects of sport.¹³² If these kinds of critiques are valid, it may not be wise to encourage more emphasis on sports at the collegiate level. The changing nature of athletic participation makes these critiques more important.¹³³

IV. CONCLUSION

This article has attempted to give a brief review of Title IX enforcement, especially in the context of the recent work of the Secretary of Education's Commission on Opportunity in Athletics. The Commission left two significant questions unanswered, namely the effects of Title IX enforcement and the intent of Title IX. Obviously, there is still a long way to go before agreement can be reached on what Title IX means or should mean. The Commission has renewed this discussion, but unless the debate is carried out with candor and honest attempts to create understanding, little progress can be expected.

Given the significant divide in philosophical approaches to the questions raised by Title IX enforcement, agreement could be hard to come by. Agreement might be possible, however, if those on opposing sides of the debate are willing to recognize the costs of each philosophical standpoint. However, the entrenched positions of those driven by ideology make this kind of creative thinking unlikely. The attempt by some to create an all-or-nothing solution postpones

129. See Nancy Theberge, *A Critique of Critiques: Radical and Feminist Writings on Sport*, 60 SOC. FORCES 341, 342 (Nov. 2, 1981) (noting the radical critique of sport as "militaristic, authoritarian, racist, sexist, overly competitive, and repressive").

130. See MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION (2001).

131. COMM'N ON INTERCOLLEGIATE ATHLETICS, KNIGHT FOUND., A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 4 (June 2001).

132. See Frey & Eitzen, *supra* note 6, at 506.

133. See, e.g., NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD 4 (1982) (noting the increased rigidity of sports participation among youth); David Brooks, *The Organization Kid*, ATLANTIC MONTHLY, at 40, 51 (Apr. 2001) (stating "there were no bureaucratized university sports programs or athletic scholarships or professional coaching in [Hobey] Baker's day.").

potential solutions. Perhaps athletes and coaches rather than lawyers should be the brokers of such agreement, to ensure that the postponement will not be indefinite.