

2005

## Navigating Into the New "Safe Harbor": Model Interest Surveys as a New Tool for Title IX Compliance Programs

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### Recommended Citation

John J. Almond and Daniel A. Cohen, Navigating Into the New "Safe Harbor": Model Interest Surveys as a New Tool for Title IX Compliance Programs, 8 *Vanderbilt Journal of Entertainment and Technology Law* 1 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol8/iss1/1>

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Bluebook 21st ed.

John J. Almond & Daniel A. Cohen, Navigating into the New Safe Harbor: Model Interest Surveys as a New Tool for Title IX Compliance Programs, 8 VAND. J. ENT. & TECH. L. 1 (2005).

ALWD 7th ed.

John J. Almond & Daniel A. Cohen, Navigating into the New Safe Harbor: Model Interest Surveys as a New Tool for Title IX Compliance Programs, 8 Vand. J. Ent. & Tech. L. 1 (2005).

APA 7th ed.

Almond, J. J., & Cohen, D. A. (2005). Navigating into the new safe harbor: model interest surveys as new tool for title ix compliance programs. *Vanderbilt Journal of Entertainment and Technology Law*, 8(1), 1-44.

Chicago 17th ed.

John J. Almond; Daniel A. Cohen, "Navigating into the New Safe Harbor: Model Interest Surveys as a New Tool for Title IX Compliance Programs," *Vanderbilt Journal of Entertainment and Technology Law* 8, no. 1 (Winter 2005): 1-44

McGill Guide 9th ed.

John J. Almond & Daniel A. Cohen, "Navigating into the New Safe Harbor: Model Interest Surveys as a New Tool for Title IX Compliance Programs" (2005) 8:1 Vand J Ent & Tech L 1.

AGLC 4th ed.

John J. Almond and Daniel A. Cohen, 'Navigating into the New Safe Harbor: Model Interest Surveys as a New Tool for Title IX Compliance Programs' (2005) 8(1) *Vanderbilt Journal of Entertainment and Technology Law* 1

MLA 9th ed.

Almond, John J., and Daniel A. Cohen. "Navigating into the New Safe Harbor: Model Interest Surveys as a New Tool for Title IX Compliance Programs." *Vanderbilt Journal of Entertainment and Technology Law*, vol. 8, no. 1, Winter 2005, pp. 1-44. HeinOnline.

OSCOLA 4th ed.

John J. Almond & Daniel A. Cohen, 'Navigating into the New Safe Harbor: Model Interest Surveys as a New Tool for Title IX Compliance Programs' (2005) 8 Vand J Ent & Tech L 1 Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:

Vanderbilt University Law School

# VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW

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VOLUME 8

WINTER 2005

NUMBER 1

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## Navigating Into the New “Safe Harbor”: Model Interest Surveys as a New Tool for Title IX Compliance Programs

*By John J. Almond and Daniel A. Cohen\**

I.	HISTORY OF THE INTERPRETATION AND APPLICATION OF PRONG THREE .....	5
	A. <i>The Three Prongs</i> .....	5
	B. <i>Judicial Interpretation of Prong Three</i> .....	8
	C. <i>The 1996 Clarification</i> .....	10
	D. <i>The Paige Commission and the 2003 Further Clarification</i> .....	11
II.	THE 2005 ADDITIONAL CLARIFICATION.....	13
	A. <i>Exploring Prong Three’s Test</i> .....	15
	1. Step One: Unmet Interest Sufficient to Sustain a Varsity Team in a Sport.....	16
	a. <i>How the Model Survey Works</i> .....	17

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- b. *Administering the Model Survey to Ensure the OCR’s Deference*..... 18
  - i. “Periodically” Administering the Model Survey ... 19
  - ii. Administering the Model Survey to all Undergraduates..... 20
  - iii. Administering the Model Survey in a Manner Designed to Generate High Response Rates..... 21
  - iv. Include all Sports in the Model Survey..... 24
  - v. Alternative Approaches to Interest Survey Administration ..... 24
- c. *Objectively Determining Whether Unmet Interest has been Demonstrated* ..... 25
- 2. Step Two: Sufficient Ability to Sustain an Intercollegiate Team in a Sport..... 27
- 3. Step Three: Reasonable Expectation of Intercollegiate Competition for a Team in the Sport within the School’s Normal Competitive Region ..... 31
- B. *Implementation*..... 31
- III. FACTORS TO CONSIDER IN DECIDING WHETHER TO IMPLEMENT THE MODEL SURVEY..... 32
  - A. *Considerations that Favor Using the Model Survey* ..... 32
    - 1. OCR’s Deference ..... 33
    - 2. Certainty of the “Safe Harbor”..... 35
    - 3. Identifying Trends in Students’ Interests in Athletics... 35
  - B. *Considerations that Disfavor Using the Model Survey*..... 36
    - 1. Costs of Implementation ..... 36
    - 2. Possible Catalyst Effect..... 37
    - 3. Negative Publicity ..... 38
    - 4. Legality of the Additional Clarification ..... 40
- IV. IMPLEMENTATION AND RECOMMENDATIONS ..... 40
- V. CONCLUSION ..... 43

Whether a college’s administrators agree or disagree with the policies behind the “Additional Clarification”<sup>1</sup> published by the Office for Civil Rights (OCR) of the U.S. Department of Education (DOE) last spring, it would be a serious mistake for them to overlook its potential utility as a component of the school’s Title IX<sup>2</sup> compliance efforts.

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1. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST – PART THREE (2005), *available at* <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter ADDITIONAL CLARIFICATION].

2. Title IX of the Education Amendments of 1972 (Title IX) is an antidiscrimination statute which prohibits discrimination on the basis of sex in education programs or

In the Additional Clarification, the OCR provides colleges and universities an objective path to proving compliance with Title IX under Prong Three of the so-called "Three-Prong Test."<sup>3</sup> Prong Three provides that a college or university<sup>4</sup> will be deemed in compliance with the gender equity participation requirements of Title IX as it relates to intercollegiate athletics if the institution can demonstrate "that the [athletic] interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program [of intercollegiate athletics offered at the school]."<sup>5</sup> To assist schools in gauging students' interests in participating in intercollegiate athletics, the Additional Clarification provides schools a model survey to use in connection with their Prong Three compliance efforts.

The Additional Clarification brings a measure of objectivity to the otherwise subjective process of determining Title IX compliance under Prong Three. The OCR has declared that compliance with any part of the Three-Prong Test provides a school a "safe harbor" from OCR sanctions,<sup>6</sup> but, before the publication of the Additional

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activities by recipients of federal financial assistance. *See* 20 U.S.C. § 1681 (2000). Title IX states: "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 . . ." *Id.* § 1681(a). The Department of Education's regulation implementing Title IX's provisions regarding equality in athletic programs, 34 C.F.R. § 106.41 (2004), requires schools to "provide equal athletic opportunity for members of both sexes." *Id.* § 106.41(c). The OCR enforces Title IX in connection with the federal funding programs implemented by the Department of Education. 20 U.S.C. §§ 1682, 3413(a), 3441(a)(3). Since 1979, the OCR and its parent agencies have periodically published administrative regulations, "interpretations," and "clarifications" to explain Title IX and provide guidance to schools regarding what they would deem to comply with Title IX.

3. *See* Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71,413-23 (December 11, 1979) [hereinafter 1979 Policy Interpretation] (published by the U.S. Department of Health, Education, and Welfare, precursor to the DOE). The 1979 Policy Interpretation is credited with creating the "Three-Prong Test" (also known as the "Three-Part Test") for determining Title IX compliance, as discussed further herein.

4. The Additional Clarification "is designed specifically for intercollegiate athletics. However, [its] general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by the Title IX implementing regulation." ADDITIONAL CLARIFICATION, *supra* note 1, at 3.

5. *Id.*

6. *See, e.g.,* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST 1 (1996), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html#two> [hereinafter 1996 CLARIFICATION] ("[i]f an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement" and, thus, is in compliance with Title IX); OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE REGARDING TITLE IX COMPLIANCE 1 (2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>

Clarification, Prong One of the Three-Prong Test (the provision of athletic opportunities “substantially proportional” to the composition of the student body) had been the only objectively measurable – and therefore the only true – “safe harbor.” Through the Additional Clarification, however, the OCR has established a second measurable “safe harbor” under the Three-Prong Test.

For those schools not currently satisfying Prong One, which therefore need to protect themselves legally by demonstrating compliance with Title IX by some other means, the Additional Clarification provides guidance for determining whether they have effectively accommodated the athletic interests and abilities of their students under Prong Three. The OCR’s so-called “Model Survey” is the *only* interest measurement tool that the OCR will presume to provide an accurate measurement of Prong Three “interest” – or lack of “interest.” If the results of the Model Survey show insufficient “unmet interest” among students of the underrepresented gender, the school will have attained a “safe harbor.” If the Survey, to the contrary, shows the existence of sufficient interest, several additional criteria relating to athletic ability levels and sustainability of interest would remain to be proven before the school would find itself in the position of having to start a new varsity sport.

Even those schools currently in compliance with Prong One of Title IX are at risk that, with each new school year, the ever-changing demographics of undergraduate populations could throw their varsity athletic programs out of gender proportionality. Thus, even schools now within the “safe harbor” of Prong One should consider the potential benefits and minimal risks that implementing the Survey presents for those in a position of current compliance.

The principal publicity regarding the issuance of the Additional Clarification has not addressed its potential importance to colleges’ Title IX compliance efforts, but has consisted, rather, of criticism or praise from parties involved in the public policy debate surrounding Title IX enforcement.<sup>7</sup> That policy debate has little relevance to the

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[hereinafter 2003 FURTHER CLARIFICATION] (“each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored”).

7. Certain groups have criticized the Additional Clarification, contending, among other things, that it improperly institutionalizes the past discrimination reflected in women’s current athletic interests. See, e.g., Alison Sawyer, *The Women’s Sports Foundation Calls for Withdrawal of New Title IX Policy*, Women’s Sports Foundation (2005), <http://womenssportsfoundation.org/cgi-bin/iowa/about/media/press.html?record=123>; Jamie Schuman, *House Democrats Urge the Bush Administration to Rescind New Guideline on Title IX Compliance*, CHRON. HIGHER EDUC., June 23, 2005, <http://chronicle.com/daily/2005/06/2005062303n.htm>; Marek Fuchs, *For Women’s Athletics, A Tempest Over a Survey*, N.Y. TIMES, July 31, 2005, at 14WC; Erik Brady, *Women’s*

practical concern of achieving provable Title IX compliance. The Additional Clarification – whether it is regarded as wise or unwise in policy – can help schools achieve compliance and thereby avoid OCR investigations or private legal challenges. The policy debate and the divergent views expressed in the mainstream media have provided little practical advice regarding the Additional Clarification or the Model Survey to the well-intentioned academic institution seeking to comply with Title IX in a cost-effective manner.

This Article is intended to be a source of such practical advice. This Article discusses the Additional Clarification from the perspective of the academic institution and seeks to help it evaluate whether to implement the OCR's recommendations, including the Model Survey, as part of its Title IX compliance program. The Article does not engage in the policy debate regarding the Additional Clarification or Title IX enforcement policy generally.

Section I of this Article discusses Prong Three from a historical perspective, to place the Additional Clarification in context. Section II summarizes the contributions of the Additional Clarification to the Title IX compliance landscape and explains the OCR's recommendations for using the Model Survey. Section III discusses possible advantages and disadvantages of using the Model Survey. Section IV suggests an approach to using the Model Survey as an ongoing component of a Title IX compliance monitoring program.

## I. HISTORY OF THE INTERPRETATION AND APPLICATION OF PRONG THREE

### A. *The Three Prongs*

The 1979 "Policy Interpretation" published by the Department of Health, Education, and Welfare (HEW)<sup>8</sup> provides colleges and

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*Groups, OCR Spar Over Title IX Surveys*, USA TODAY, May 16, 2005, at [http://www.usatoday.com/sports/2005-05-16-title-ix\\_x.htm](http://www.usatoday.com/sports/2005-05-16-title-ix_x.htm).

Other groups have praised the Additional Clarification for, among other things, breathing life into an alternative for Title IX compliance to Prong One, which they contend had led to the widespread elimination of men's teams. See, e.g., Jen Brown, *New Title IX Debate: Will Women's Sports Suffer or Men's Sports Be Saved?*, ABC NEWS, June 22, 2005, <http://abcnews.go.com/Sports/story?id=868060&page=1>; Carrie Lukas, *Happy Birthday, Title IX: the Bush Administration has Provided a Real Reason to Celebrate*, NAT'L R. ONLINE, June 24, 2005, <http://www.nationalreview.com/script/printpage.p?ref=/comment/lukas200506240757.asp>; Kathryn Jean Lopez, *Interest Surveys Will Let Secret Out on Title IX Women's Sports*, PASADENA STAR-NEWS, Mar. 28, 2005.

8. In 1980, Congress subdivided HEW into the current Department of Health and Human Services and the Department of Education. Department of Education Organization

universities three alternate ways of demonstrating compliance with Title IX in the context of intercollegiate athletic participation.<sup>9</sup> The three alternative tests have commonly been referred to as the “Three Prongs” of Title IX and should be familiar to most athletic administrators:

1. *Proportionality*: A school complies with Title IX if it provides athletic participation opportunities for male and female students in numbers substantially proportionate to their respective enrollments. For example, if a school has fifty-one percent women in its student body, approximately fifty-one percent of its varsity athletes must be women.<sup>10</sup>

2. *Program Expansion*: A school at which members of one gender have been and are underrepresented among intercollegiate athletes complies with Title IX if it demonstrates a history and continuing practice of program expansion demonstrably responsive to the developing athletic interests and abilities of its underrepresented students.<sup>11</sup>

3. *Interest*: A school complies with Title IX if it demonstrates that the interests and abilities of the members of the underrepresented gender are fully and effectively accommodated by the present athletic program.<sup>12</sup>

The OCR has often implied that each part of the Three-Prong Test is a “safe harbor,”<sup>13</sup> meaning that the school is insulated from liability if it can demonstrate its compliance with any one of the test’s three parts. Prongs Two and Three, however, have not afforded true safe harbors, as they have not incorporated objective criteria. The Second Prong is inherently vague. Moreover, its usefulness has diminished due to the substantial progress made over the last thirty

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Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified in scattered sections of 20 U.S.C.). The Department of Education inherited most of the programs under which HEW provided educational funding. See 20 U.S.C. §§ 3441(a)(2), 3508(b) (2000).

9. See 1979 Policy Interpretation, *supra* note 3.

10. *Id.*

11. *Id.*

12. *Id.*

13. Compare ADDITIONAL CLARIFICATION, *supra* note 1, at 1 (expressly declaring that each Prong “is a safe harbor”) with Letter from Norma V. Cantú, Assistant Secretary for Civil Rights, Office for Civil Rights, accompanying 1996 CLARIFICATION, *supra* note 6, available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter 1996 Cantú Letter] (expressly referring only to Prong One as a “safe harbor” but implying such security also exists under Prongs Two and Three by stating: “If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this [Title IX’s] requirement”). The 2003 Further Clarification put an end to speculation that the 1996 Cantú Letter implicitly eliminated safe harbor protection under Prongs Two and Three, definitively declaring that “[e]ach of the three prongs is thus a valid, alternative way for schools to comply with Title IX.” 2003 FURTHER CLARIFICATION, *supra* note 6.



years of Title IX enforcement. Depending on the demographics of its student populations, a school may find it difficult to persuade an investigator that it is sufficient at this late date merely to show that it is "making progress" towards expanding athletic programs for the underrepresented gender. Nor could a school feel secure in relying upon the Third Prong because of the difficulty of determining whether it had "fully and effectively accommodated"<sup>14</sup> the athletic interests of its female students (usually, the underrepresented gender). Thus, for some years now, proportionality has been the only objective safe harbor that institutions have been able to rely on.<sup>15</sup>

For budgetary and other reasons, schools have often struggled, however, to meet proportionality goals under Prong One. Without the legal protection of the measurable Prong One safe harbor, such schools were exposed to the possibility of costly OCR investigations and litigation as to their compliance with the subjective Prongs Two or Three – with little assurance that even their good faith attempts at compliance thereunder would be considered sufficient by OCR investigators or courts. According to the data supplied by the OCR to the National Center for Education Statistics in connection with the development of the Additional Clarification, between 1992 and 2002, the OCR investigated 130 schools for Title IX compliance, of which only thirty-six schools were able to demonstrate compliance with Prong One and a mere eight with Prong Two.<sup>16</sup> Thus, approximately two-thirds of the schools investigated (86 out of 130) sought to demonstrate their compliance with Title IX under Prong Three, many by means of student interest surveys.<sup>17</sup>

Until the Additional Clarification, clear official guidance was lacking on how a school could validly measure the athletic interests and abilities of its underrepresented athletes and achieve the

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14. ADDITIONAL CLARIFICATION, *supra* note 1, at 3.

15. SEC'Y OF EDUC.'S COMMISSION ON OPPORTUNITY IN ATHLETICS, U.S. DEP'T OF EDUC., OPEN TO ALL: TITLE IX AT THIRTY 23-24 (2005) [hereinafter 2003 COMMISSION REPORT]; see also *Hearing before the Sec'y of Educ.'s Comm'n on Opportunity in Athletics* 78 (Oct. 22, 2002) (Statement of Rick Taylor, Athletic Director, Northwestern Univ.) [hereinafter Rick Taylor Statement] ("[I]n 1997, we were faced with an OCR complaint regarding water polo. In dealing with OCR we found out a great deal about the application of Title IX. Proportionality is the only safe harbor. Continuing expansion and meeting interests have no end point except to move you closer to prong one, proportionality, and in this context, proportionality is a quota. When is program expansion enough? When proportionality has been met?").

16. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., USER'S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX 3 (2005), available at <http://165.224.221/98/pubs2005/2055173.pdf> [hereinafter USER'S GUIDE].

17. *Id.*

theoretical safe harbor under Prong Three.<sup>18</sup> Indeed, any definitive guidelines originally would have been seen as contrary to the OCR's stated goal of preserving institutions' "discretion and flexibility in choosing the nondiscriminatory methods to determine the athletic interests and abilities of the underrepresented sex."<sup>19</sup> To this end, the 1979 Policy Interpretation<sup>20</sup> offered as guidance only a description of factors it would consider:

Institutions may determine the athletic interests and abilities of students [under Prong Three] by nondiscriminatory methods of their choosing provided:

- a. The processes take into account the nationally increasing levels of women's interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and
- d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.<sup>21</sup>

Although these factors and others listed in the 1979 Policy Interpretation provided schools some guidance, they still left unclear what actions by a school would be deemed sufficient to assure compliance. This left schools vulnerable to the possibility of varying interpretations of the Prong Three requirements any time the OCR or private litigants questioned their compliance efforts.

### *B. Judicial Interpretation of Prong Three*

This uncertainty was heightened by court cases that held schools liable notwithstanding their attempts at compliance under Prongs Two and Three.<sup>22</sup> The most significant of these cases was

18. 2003 COMMISSION REPORT, *supra* note 15, at 26.

19. ADDITIONAL CLARIFICATION, *supra* note 1, at 5.

20. The original 1979 Policy Interpretation, which established the Three-Prong Test, was itself drafted in large part in response to college administrators' complaints that the law was ambiguous and that they needed guidance on how to comply with the statute. See 1979 Policy Interpretation, *supra* note 3, at 71,414.

21. 1979 Policy Interpretation, *supra* note 3, at Pt. VII.C.

22. In 1979, the U.S. Supreme Court ruled that an individual has the right under Title IX to sue a school directly if he or she is affected by a violation of Title IX. See *generally* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (allowing a woman to bring suit under Title IX after she was denied admission to two medical schools at two private universities). The Court further expanded the reach of Title IX enforcement in 1992, when it held that a party could collect monetary damages for proving that an institution violated Title IX if this violation affected him or her. See *Franklin v. Gwinnett County Pub. Sch.*,

*Cohen v. Brown University*.<sup>23</sup> In that case, female athletes challenged a Brown University decision to eliminate its funding of two women's teams, volleyball and gymnastics, due to financial pressures (two men's teams, water polo and golf, were contemporaneously eliminated).<sup>24</sup> Brown University argued that, although it had not provided proportional opportunities for its male and female athletes, it had complied under the Third Prong of Title IX.<sup>25</sup> Brown University argued that, based on the student interest surveys it had conducted, women did not express the same interests in athletics as men for purposes of its Prong Three analysis.<sup>26</sup> Brown University submitted the following evidence in support of its compliance:

i) [A]dmissions data showing greater athletic interest among male applicants than female applicants; ii) college board data showing greater athletic interest and prior participation rates by prospective male applicants than female applicants; iii) data from the Cooperative Institutional Research Program at UCLA indicating greater athletic interest among men than women; iv) an independent telephone survey of 500 randomly selected Brown undergraduates that revealed that Brown offers women participation opportunities in excess of their representation in the pool of interested, qualified students; v) intramural and club participation rates that demonstrate higher participation rates among men than women; vi) walk-on and try-out numbers that reflect a greater interest among men than women; vi) [sic] high school participation rates that show a much lower rate of participation among females than among males; (viii) the NCAA Gender Equity Committee data showing that women across the country participate in athletics at a lower rate than men.<sup>27</sup>

The First Circuit Court of Appeals held that Brown University failed to comply with Prong Three by failing to fully and effectively accommodate the interests and abilities of women at the university because the sustained existence of the women's gymnastics and volleyball teams before their elimination showed that Brown University women *had* the interest and ability to sustain them.<sup>28</sup> The majority opinion rejected Brown University's contention that Title IX (and hence Prong Three) requires a school to equally accommodate the relative interests of male and female students and held as irrelevant

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503 U.S. 60, 77 (1992) (finding sexual harassment and discrimination by a male coach-teacher). Prevailing Title IX plaintiffs also qualify for attorneys fees under 42 U.S.C. § 1988(b), which often dwarf damages awards. *See, e.g.,* Mercer v. Duke Univ., 401 F.3d 199, 211 (4th Cir. 2005) (approving an attorney fee award of \$350,000 in addition to nominal compensatory damages of \$1).

23. 991 F.2d 888 (1st Cir. 1993), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

24. *Id.* at 892.

25. *Id.* at 899.

26. *See Cohen*, 101 F.3d at 198 n.30 (Torruella, C.J., dissenting).

27. *Id.*

28. *Cohen*, 991 F.2d at 904.

evidence showing that men had greater interest in college athletics than did women. The Court instead focused entirely on the interests of female students at Brown University.<sup>29</sup>

In its Prong Three analysis, the court reiterated and deferred to the formulation of the Prong Three test articulated in the 1979 Policy Interpretation:

[T]he mere fact that there are some female students interested in a sport does not ipso facto require the school to provide a varsity team in order to comply with the third benchmark. Rather, the institution can satisfy the third benchmark by ensuring participatory opportunities at the intercollegiate level when, and to the extent that, there is “sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team . . . .”<sup>30</sup>

In recent years, the federal appellate courts that have examined Prong Three or the Three-Prong Test generally have continued to apply and follow the above-quoted formulation, citing the principle that courts should defer to reasonable regulations of an administrative agency.<sup>31</sup> Indeed, the standard set forth in 1979 continues to play a major role today in the Additional Clarification.<sup>32</sup>

### C. The 1996 Clarification

The OCR published a “Clarification”<sup>33</sup> of the Three-Prong Test in 1996 in response to numerous requests from schools seeking further explanation of what the OCR would deem to constitute compliance with its requirements. “[T]he objective of the [1996] Clarification is to respond to requests for specific guidance about the existing standards

29. *Cohen*, 101 F.3d at 198 (Torruella, C.J., dissenting).

30. *Cohen*, 991 F.2d at 898 (quoting 1979 Policy Interpretation, *supra* note 3, at 71,418).

31. See 2003 COMMISSION REPORT, *supra* note 15, at 16 (citing *Chalenor v. Univ. of N. Dakota*, 291 F.3d 1042, 1046-47 (8th Cir. 2002); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *Neal v. Bd. Of Trs. of the California State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999); *Cohen*, 101 F.3d at 173; *Horne v. Kentucky High Sch. Athletic Assoc.*, 43 F.3d 265, 275 (6th Cir. 1994); *Kelley v. Bd. Of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3rd Cir. 1993)).

32. As discussed further below, these same factors cited by the court from the 1979 Policy Interpretation mirror the factors outlined by the OCR in the 2005 Additional Clarification: “(a) unmet interest sufficient to sustain a varsity team in the sport(s); (b) sufficient ability to sustain an intercollegiate team in the sport(s); and (c) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school’s normal competitive region.” ADDITIONAL CLARIFICATION, *supra* note 1, at 4.

33. See *generally*, 1996 CLARIFICATION, *supra* note 6.

that have guided the enforcement of Title IX in the area of intercollegiate athletics."<sup>34</sup>

With respect to Prong Three, the 1996 Clarification emphasized three factors originally listed in the 1979 Policy Interpretation that the OCR would consider while assessing a school's compliance:

In making this determination [of compliance with Prong Three], OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.<sup>35</sup>

Yet, the OCR also emphasized its traditional policy of permitting schools the discretion and flexibility "to which they are entitled when deciding how best to comply with the law."<sup>36</sup> Recognizing that the 1996 Clarification, with its lack of definitive guidance, still left schools somewhat unclear about what efforts would be sufficient to comply under Prong Three, the OCR also offered to provide more guidance in the future:

[S]everal parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability . . . . We recognize . . . that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.<sup>37</sup>

#### *D. The Paige Commission and the 2003 Further Clarification*

On the thirtieth anniversary of Title IX's enactment, the DOE renewed public interest in the law by studying its significance and ways to improve enforcement.<sup>38</sup> In June 2002, the U.S. Secretary of Education, Rod Paige, established the Secretary of Education's Commission on Opportunity in Athletics (the Commission), the first federal advisory panel created to study Title IX and to determine the effects of Title IX in the context of intercollegiate athletics over the last thirty years.<sup>39</sup> The findings and recommendations from the Commission were published in February 2003. The recommendations "not only speak to compliance, they also speak to the need for greater

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34. See 1996 Cantú Letter, *supra* note 13.

35. 1996 CLARIFICATION, *supra* note 6, at Pt. Three.

36. 1996 Cantú Letter, *supra* note 13.

37. *Id.*

38. See 2003 COMMISSION REPORT, *supra* note 15, at 46-47.

39. *Id.* at 2.

clarity and education from the Office for Civil Rights to the nation's sports administrators, educators, coaches, athletes, and parents . . .”<sup>40</sup>

The Commission observed that many college administrators felt that the OCR still failed to provide them with clear guidance on compliance and policy interpretations.<sup>41</sup> The Commission addressed the need for the OCR to educate colleges regarding the OCR's expectations so they could better plan athletic programs that would effectively meet the needs and interests of their students while complying with Title IX.<sup>42</sup> The Commission Report included the recommendation that:

The Office for Civil Rights should allow institutions to conduct continuous interest surveys on a regular basis as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports. The Office should specify the criteria necessary for conducting such a survey in a way that is clear and understandable.<sup>43</sup>

The Commission also recommended that: “The Office for Civil Rights should study the possibility of allowing institutions to demonstrate that they are in compliance with the third part of the three-part test . . . by the interest levels indicated in surveys of prospective or enrolled students at that institution.”<sup>44</sup>

The Commission had heard numerous complaints from college administrators about the Three-Prong Test. Many administrators told the Commission that because the guidance concerning Prongs Two and Three was so ambiguous, the proportionality prong was the only meaningful test.<sup>45</sup> Indeed, witnesses testified to the Commission that

40. *Id.* at 1.

41. *Id.* at 3.

42. *Id.*

43. *Id.* at 38 (emphasis omitted) (Recommendation 18). Recommendation 18 was not adopted unanimously by the Commission. *Id.* at 59. It was adopted by an 8-5 vote (the closest vote of all the Commission's recommendations). *Id.*

Those Commissioners opposed to this recommendation believe that allowing interest surveys may prevent future progress in providing opportunities for women because offering opportunities regardless of interest may encourage participation even where none currently exists. They felt that any use of interest surveys should be limited to demonstrating compliance with the third part of the three-part test. They also faulted the recommendation for not taking into consideration the effect of historical patterns of discrimination on women's interest in athletics.

*Id.* at 38. Consistent with their dissenting votes, some of the Commissioners have stated their opposition to use of the Model Survey. See Erik Brady, *Ex-members of Title IX Panel Urge Against Use of Surveys*, USA TODAY, Oct. 17, 2005, available at [http://www.usatoday.com/sports/college/other/2005-10-17-title-ix\\_x.htm](http://www.usatoday.com/sports/college/other/2005-10-17-title-ix_x.htm).

44. 2003 COMMISSION REPORT, *supra* note 15, at 39 (Recommendation 19). Recommendation 19 was adopted unanimously by the Commission. *Id.* at 59.

45. *Id.* at 23.

attorneys and consultants had told them that "the only safe way to demonstrate compliance with Title IX's participation requirement is to show that they meet the proportionality requirement [in Prong One] of the three-part test."<sup>46</sup> The Commission concluded that:

There should be an additional effort to designate [Prongs] two and three as safe harbors along with [Prong] one. For attorneys and consultants, the easily quantifiable nature of the proportionality test, requiring as it does simple data and a clear mathematical formula, may make it more likely to be favored as a means of establishing compliance.<sup>47</sup>

In the 2003 "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance," issued by the OCR in July 2003 following its review of the Commission Report,<sup>48</sup> the OCR foreshadowed the issuance of the Additional Clarification, noting:

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.<sup>49</sup>

## II. THE 2005 ADDITIONAL CLARIFICATION

On March 17, 2005, the OCR sought to clarify the matter of compliance with Prong Three by publishing an "Additional Clarification."<sup>50</sup> Most notably, this publication describes a model interest survey, which the OCR refers to as the "Model Survey," that can be administered to an undergraduate student population in order to determine the existence or non-existence of students' "unmet interest" in participating in intercollegiate athletics, one component of the Prong Three determination under Title IX. Further, the Additional Clarification states that the "OCR will presume that [the data collected from] the Model Survey is an accurate measure of student interest, absent other direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team,"<sup>51</sup> if it is administered in accordance with the OCR's recommendations. The

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46. *Id.*

47. *Id.* at 24.

48. See 2003 FURTHER CLARIFICATION, *supra* note 6.

49. *Id.*

50. The Additional Clarification was published along with a "User's Guide" that further explains the Model Survey and a "Technical Manual" that provides the statistical analysis that is the basis for the Model Survey and the User's Guide. See ADDITIONAL CLARIFICATION, *supra* note 1, at 3.

51. *Id.* at 6.

Additional Clarification also provides that, if the Model Survey is properly administered, a student's failure to respond to it can be considered evidence that he or she actually lacks "interest" as contemplated by Prong Three. Thus, if Model Survey results demonstrate a lack of student interest in additional athletic offerings – including through nonresponses to the Survey – the school will be considered by the OCR to be within a demonstrable Prong Three "safe harbor."<sup>52</sup>

The Model Survey and the OCR's deference to its results appear to be the most important developments offered by the OCR in the Additional Clarification. With the Model Survey as its centerpiece, however, the Additional Clarification also reorganizes and focuses the OCR's pre-existing and vague Prong Three guidance to create a concise and practical roadmap to compliance with each element of Prong Three that schools can follow with confidence.<sup>53</sup>

The Additional Clarification is intended to address, in part, the long-standing concerns that institutions have voiced to the Commission and others<sup>54</sup> about the lack of guidance as to how to comply with Prong Three.<sup>55</sup> To this end, the OCR restates in the Additional Clarification that:

[A]n institution will be found in compliance with [Prong Three] unless there exists a sport(s) for the underrepresented sex for which *all* three of the following conditions are met:

- a. Unmet interest sufficient to sustain a varsity team in the sport(s);
- b. Sufficient ability to sustain an intercollegiate team in the sport(s); and
- c. Reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region.

....

... When one or more of these conditions is absent, a school is in compliance with [Prong] three. It follows that schools are not required to accommodate the interests and abilities of all their students of the underrepresented sex or to fulfill

52. *Id.* at 7.

53. *Id.* at 3.

54. *Id.* at 2; 2003 COMMISSION REPORT, *supra* note 15, at 38-39.

55. According to the Additional Clarification, "[b]ased on the OCR's experience investigating the three-part test and the fact that the OCR has not investigated the vast majority of recipient institutions, OCR believes that institutions may be uncertain [prior to the Additional Clarification] about the factors OCR considers" under the Third Prong. ADDITIONAL CLARIFICATION, *supra* note 1, at 2.



every request for additions of new varsity teams or elevations of particular club sports to varsity status[, unless all three conditions are present for a given sport].<sup>56</sup>

### A. *Exploring Prong Three's Test*

To measure compliance with this test (and as explained in greater detail throughout the sub-parts to this Section II.A.), the OCR will first look to see whether there is demonstrable interest among students of the underrepresented gender capable of competing at the intercollegiate level in a sport that the school does not presently offer. The burden of proof is on the OCR to demonstrate this unmet interest.<sup>57</sup> This is where the Model Survey can be dispositive – if the Model Survey responses demonstrate insufficient unmet interest, the OCR will not conduct a compliance review of the school.

If unmet interest is demonstrated in a given sport, however, the school must then take steps to determine whether the interested students actually have the ability to compete at the collegiate level and whether such interest and ability is sustainable over time, presumably over a number of years. This second-step analysis is subjective, but it is a necessary step in determining whether a school is Prong Three compliant once unmet interest is demonstrated.

If this second-step analysis suggests sufficient interest and ability among student-athletes of the underrepresented gender to sustain a team, the OCR will look at competitive opportunities in the school's geographic region to see whether implementation of a new team is practical.

The importance of this three-step procedure is that, if the OCR's relatively clear guidance is followed – specifically, use of the Model Survey to determine interest and use of the Additional Clarification's guidance to evaluate the two additional Prong Three elements in good faith – a school can largely monitor its own compliance efforts with assurance that the OCR will defer to the school's decisions, absent direct and very persuasive evidence contrary to the school's determinations.

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56. ADDITIONAL CLARIFICATION, *supra* note 1, at 4. Note that this test is not new; these same factors appeared in the 1979 Policy Interpretation, *supra* note 3, the 1996 CLARIFICATION, *supra* note 6, and were cited by the 1993 *Cohen* court in its Prong Three analysis, see *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996).

57. ADDITIONAL CLARIFICATION, *supra* note 1, at 4. The burden of proof has always been on the government since the 1979 Policy Interpretation. "The Department would [have] the burden of demonstrating that the institution was actually engaged in unlawful discrimination." 1979 Policy Interpretation, *supra* note 3, at 71,414.

### 1. Step One: Unmet Interest Sufficient to Sustain a Varsity Team in a Sport

The Model Survey was designed specifically to measure whether sufficient unmet interest exists among the underrepresented gender to sustain a varsity team.<sup>58</sup>

Student interest surveys have always been part of the Title IX compliance landscape. Nearly two-thirds of the schools investigated by the OCR between 1992 and 2002 (86 out of 130) sought to demonstrate their compliance with Title IX under Prong Three.<sup>59</sup> Of these, approximately three-fourths of the institutions (67 out of 86) did so by means of a student interest survey.<sup>60</sup> These surveys varied widely in substance and technique, but they were often helpful and sometimes persuasive in demonstrating a school's compliance with Title IX.<sup>61</sup>

The OCR charged the National Center for Education Statistics (NCES)<sup>62</sup> and the National Institute of Statistical Sciences (NISS)<sup>63</sup> with conducting a historical analysis of the use of surveys in its case files and designing a streamlined, model survey based on the best practices and collective learning of the various schools over the last decade of Title IX enforcement.<sup>64</sup> NCES and NISS then drafted the User's Guide and Technical Manual, respectively, to "discuss the effective and problematic elements of [the] survey instruments" used

58. ADDITIONAL CLARIFICATION, *supra* note 1, at 5.

59. USER'S GUIDE, *supra* note 16, at 3.

60. *Id.*

61. The contents of these various survey instruments are discussed and analyzed at length in the so-called "Technical Manual" published by individuals working for the National Institute of Statistical Sciences. See ALAN F. KARR & ASHISH P. SANIL, TITLE IX DATA COLLECTION: TECHNICAL MANUAL FOR DEVELOPING THE USER'S GUIDE (Nat'l Inst. of Statistical Sciences, 2005) [hereinafter TECHNICAL MANUAL].

62. The User's Guide describes the NCES as:

[T]he primary federal entity for collecting, analyzing, and reporting data related to education in the United States and other nations. It fulfills a congressional mandate to collect, collate, analyze, and report full and complete statistics on the condition of education in the United States; conduct and publish reports and specialized analyses of the meaning and significance of such statistics; assist state and local education agencies in improving their statistical systems; and review and report on education activities in foreign countries.

USER'S GUIDE, *supra* note 16, at ii.

63. "NISS was established in 1991 by the national statistics societies and the Research Triangle universities and organizations, with the mission to identify, catalyze and foster high-impact, cross-disciplinary research involving the statistical sciences." NISS Home Page, <http://www.niss.org> (last updated Nov. 22, 2005).

64. USER'S GUIDE, *supra* note 16, at 2.

by the schools.<sup>65</sup> According to the OCR, as published in the Additional Clarification:

NCES’s expert statisticians carefully designed the web-based Model Survey, after extensive analysis of the 57 survey instruments, to effectively measure student interest in a simple, straightforward manner. The Model Survey is an unbiased, standardized methodology that maximizes the possibilities of obtaining correct information and facilitating responses. It effectively captures information on interest, experience, and self-assessment of ability across multiple sports, while not unnecessarily complicating responses with superfluous or confusing questions.<sup>66</sup>

#### *a. How the Model Survey Works*

The OCR’s representation that the Model Survey measures student interest in a “simple, straightforward manner” seems to be accurate. The computer-based Model Survey consists of only eight screens, and not all respondents need to proceed through all eight screens. As described by the NCES:

**Screen 1** introduces the survey and informs respondents of the purposes of the census, provides an explicit confidentiality statement, and provides an explanation of the structure of the instrument.

**Screen 2** requests four items of demographic information—age, year in school, gender, and whether the student is full-time. The dropdown boxes and radio buttons constrain responses to those allowed by the institution conducting the census.

**Screen 3** explains the next set of questions—on athletic experience, participation, and ability. It allows respondents with no interest in future participation in athletics to so indicate and complete the instrument without having to view any of the other screens.

**Screen 4** of the proposed instrument is reached only by respondents who wish to enter information concerning athletic experience, interests, and abilities. It lists the responses that will be allowed when the information is requested (on screen 6), and contains a neutral statement of the burdens and benefits associated with participation in intercollegiate athletics . . . .

**Screen 5** allows respondents who wish to enter information concerning athletic experience, interests, and abilities to *select the sports for which they wish to provide information*. The purpose of this is to reduce the size and complexity of screen 6, on which the information is actually entered. Only those sports selected on screen 5 are listed on screen 6 . . . .

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65. ADDITIONAL CLARIFICATION, *supra* note 1, at 3.

66. *Id.* at 5. As stated above, sixty-seven institutions demonstrated their compliance under Prong Three by means of a student interest survey between 1992 and 2002. “Detailed data were available on three-fourths of these [student interest] surveys (52 of the 67).” USER’S GUIDE, *supra* note 16, at 6. The OCR-commissioned analysts reviewed the fifty-two survey instruments used in OCR cases plus five additional survey instruments used by other institutions for a total of fifty-seven survey instruments. See ADDITIONAL CLARIFICATION, *supra* note 1, at 3; USER’S GUIDE, *supra* note 16, at 8.

Screen 6 is where actual information regarding experience, current participation, interest in future participation, and self-assessed ability is entered . . . . The allowable responses, which are constrained by radio buttons that also prevent multiple responses, are as follows:

For experience at the high school level, “Recreational,” “Intramural,” “Club,” “Junior Varsity” and “Varsity.”

For current participation, “Recreational,” “Intramural,” “Club” and “Varsity.”

For interest in future participation at the institution: “Recreational,” “Intramural,” “Club” and “Varsity.”

For ability: “Yes, I have the ability” and “No, I would need to develop the ability.”

The reason for inclusion of four separate categories is that a determination of interest and ability is related to the pattern of response across these categories. For example, to determine the number of students of the underrepresented sex with interest and ability in a varsity sport, the students to be counted could be those who express an interest in future participation at the varsity level, indicate that they have the ability to do so, and have current or high school experience beyond the recreational level . . . .

Screen 7 offers respondents the opportunity for comments or other feedback, asks them to click a button to record their responses, and thanks them for participating.

Screen 8 is a pop-up screen that appears only for full-time students of the underrepresented sex who have expressed an interest and ability to participate at a higher level. It lists the sport(s) in which the student has indicated an ability and interest in future participation, and asks the student to provide contact information if the student wishes to be contacted by the athletics department or some other organization in the university with respect to her interests. The student can exit this screen without providing the requested information by indicating that she does not wish to be contacted.<sup>67</sup>

#### *b. Administering the Model Survey to Ensure the OCR’s Deference*

The OCR offers institutions using the Model Survey significant procedural advantages if – but only if – they administer the Model Survey consistently with the OCR’s recommendations.

The burden of proof is on OCR (in the case of an OCR investigation or compliance review), or on students (in the case of a complaint filed with the school under its Title IX grievance procedures), to show by a preponderance of the evidence that the institution is not in compliance with [Prong] three.<sup>68</sup>

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67. USER’S GUIDE, *supra* note 16, at 13-14; *see also id.* at 15-22. Respondents selecting the “no interest” option on Screen 3 are deemed to have no interest in participating in college athletics for purposes of Prong Three analysis. ADDITIONAL CLARIFICATION, *supra* note 1, at 5.

68. ADDITIONAL CLARIFICATION, *supra* note 1, at 4; *see also supra* note 57.

If the Additional Clarification is diligently followed, the OCR “will presume that Model Survey results indicating lack of interest sufficient to sustain a varsity team are evidence of such actual lack of interest, and an institution will therefore be determined to be in compliance with” Prong Three, so long as the Model Survey is properly administered.<sup>69</sup> Further,

[S]chools may assume that nonresponse to the census indicates an actual lack of interest *if* all students have been given an easy opportunity to respond to the census, the purpose of the census has been made clear, and students have been informed that the school will take nonresponse as an indication of lack of interest.<sup>70</sup>

The presumption that responses from a properly-administered Model Survey accurately measure student interest – or lack of interest – can only be overcome “if OCR finds direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team, such as . . . a recent, broad-based petition from an existing club team for elevation to varsity status.”<sup>71</sup> “Where the Model Survey shows insufficient interest to field a varsity team, OCR will not conduct a compliance review” of that institution’s Title IX compliance efforts,<sup>72</sup> although OCR is required to investigate any complaint of discrimination brought to its attention.<sup>73</sup>

Proper administration, according to the OCR, includes: (i) administering the Model Survey “periodically to permit schools to identify developing interests;” (ii) “ideally” providing it to “all full-time undergraduates;” (iii) administering it “in a manner that is designed to generate high response rates;” and (iv) “include in the census at least the full list of sports recommended in the Model Survey.”<sup>74</sup>

#### i. “Periodically” Administering the Model Survey

The Additional Clarification does not specify how often the Model Survey should be administered, other than to suggest that it

69. ADDITIONAL CLARIFICATION, *supra* note 1, at 7.

70. *Id.* at 6 (emphasis added); *see also id.* at 7; USER’S GUIDE, *supra* note 16, at 12.

71. ADDITIONAL CLARIFICATION, *supra* note 1, at 7. As discussed below in Section III.B.2., the creation of such a petition is always a viable option for a group seeking to compel a school to start a new sports team. Since these petitions may be created with or without the impetus of a survey, they should not be seen as a deterrent to administering the Model Survey.

72. *Id.* at 7-8.

73. *Id.* at 8 n.14; *see also* 1979 Policy Interpretation, *supra* note 3 (citing 45 C.F.R. § 80.7(b) (2004)).

74. ADDITIONAL CLARIFICATION, *supra* note 1, at 6-7; *see also* USER’S GUIDE, *supra* note 16, at 12.

occur “periodically.”<sup>75</sup> As no definition of “periodically” is provided, it is likely that administration biannually is sufficient.<sup>76</sup> Indeed, the User’s Guide suggests that less frequent surveying may be appropriate for certain schools:

A survey of the entire undergraduate student body that generates high response rates and demonstrates that the interests of the underrepresented sex are fully accommodated might serve for several years if the demographics of the undergraduate population at the institution are stable and if there are no complaints from the underrepresented sex with regard to a lack of athletic opportunities.<sup>77</sup>

## ii. Administering the Model Survey to all Undergraduates

The OCR recommends administering the Model Survey as “a census whereby the Model Survey is provided to all full-time undergraduates,”<sup>78</sup> rather than to a sample of students. As discussed further below, the OCR determines the existence of sufficient Prong Three interest based on the absolute number of Model Survey responses indicating athletic interest, rather than on the relationship that the number of such responses bears to the number of students surveyed. The ability to accurately extrapolate sample survey data to determine the number of interested students with precision would be compromised by “issues associated with sample surveys: selection of the sampling mechanism, selection of the sample size, and calculation of sampling error.”<sup>79</sup>

Although the OCR does not permit a school flexibility to survey only a sample of students, if the school wishes to have the benefit of OCR deference to the school’s Model Survey results,<sup>80</sup> the Additional Clarification does give schools the option of only surveying all students of the underrepresented gender.<sup>81</sup> Such an approach, however, would seem more difficult to administer, as the school would need to segregate its list of enrolled students based on gender to restrict access to the survey to a subset of the undergraduate student body. Further, such an approach might project an indifference to the

75. ADDITIONAL CLARIFICATION, *supra* note 1, at 6.

76. *Id.* By its use of the word “periodically” rather than “annually”, the OCR likely intended to convey that annual administration of the Model Survey is not required. A school may elect, however, to survey its students annually in order to have more timely information on developing student interest.

77. USER’S GUIDE, *supra* note 16, at 11.

78. ADDITIONAL CLARIFICATION, *supra* note 1, at 6.

79. USER’S GUIDE, *supra* note 16, at 10.

80. ADDITIONAL CLARIFICATION, *supra* note 1, at 7.

81. *Id.* at 6.

interests of the overrepresented gender<sup>82</sup> and would forego the opportunity to collect potentially useful data that could help an athletic department track students' athletic interests and, thereby, allocate its resources more efficiently.

The OCR does not approve colleges administering the Model Survey to high school students as a way of determining interest. Such an application would inherently involve sampling, because the relevant high school student population served by a given institution is almost impossible to determine.<sup>83</sup> It should be noted, however, that "[w]hen determining whether an institution is fully and effectively accommodating the interests and abilities of its students of the underrepresented sex, OCR considers the interests and abilities of currently enrolled students, *as well as students who have been admitted.*"<sup>84</sup> The OCR also does not require the surveying of part-time students.<sup>85</sup>

### iii. Administering the Model Survey in a Manner Designed to Generate High Response Rates

The OCR requires that the Model Survey be administered "in a manner that is designed to generate high response rates."<sup>86</sup> The OCR will assume that nonresponses to the Model Survey are indicative of lack of interest only "if all students have been given an easy opportunity to respond to the census, the purpose of the census has been made clear, and students have been informed that the school will take nonresponse as an indication of lack of interest."<sup>87</sup>

The Additional Clarification provides two examples of Model Survey distribution methods that are designed to generate high response rates. First, the OCR suggests that the Model Survey may be administered "as part of the registration process whereby students

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82. See, e.g., USER'S GUIDE, *supra* note 16, at 10-11.

83. *Id.* at 10.

84. ADDITIONAL CLARIFICATION, *supra* note 1, at 3 n.6 (emphasis added).

85. *Id.* at 6 n.11. Theoretically, only those students eligible to compete at the intercollegiate level, as determined by the governing athletic association, would need to be surveyed, as ineligible students would lack the ability to compete. Isolating ineligible students out of the survey population, however, may be difficult administratively, especially if such an exercise delves into analyses of students' academic standing. See TECHNICAL MANUAL, *supra* note 61, at 49.

86. ADDITIONAL CLARIFICATION, *supra* note 1, at 7; see also USER'S GUIDE, *supra* note 16, at 12.

87. ADDITIONAL CLARIFICATION, *supra* note 1, at 6. Presumably, the OCR's description of the Model Survey, provided in the User's Guide in connection with Screen 1 of the Model Survey, is sufficient. USER'S GUIDE, *supra* note 16, at 15.

must complete or actively bypass the Model Survey to register for courses.”<sup>88</sup>

The Additional Clarification also acknowledges that a school may administer the Model Survey to its students by “send[ing] an email to the entire target population that includes a link to the Model Survey.”<sup>89</sup> If this method is used, however, the OCR requires that “the school [have] accurate email addresses, [that] students have access to email, and [that] the school [take] reasonable steps to follow-up with students who do not respond.”<sup>90</sup> The Additional Clarification does not give further guidance about what follow-up efforts would satisfy the OCR’s requirement that the Model Survey be administered in a manner to generate high response rates.<sup>91</sup> The OCR does not require that a properly-administered Model Survey actually generate any minimum response rate: “[a]lthough rates of nonresponse may be high with the email procedure, under these conditions [of proper Survey administration, including some level of follow-up], OCR will interpret such nonresponse as a lack of interest.”<sup>92</sup>

88. *Id.* at 7.

89. *Id.*

90. *Id.*

91. *Id.*; see also USER’S GUIDE, *supra* note 16, at 12. The reasonable follow-up requirement is imprecise. A school that wishes to avoid any questions about the adequacy of its follow-up efforts might affirmatively contact (beyond the initial email) any students it might expect to be interested in competing intercollegiately in a sport not presently offered at the varsity level, such as those presently participating on the school’s preexisting club or intramural teams. A school can easily publicize the existence of the Model Survey among such already cohesive units by sending follow-up email(s) to the students on such teams or by contacting their teams’ coaches or administrators. Schools should strive, though, to be even-handed in their follow-up efforts. Disparate treatment may lay the case for a statutory Title IX violation or a constitutional violation for public schools subject to the Fourteenth Amendment’s equal protection clause. The Additional Clarification does not purport to provide safe harbor status to constitutional or state-law violations. ADDITIONAL CLARIFICATION, *supra* note 1, at 1 n.1. Thus, a school may instead opt to send follow-up email(s) to all students.

92. ADDITIONAL CLARIFICATION, *supra* note 1, at 7. A low response rate does not, *per se*, raise Title IX concerns. A small gross number of positive Model Survey responses – perhaps ten to fifteen students for a sport with a limited roster like basketball among thousands of students within the Survey population – will obligate a school to take steps to further explore whether it needs to add the desired sport. See discussion *infra* Section II.A.1.c. The responses (or nonresponses) of the overwhelming majority of Survey-takers who lack the ability or the interest to compete at the intercollegiate level are not relevant under a strict Title IX analysis, as a school could not be required to establish an intercollegiate team for their benefit. See, e.g., ADDITIONAL CLARIFICATION, *supra* note 1, at 4, 10-11. Indeed, this has been the case since the original 1979 Policy Interpretation: “As explained in the Policy Interpretation, OCR requires that the assessment of students’ interests and abilities use ‘methods [which] are responsive to the expressed interests of students capable of intercollegiate competitions who are members of an underrepresented sex.’ ” *Id.* at 4-5 (emphasis added) (citing 1979 Policy Interpretation, *supra* note 3, at 71,417). Further, the “survey nonresponse bias” suggests that those most likely to benefit



Critics of the Additional Clarification – including the NCAA – have expressed skepticism about the reliability of the Model Survey to determine athletic interest if it is distributed via email, contending that participation in email surveys is inevitably spotty, leading to unreliable results.<sup>93</sup> Such critics fear that low response rates, when accepted as an indication of lack of interest, will be construed as an apparent – and misleading – lack of interest in sports by women, which the OCR will nevertheless accept as conclusive evidence that a school does not need to further accommodate their athletic interests.<sup>94</sup>

OCR's premise, however, appears to be that if students have access to and are properly informed about the Model Survey – including the purpose of the Survey and the fact that the school will interpret a nonresponse as an indication of lack of interest<sup>95</sup> – then it is appropriate to conclude that a potential student-athlete not interested enough to respond to a survey would not be interested in making the significant commitment needed to compete in an intercollegiate varsity sport.<sup>96</sup> If a school employing the email method fails to properly publicize the Model Survey, fails to make it readily available, or fails to take "reasonable steps to follow-up" with those

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from a survey are the ones most likely to respond to it. *See, e.g.*, TECHNICAL MANUAL, *supra* note 61, at Ch. 5. The Model Survey serves as a direct conduit for varsity-caliber athletes to be heard about their athletic interests, giving them the self-interest to want to respond.

93. *See, e.g.*, Press Release, NCAA, Statement from NCAA President Myles Brand Regarding Department of Education Title IX Clarification (Mar. 22, 2005), available at [http://www2.ncaa.org/media\\_and\\_events/press\\_room/2005/march/20050322\\_brand\\_stmnt\\_titleix\\_survey.html](http://www2.ncaa.org/media_and_events/press_room/2005/march/20050322_brand_stmnt_titleix_survey.html).

94. *See, e.g.*, National Women's Law Center, Bush Administration Covertly Attacks Title IX by Weakening Athletics Policies, Apr. 5, 2005, <http://www.nwlc.org/details.cfm?id=2211&section=infocenter>; Womenssportsfoundation.org, *Department of Education Creates Huge Title IX Compliance Loophole: The Foundation Position*, June 16, 2005, <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=1009>; Save Title IX, Questions and Answers on the Department of Education's "Clarification" of Title IX Policy, <http://www.savetitleix.com/questions.html> (last visited Dec. 29, 2005).

95. ADDITIONAL CLARIFICATION, *supra* note 1, at 6.

96. *See, e.g.*, USER'S GUIDE, *supra* note 16, at 18 ("[I]ntercollegiate athletics usually requires [sic.] athletes to devote 20 hours of practice each week during the season, as well as individual regimens of training during the off-season. Athletes are required to travel and occasionally miss classes."). Critics contend, however, that email survey response rates are consistently low, thus ensuring that even interest among female athletes will not be accurately measured. *See generally*, Feminist Majority Foundation Online, Feminist Daily News Wire, *Dept. of Education Weakens Title IX Compliance Standards for College Athletics*, Mar. 23, 2005, <http://www.feminist.org/news/newsbyte/printnews.asp?id=8964>; Save Title IX, *supra* note 94; Womenssportsfoundation.org, *Loophole*, *supra* note 94.

who do not respond, however, the OCR will not presume that the Survey responses are an accurate measure of interest.<sup>97</sup>

If a mandatory response method is used (i.e., students are required to complete or actively bypass the Survey), the school will not be confronted with the nonresponse concerns and the follow-up obligations that surround the non-mandatory email approach. Accordingly, the mandatory method may be viewed by schools as the preferred method of administration.

#### iv. Include all Sports in the Model Survey

The Model Survey must be administered so as to give students an opportunity to express interest in “all varsity sports, including ‘emerging sports,’ currently recognized by the three national intercollegiate athletic associations to which most schools belong.”<sup>98</sup> In addition to recognizing twenty-three championship sports, the NCAA “recognizes 7 ‘emerging sports’ that are intended to provide additional athletics opportunities to female student-athletes.”<sup>99</sup> The current list of NCAA sports is provided in the User’s Guide in connection with Screen 5 of the Model Survey.<sup>100</sup>

#### v. Alternative Approaches to Interest Survey Administration

Of course, a school is not obligated to implement the Model Survey – much less to follow the above procedures for implementation – even if it seeks to comply with Title IX through the Third Prong.<sup>101</sup> The Additional Clarification seeks to preserve schools’ discretion to run their athletic departments in any non-discriminatory manner that they choose.<sup>102</sup> But failure to use the Model Survey as part of an effort to demonstrate compliance with the Third Prong of Title IX has additional risk because student interest would then have to be gauged by some other method that does not enjoy the benefit of the OCR’s deference. For example, if a school uses a census other than the Model

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97. ADDITIONAL CLARIFICATION, *supra* note 1, at 6.

98. *Id.* at 7. The national intercollegiate athletic associations referred to are the National Collegiate Athletic Association (NCAA), the National Association of Intercollegiate Athletics (NAIA), and the National Junior College Athletic Association (NJCAA). *See, e.g.*, THE OFFICIAL NCAA WEBSITE, <http://www.ncaa.org/about/champs.html> (explaining that the NCAA administers eighty-eight championships in twenty-three sports for its member institutions).

99. USER’S GUIDE, *supra* note 16, at 13.

100. *Id.* at 19.

101. *See* ADDITIONAL CLARIFICATION, *supra* note 1, at 8 (stating that “surveys of this kind are only one method by which a school may obtain data on its students’ interests”).

102. *Id.*

Survey, the OCR will need to evaluate such census for reliability equivalent to the Model Survey and for compliance with the four factors for proper Model Survey administration discussed above.<sup>103</sup> Further, if a school does not use the Model Survey or an equivalent census, the results of any other survey tool will not be considered by the OCR as adequate to measure student interest. "Instead, OCR will look to a broader range of factors drawn from previous OCR guidance on the three-part test in determining whether the school has accurately measured student interest."<sup>104</sup>

Thus, use of any survey tool other than the Model Survey appears to forego the benefit of OCR deference and the presumption of accuracy that use of the Model Survey provides.

*c. Objectively Determining Whether Unmet Interest has been Demonstrated*

After the Model Survey is administered, the school must determine whether the gross number of positive responses collected from the Model Survey for a given sport exceeds the level of requisite interest that the school has determined to be necessary for a new varsity team.<sup>105</sup> Unlike many components of Prong Three, this component involves a relatively objective exercise.

The number of positive responses that would comprise requisite unmet interest should not be difficult for a school to establish.<sup>106</sup> The User's Guide offers the following example:

An operational formulation of the problem is as follows: There are a minimal number of team members necessary to "field" a team in the given sport. The institution must specify this number. It depends on the sport and possibly contextual factors. For instance, a basketball team cannot play with fewer than five players, but this is not the minimal number of players needed for basketball. Instead, the minimal number is presumably in the range 10–15. NCAA or other association rules may provide other bounds for the number of players, but prevailing values in the conference to which the institution belongs are also relevant.<sup>107</sup>

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103. *Id.*

104. *Id.* at 9 (punctuation omitted).

105. The Additional Clarification does not mandate that a school determine the number of athletes necessary to field a team prior to conducting the Model Survey, although this would seem preferable from the standpoint of establishing the credibility of the school's compliance processes. See discussion *infra* Section II.A.2, for a discussion of how the OCR is more likely to defer to a school's decisions if they are made pursuant to a predetermined process designed to maximize the chances of achieving neutrality in the results.

106. USER'S GUIDE, *supra* note 16, at 24.

107. *Id.* at 9.

The OCR recognizes that practical factors involving particular sports may change the calculation of the minimum number of participants needed.<sup>108</sup> When evaluating the minimum number of athletes needed, the OCR “may consider factors such as: rate of substitutions, caused by factors such as intensity of play or injury; variety of skill sets required for competition; and effective practices for skill development.”<sup>109</sup> Further, the OCR will defer to athletic administrators’ decisions as to the minimum number of positive Model Survey responses that will be deemed to show requisite interest for each sport:

Athletic directors and coaches for a particular sport will generally have the experience with the mechanics and realities of operating a team to determine the impact of these factors and decide the number of students needed to establish teams by sport. In general, OCR defers to decisions of the athletic directors and coaches.<sup>110</sup>

Once a school sets its minimum number of participants for each sport, then it simply counts the number of positive responses to determine whether the Model Survey indicates sufficient unmet interest.<sup>111</sup> Unless a student selects on Screen 6 that her “interest in future participation at the institution” is at the “Varsity” level,<sup>112</sup> her survey response will not count towards the requisite number of positive responses. The Model Survey also requires students to provide a self-assessment of their level of ability. Here, too, the OCR will defer to the Model Survey’s results: “OCR will presume that a student’s self-assessment of lack of ability to compete at the intercollegiate varsity level in a particular sport is evidence of actual lack of ability.”<sup>113</sup>

108. ADDITIONAL CLARIFICATION, *supra* note 1, at 11.

109. *Id.* (punctuation omitted); *see also id.* at 11-12 (discussing further the factors used to determine the minimum number of athletes).

110. *Id.* at 11. Although not mandated by the OCR, this requisite number should be selected by the school ahead of time to avoid any inference that it was influenced by the survey results.

111. *See, e.g.*, USER’S GUIDE, *supra* note 16, at 24.

112. *See id.* at 14.

113. ADDITIONAL CLARIFICATION, *supra* note 1, at 10. This is a somewhat surprising declaration of deference considering the OCR’s suggested phraseology about ability in the Model Survey. Screen 6 of the Model Survey does not give students an option to honestly declare that they lack the ability to compete at the collegiate level. Rather, the only options with regard to ability are “Yes, I have the ability” and “No, I would need to develop the ability.” USER’S GUIDE, *supra* note 16, at 20. The OCR expressly contemplates that athletes may be able to develop the ability to compete at the collegiate level:

[A] lack of experience or limited experience in a particular sport does not necessarily indicate the inability to compete in a particular sport at the intercollegiate level. For example, a student may have athletic skills, gained

Only if the properly-administered Model Survey results evidence that sufficient varsity-level interest exists among those in the underrepresented gender with the self-declared ability to compete intercollegiately in a sport not currently offered by the school must the school then take additional steps under the second part of the Prong Three analysis.

## 2. Step Two: Sufficient Ability to Sustain an Intercollegiate Team in a Sport

Conducting the Model Survey is the first, and potentially dispositive, step under the OCR's recommended approach to Prong Three compliance. If, after proper administration of the Model Survey to the entire student body, requisite interest is not demonstrated in any sport not currently offered to the underrepresented gender, then the school can have a high degree of comfort that it is in compliance with Title IX under Prong Three.<sup>114</sup>

If, however, requisite interest *is* demonstrated in a given sport, that, without more, does not mean that the sport must be instituted on a varsity level. Upon finding such requisite interest, the school would then proceed to the second step of the Prong Three test to assess whether those with interest in fact have sufficient ability to sustain an intercollegiate team.<sup>115</sup> The Additional Clarification makes clear that this "assessment process" is a separate and independent

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from experience in other sports, which are fundamental to the particular sport in which the student has expressed an interest.

ADDITIONAL CLARIFICATION, *supra* note 1, at 10. Yet, the OCR will apparently allow Survey results falling into this category to evidence lack of ability for purposes of analyzing Model Survey data at this stage:

While changing Screen 6 to allow a third option for self-assessment of ability might be helpful (such as "No, I do not have the ability"), such change might run the risk of drawing the OCR's review and losing the OCR's deference to the Survey's results, perversely for the same reasons outlined above. If a student lacks experience in a sport but has sufficient athleticism to compete intercollegiately, she may presume that she lacks ability and select such option on a Survey. By allowing a student to substitute her experience as a proxy for her ability, the OCR may see such a third option on Screen 6 as creating a certain bias in the results.

In any event, students' self-appraisals of ability become secondary to the opinions of coaches during the "assessment process" of measuring ability under the Prong Three analysis, as discussed further in the next section, *see also id.* at 9-11; USER'S GUIDE, *supra* note 16, at 24, so the benefits of altering the Model Survey may not be worth the major, but remote, risk of losing the OCR's deference.

114. ADDITIONAL CLARIFICATION, *supra* note 1, at 7-8. Such deference, of course, is in the absence of "other direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team," *id.* at 6, such as "[a] recent broad-based petition from an existing club team for elevation to varsity status," *id.* at 6 n.10.

115. *See, e.g., id.* at 4.

step in a Prong Three analysis. "Schools are not required to create a varsity team or elevate a club team to intercollegiate varsity status unless there are a sufficient number of interested students *that have the ability to sustain an intercollegiate varsity team.*"<sup>116</sup>

Students' self-appraisals of ability in their responses to the Model Survey serve only to begin the analysis relating to ability.<sup>117</sup> Although the Model Survey "effectively captures information on interest, experience, and self-assessment of ability,"<sup>118</sup> the Additional Clarification ultimately leaves to the school the qualitative determinations related to whether such ability reaches the level necessary for intercollegiate competition and whether such interest and ability is sustainable over a period of time.<sup>119</sup>

The opinions of coaches play a crucial role in determining whether interested students in fact possess the ability needed to play on the intercollegiate level. Further, the Additional Clarification provides that "[b]ecause athletic directors and coaches have unique expertise when assessing athletic ability, *their assessments will be presumed to be valid*, provided the methods used to assess ability are adequate and evaluate whether the students have sufficient ability to sustain an intercollegiate varsity team."<sup>120</sup>

A school's assessment process under the second part of the Prong Three test may not differ significantly from the processes that would have been appropriate as part of a pre-Model Survey effort to demonstrate compliance with Prong Three.<sup>121</sup> The User's Guide suggests the following process by which a school may further assess

116. *Id.* at 10 (emphasis added).

117. *Id.* Students' self-appraisals are of limited utility because they are confidential by default under the Model Survey. See, e.g., USER'S GUIDE, *supra* note 16, at 11, 15. Thus, a coach cannot connect a self-assessment to a given student unless that student opts to be contacted on Screens 7 and 8. See, e.g., *id.* at 21-22.

118. ADDITIONAL CLARIFICATION, *supra* note 1, at 5. Further, the Model Survey cannot adequately measure sustainability of an intercollegiate sport in a given year. It serves no role in this part of the analysis until its cumulative results can be analyzed after a school has administered it over a number of years.

119. See *id.* at 9-11.

120. *Id.* at 9 (emphasis added). Preserving the benefit of this presumption will be important to a school's success in any OCR investigation. Although loss of this presumption, if the OCR were to determine that a school's assessment methods were not "adequate" or unbiased, should not, in theory, shift the burden of proof in an investigation from the OCR to the school, *id.* at 4, the burden would effectively shift since the OCR would not be equipped to prove that the assessed players *are* sufficiently talented and/or that their interest and ability *is* sustainable. Thus, a loss of the presumption would also effectively shift the burden to the school to prove that its assessment (which, in this hypothetical, would have already been deemed biased by the OCR) was nonetheless accurate. This would be a heavy burden that no school would wish to take on.

121. See, e.g., *id.* at 9-11; 1996 CLARIFICATION, *supra* note 6, Pt. Three(b).

the "ability to sustain" a new varsity team – including assessing whether the interest is sustainable and evaluating the abilities of the interested student-athletes – after a Model Survey evidences unmet interest:

[A] next step might be for the institution to call a meeting of women students to see if there is enough interest to field a team. A desirable practice in obtaining attendance at the meeting would involve both direct contact with those women who had self-identified and provided contact information through the survey, as well as advertising the meeting through flyers or announcements in the campus paper. Given sufficient turnout, coaches could then conduct tryouts to evaluate the ability of prospective athletes. An evaluation of ability through a tryout would take precedence over a student's self-appraisal of ability on a survey.<sup>122</sup>

During the tryouts, a school will likely want to maximize the transparency of its approach to assessing ability, in order to ensure that its impartiality cannot be questioned and to preserve the OCR's presumption of validity. For example, the school could make clear before the tryouts what it will consider to be "varsity-level" ability.<sup>123</sup> The school also could, for example, consult multiple individuals with experience coaching the sport to evaluate players' talents, rather than entrust this discretionary decision to a single coach. Although the assessments of ability will necessarily be subjective, these measures (or others) should be considered "adequate" so as to improve the chances that the assessments will be respected by the OCR.<sup>124</sup>

Recognizing the difficulty of assessing ability levels – let alone of determining whether a showing of requisite ability level among interested students is sustainable over the course of several years – the OCR also allows for interim steps short of creating a new varsity team if a school suspects such a team *might* be required:

Because OCR considers participation in club and intramural sports to be an important indicator of interest and ability, schools that are unsure whether the interests and abilities they have measured will be sufficient to sustain a new

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122. USER'S GUIDE, *supra* note 16, at 24. A school that, out of an abundance of caution, wishes to avoid any questions about whether the meeting was adequately publicized might separately provide notice of the meeting to members of any existing club or intramural team in the sport.

123. Perhaps an athletic department mission statement could declare that it aspires to be competitive within its conference in every sport. Such a school may seek to assess its potential student-athletes by reference to the abilities and credentials of student-athletes participating in that particular sport at other schools within the region or conference (with an allowance made for the fact that a start-up team may not be competitive in its first few seasons). Alternatively, an athletic department may seek to define "varsity-level" ability by reference to the relative abilities and credentials of its existing varsity athletes competing in other varsity programs, as compared to high school student-athletes (e.g., a college's varsity athletes are generally among the top ten percent of all high school athletes in the sport).

124. See ADDITIONAL CLARIFICATION, *supra* note 1, at 9.

varsity team are permitted – though not required – to create a club or intramural team to further assess those interests and abilities. . . . Just as an institution might conduct tryouts or hold organizational meetings after a survey or other initial assessment shows the potential interest and ability to create a new varsity team, an institution has the option to field a club or intramural team for a reasonable period of time to further assess the depth and breadth of the interests and abilities of the participating athletes. However, this option must be exercised as only a part of the assessment process, using standards that apply equally to male and female athletes. Once a school completes the assessment process by concluding that there is sufficient interest and ability to support a new varsity team, the school is under an obligation to create a varsity team within a reasonable period of time.<sup>125</sup>

This express endorsement of starting a club or intramural sport provides schools a way to verify the existence on campus of sustainable interest and ability. By monitoring the interest and ability levels of club or intramural participants, the school will be able to observe whether the requisite levels are sustainable over time. Wide fluctuations in these levels would likely provide a school a safe harbor if it decides against implementing a varsity team on the basis of a lack of sustainability.

If the OCR's recommendations are followed, the OCR should, in an investigation, defer to the school's determinations. If deference is for some reason not indulged, however, the OCR will consider multiple factors in addition to the coaches' assessments:

When OCR is required to make this determination, it may consider such factors as the following —:

- the athletic experience and achievement — in interscholastic, club or intramural competition — of underrepresented students interested in playing the sport;
- participation in other sports, intercollegiate or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered;
- self-assessment of ability to compete in a particular interscholastic varsity sport;
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team;
- tryouts in the particular sport in which there is an interest;
- other direct observations of participation in the particular sport being considered; and
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students have the potential to sustain a varsity team.<sup>126</sup>

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125. *Id.* at 10-11. Note, however, what constitutes a “reasonable amount of time,” *id.*, is not defined.

126. *Id.* at 10.



### 3. Step Three: Reasonable Expectation of Intercollegiate Competition for a Team in the Sport within the School's Normal Competitive Region

The third step of the Prong Three test – whether intercollegiate competition exists within the school's normal competitive region – is perhaps the easiest of the steps to assess. The school's other varsity athletic programs will provide guidance as to the school's normal competitive region, and information is readily available about the existence of other intercollegiate teams within any region. The OCR explains in the Additional Clarification that it "will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete."<sup>127</sup> Further, "if an institution's normal competitive region includes an area outside its own geographic area, OCR will not require the creation of a particular sport if, due to climate or topography, it would not be possible as a practical matter for students at the institution to practice that sport," such as a skiing program for a Big 12 school located outside of the Rocky Mountain area.<sup>128</sup> Schools ordinarily will have no obligation beyond the above, but if the OCR investigates a school for Title IX compliance and finds it to be in violation, "institutions may be required by the Title IX regulation to encourage the development of such competition as part of a resolution agreement or remedy."<sup>129</sup>

#### *B. Implementation*

When a school has students of the underrepresented gender with "sufficient unmet interest and ability" to sustain an intercollegiate team in a sport that has sufficient intercollegiate competition within the school's normal region of competition, "the school is under *an obligation* to create a varsity team in that sport or elevate the club team to varsity status," if it has not otherwise proven compliance by means of Prongs One or Two.<sup>130</sup>

This implementation, however, can take place gradually according to the Additional Clarification:

OCR recognizes that, for practical and financial reasons, a school may be unable to immediately create a new varsity team or elevate a team to varsity status. When determining whether the period of time to create or upgrade a team is reasonable, OCR will account for the steps necessary to establish the varsity

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127. *Id.* at 12.

128. *Id.*

129. *Id.*

130. *Id.* (emphasis added).

team, which will vary by sport and by school and may include obtaining necessary approval and funding to establish the team, building or upgrading facilities, obtaining varsity level coach(es), and acquiring necessary equipment and supplies.<sup>131</sup>

Although it is unlikely that use of the Model Survey approach to Title IX compliance will result in a school having to start a new varsity sport that it would not otherwise have to start, that is one risk that administrators should nevertheless take into account in determining whether to follow the Additional Clarification. The following section will discuss this and other considerations that administrators should evaluate in deciding whether to use the Model Survey.

### III. FACTORS TO CONSIDER IN DECIDING WHETHER TO IMPLEMENT THE MODEL SURVEY

Institutions have flexibility to demonstrate compliance by means of any one (or all) of the three prongs of Title IX, and each prong provides a sufficient basis to demonstrate compliance.<sup>132</sup> Further, an institution need not make an election to comply with one particular prong. From the standpoint of defending a school against potential Title IX liability, therefore, it would seem advantageous for a school to be in a position to defend its athletic program on the basis of multiple prongs.

Institutions that seek to demonstrate Prong Three compliance (either of necessity or due to uncertainty about their ability to comply under Prongs One or Two) have always been obligated to evaluate the athletic interests and abilities of the underrepresented gender. Now that the OCR has delineated a method under Prong Three for reaching a safe harbor – and gaining the OCR's deference that it has, indeed, been reached – there are compelling reasons for such schools to avail themselves of this safe harbor.

The Model Survey approach, however, may not be appropriate for every school, as there are certain costs and risks associated with its implementation that may outweigh its potential benefits to a given school.

#### *A. Considerations that Favor Using the Model Survey*

The Model Survey need not be the only basis for evaluating interest under Prong Three. Because it is expressly sanctioned by the

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131. *Id.* at 13.

132. *Id.* at 1.

OCR and is intended to help institutions achieve the Prong Three safe harbor, however, a good case can be made for using it as one method of measuring interest.

### 1. OCR's Deference

Although the OCR will accept several indicators of interest for purposes of Prong Three compliance efforts, none of them are expressly given the presumption of accuracy that the OCR has given the Model Survey.<sup>133</sup> Although the OCR professes to have the burden of proof to show that an institution is not in compliance with Prong Three,<sup>134</sup> this conflicts somewhat with the discussion in the Additional Clarification regarding non-Model Survey approaches to Prong Three compliance efforts.<sup>135</sup> For example, the Additional Clarification warns that when a school does not implement the Model Survey and administer it as recommended, "OCR will not presume that survey results (if any) alone are adequate to measure student interest under [Prong] three."<sup>136</sup> In other words, a school is not required to use the Model Survey, but any other tool it uses to measure student interest levels will not receive the benefit of the OCR's deference during an OCR investigation, effectively imposing on the school the burden of proving that the tool was equivalent to the Model Survey.<sup>137</sup> Unless such equivalence can be demonstrated, any evidence of the presence or absence of "unmet interest" generated by methods other than the Model Survey will not be presumed to be accurate but, rather, will be scrutinized subjectively with a number of other factors.<sup>138</sup> Schools that use such methods thus might find themselves subjected to a potentially burdensome OCR investigation

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133. *Id.* at 8-9.

134. *Id.* at 4. The burden of proof has always been on the government since the 1979 Policy Interpretation. "The Department would [have] the burden of demonstrating that the institution was actually engaged in unlawful discrimination." 1979 Policy Interpretation, *supra* note 3, at 71,414.

135. The OCR has been careless in the past in discussing the burden of proof. Compare 1996 Cantú Letter, *supra* note 13 (stating that "if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, *as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated*") (emphasis added) with 1996 CLARIFICATION, *supra* note 6, at Pt. Three (explaining that "[u]nder part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex") (emphasis added).

136. ADDITIONAL CLARIFICATION, *supra* note 1, at 9.

137. *Id.* at 8-9.

138. *Id.* at 9.

of their compliance methods,<sup>139</sup> and might ultimately be regarded by the OCR as out of compliance, notwithstanding their good faith efforts to comply.<sup>140</sup>

What seems to be clear, however, is that, so long as the Model Survey is implemented and properly administered in accordance with the procedures explored in Section II.A.1.b., the OCR will defer to its results and will not conduct a compliance review if the results do not show sufficient unmet interest to sustain a new varsity team.<sup>141</sup> Non-proportional schools – those not in compliance with Prong One – *must* measure and fully accommodate the athletic interests of the underrepresented gender to comply with Prong Three, unless they are confident that they can persuade a court or OCR investigator that they satisfy the vague and uncertain requirements of Prong Two. For these schools, failing to conduct the Model Survey expressly sanctioned by the OCR – or failing to administer it in the manner suggested by the OCR – foregoes important legal safeguards and an opportunity to demonstrate *with certainty* the absence of unmet interest for purposes of Prong Three.

Aside from the Model Survey, the Additional Clarification also outlines methods that schools may follow to gauge interested students' *abilities*.<sup>142</sup> If those methods are properly followed, the OCR will defer to schools' assessments of students' abilities.<sup>143</sup> If those methods are not followed, however, the OCR will not defer but, as with the determination as to unmet interest, will consider multiple factors, an approach that may yield unpredictable results.<sup>144</sup>

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139. According to certain schools that have been investigated by the OCR, investigators can burden schools with voluminous and intrusive requests. *E.g.*, Letter from Estelle A. Fishbein, General Counsel, Johns Hopkins Univ., to Norma Cantú, Assistant Secretary, and Judith Winston, General Counsel, U.S. Dep't of Educ., at 2-3 (Dec. 8, 1994) (complaining that the OCR questioned the university on irrelevant issues, including the funding of a sports museum not affiliated with the university and the smaller size of women's basketballs compared to men's basketballs notwithstanding that NCAA and Olympic regulations set the official sizes); Letter from Estelle A. Fishbein, General Counsel, Johns Hopkins Univ., to Dr. Robert Smallwood, Regional Director, Office for Civil Rights, U.S. Dep't of Educ., at 2 (Dec. 8, 1994) (“[f]rom the beginning, OCR’s investigation carried all the stigmata of a fishing expedition”); *id.* (counting athletic supporters, sports bras, and socks, contrary to OCR policy against analyzing information on undergarments) (quoting OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 29 (1990)).

140. *See* ADDITIONAL CLARIFICATION, *supra* note 1, at 8-9.

141. *Id.* at 7.

142. *See id.* at 9-11.

143. *Id.* at 9.

144. *Id.* at 10.

## 2. Certainty of the "Safe Harbor"

Before the OCR issued the Additional Clarification, Prong Three was theoretically considered a safe harbor,<sup>145</sup> but schools faced uncertainty as to whether they had navigated into it. Schools did not know what methods of measuring unmet interest would be seen as valid in the OCR's eyes, or at what point evidence of unmet interest warranted further assessment or accommodation.<sup>146</sup> A principal purpose of the Additional Clarification is to encourage schools to consider reliance on Prong Three a viable compliance option by mapping a route into a more clearly defined safe harbor.<sup>147</sup> A school can now feel confident that it has complied with its Title IX obligations in connection with its athletic program if the Model Survey does not reveal requisite levels of unmet interest.

## 3. Identifying Trends in Students' Interests in Athletics

Responses to the Model Survey can help a school identify trends in undergraduate athletic interests as they emerge. The compilation of survey data should permit an athletic department to make more informed plans and decisions at an earlier stage.

Interest in a new sport seldom materializes overnight. Use of the Model Survey on a periodic basis can help a school identify nascent interest as it develops and evaluate whether such interest is sustainable, fleeting, or fluctuating. The school can then take steps to address such interest and monitor the abilities of the interested students, such as forming club or intramural teams or implementing other controlled measures. If data compiled over a few years shows that interest in a sport is not sustainable, the school will not be required to endorse a varsity team.

In addition, evidence as to the relative interests and abilities of members of both genders might have relevance to future determinations of Title IX compliance or of liability under a lawsuit brought by a private litigant (i.e., the absence or presence of actual discrimination).<sup>148</sup>

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145. See 1996 CLARIFICATION, *supra* note 6, at 1; 2003 FURTHER CLARIFICATION, *supra* note 6.

146. 2003 COMMISSION REPORT, *supra* note 15, at 23-24.

147. See ADDITIONAL CLARIFICATION, *supra* note 1, at 3-4.

148. See *id.* at 5-6; see also *id.* at 1 n.1. Although *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), held that the interests of the overrepresented gender were irrelevant to its Prong Three analysis, data showing the relative interests in athletics of both genders might prove persuasive, depending on the nature of the case, to a future jury, court or investigator.

Further, if the Model Survey results show significant interest in a sport among the *overrepresented* gender, a school may consider addressing such interest by offering club or intramural teams. Indeed, if a school is in compliance with Prong Three, it is then free to add popular *varsity* sports for either gender, even if doing so would result in the school becoming non-proportional.<sup>149</sup> This flexibility could be viewed as a benefit by athletic administrators who have felt compelled to maintain proportionality by limiting men's sports or participation levels.

### *B. Considerations that Disfavor Using the Model Survey*

#### 1. Costs of Implementation

All schools have concerns about costs. Use of the Model Survey will involve cost outlays, as it must be properly administered and the results analyzed. Then, if sufficient unmet interest is demonstrated, the school may be required to hold meetings and tryouts, which will also involve costs. Unless a school already meets the proportionality test of Prong One, however, many of these steps and expenses will also be required under any non-Model Survey effort to comply with Prong Two or Prong Three.

Although schools could, for financial reasons, forego the methods recommended in the Additional Clarification, such a decision may be shortsighted. Unless they satisfy the Prong One test of proportionality, schools will need to monitor the athletic interest and ability levels of the underrepresented gender in any event. Although non-Model Survey methods of monitoring may be less expensive at the outset, an OCR investigation, wherein the school's decisions will not receive deference from the OCR, will doubtless be much more costly. The certainty of knowing that a school is within the Prong Three safe harbor may be well worth the costs of implementing the processes suggested in the Additional Clarification, including the Model Survey. Furthermore, conducting the Model Survey should not involve a significant cost for most schools with in-house IT resources.

To save money, a school could employ only some, but not all, of the measures recommended in the Additional Clarification. For example, a school certainly could consider not surveying the *overrepresented* gender, if that approach, indeed, would be more cost-effective. It also could consider administering the Model Survey less

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149. ADDITIONAL CLARIFICATION, *supra* note 1, at 5.

frequently,<sup>150</sup> although that might increase the risk of losing the OCR's approval.

Even if sufficient unmet interest and ability are demonstrated as to a given sport, a school need not start a varsity team immediately. The OCR permits a school to implement the sport at a club or intramural level as a means to verify whether sufficient interest and ability are sustainable.<sup>151</sup> This interim measure would reduce the risk that a school would incur the expense of starting a new varsity sport in which sustained interest and ability levels are lacking. The OCR also will permit a school up to four years to fund the scholarship costs once a new varsity team is formed.<sup>152</sup>

## 2. Possible Catalyst Effect

Under Prong Three, a school theoretically can avoid discovering unmet interest in athletics among its current students by not affirmatively trying to assess its existence. It may be argued that conducting the Model Survey might provide the catalyst for a group of students interested in a given sport to present the school with evidence of interest that might not otherwise have surfaced. Any results evidencing requisite unmet interest, in turn, would require the school to spend money to take the next steps to assess the prospects of forming a new team.

Even if this "catalyst effect" is real,<sup>153</sup> schools are better advised to be proactive in assessing interest. If use of the Model Survey proves to have some kind of catalyst effect, that would only show that schools that fail to adequately monitor the interests of their students are vulnerable. Existing, but latent, interest could surface at any time. Petitions by groups of athletes of the underrepresented gender have been part of the Title IX landscape for years. At any time, a group of athletes could organize and present the institution with a request to start a new varsity team. A school that does not use the Model Survey, but merely assumes that unmet interest does not

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150. See USER'S GUIDE, *supra* note 16, at 11; see also discussion *supra*, Section II.A.1.b.i. (providing an example of a situation that may lend itself to less frequent surveying).

151. ADDITIONAL CLARIFICATION, *supra* note 1, at 10.

152. *Id.* at 12 n.15.

153. See 2003 COMMISSION REPORT, *supra* note 15, at 38 (recommending "interest surveys on a regular basis as a way of . . . stimulating student interest in varsity sports"). Also, "[t]he Department of Education says schools that use the surveys correctly may well find they have an obligation to add sports for women under Title IX." Erik Brady, *supra* note 43. At this point, however, any potential catalyst effect of the Model Survey cannot be measured.

exist on its campus, may have difficulty defending itself if faced with a student petition for that sport.

The catalyst effect concern, moreover, may be misplaced. A core of interested students likely already exists in an organized fashion in many schools' club or intramural sports programs. Athletes assembled on such a team would be more likely to petition the school for a varsity team than a group of previously non-organized individuals whose interest was piqued by responding to a survey. Further, students already competing on a club or intramural team are those that are most likely to have the interest and ability to participate at a varsity level. Thus, although use of the Model Survey could uncover unmet interest, it seems unlikely that a school, using the Model Survey, would ultimately be required to implement a new team, after the assessment process, that would not have been required but for the Model Survey.

Even under the Additional Clarification, the OCR will give consideration to a student petition notwithstanding Model Survey results demonstrating a lack of interest.<sup>154</sup> The OCR will consider “[a] recent broad-based petition from an existing club team for elevation to varsity status [to be] direct evidence of interest in that sport by students on the club team.”<sup>155</sup> The burden of proof in such a situation will remain on the OCR or the petitioning students, however, to show that such direct evidence is sufficient to overcome the Model Survey results.<sup>156</sup>

If a school is presented with a student petition and has not implemented the Model Survey, the school will have foregone an opportunity to establish its reputation for compliance and will have no *recognized* form of evidence to overcome the students' “direct evidence of interest.” The institution will then face an uphill legal battle to avoid a finding of noncompliance and OCR sanctions.

### 3. Negative Publicity

The OCR's Model Survey has been widely criticized by certain Title IX activists and others in the ongoing policy debate.<sup>157</sup> It is possible that some in this group may target a school that decides to

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154. ADDITIONAL CLARIFICATION, *supra* note 1, at 6 n.10.

155. *Id.*

156. *Id.* at 4.

157. *See, e.g.*, sources cited *supra* notes 7, 94.



use the Model Survey with a policy-based media campaign attacking the school's gender equity compliance efforts.<sup>158</sup>

Making affirmative efforts to gauge students' interests in athletics, however, has always been a valid – and lawful – method of complying with Title IX,<sup>159</sup> and the use of interest surveys is a well-established technique for doing so.<sup>160</sup> The OCR adopted only the best practices from the various survey instruments created by individual schools "to develop suggestions for an improved process for conducting [the Model Survey]."<sup>161</sup> Thus, the Model Survey tries to improve upon and make more accurate an already-valid method of complying with Title IX.

Furthermore, unless the Model Survey is the exclusive approach used by a school to comply with Title IX, the primary criticism of the Additional Clarification can be deflected by focusing the public (and the media) on the school's other compliance efforts.<sup>162</sup> For example, a school that uses the Model Survey but also monitors participation in club and intramural sports, solicits views from coaches, tracks trends in local high school participation, or uses other factors to gauge interest should be able to point to these other compliance efforts to rebut any criticisms relating to its use of the Model Survey, including the criticism that students' failure to respond to the Model Survey was dispositive in the school's analysis.<sup>163</sup>

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158. Although, the same type of publicity campaign could be launched with or without Model Survey data.

159. See 1979 Policy Interpretation, *supra* note 3, at 71,414. Eighty-six out of 130 schools investigated by the OCR between 1992 and 2002 demonstrated their compliance with Title IX under Prong Three. USER'S GUIDE, *supra* note 16, at 3.

160. Indeed, sixty-seven out of eighty-six schools that demonstrated their compliance with Title IX under Prong Three between 1992 and 2002 employed some form of survey instrument. *Id.* at 3.

161. *Id.*

162. While administration of the Model Survey could help a school feel confident that it is meeting the athletic *interests* of its student body, it also could create discoverable evidence suggesting that a school is not. As long as a school is in compliance with the law, however, it should be able to rebut any such criticism.

163. See also discussion *supra* Section II.A.1.b.iii. (discussing that schools may desire to make the Model Survey mandatory, such as by requiring students to complete it or actively bypass it as part of the registration process, in order to avoid the criticisms associated with potential low response rates).

#### 4. Legality of the Additional Clarification

Certain critics have intimated that schools might expose themselves to liability merely by following the Additional Clarification.<sup>164</sup> Such a result is highly unlikely.

In regard to an OCR investigation, a federal agency such as the OCR generally must follow its own regulations, procedures, and precedents until it amends or revokes them.<sup>165</sup> Although the OCR could change its procedures and disavow the Model Survey in the future, it is doubtful that a school could suffer negative inferences in the eyes of the OCR for following its current guidance.<sup>166</sup>

A school should also be largely insulated from liability from any legal challenge by a third party to the Model Survey's accuracy or neutrality so long as the school follows the OCR's guidance. Although the Additional Clarification will likely be considered by a court to lack the binding force or effect of law, courts generally give deference to an agency's interpretation of its own regulations.<sup>167</sup>

### IV. IMPLEMENTATION AND RECOMMENDATIONS

Each school will face its own unique set of considerations in deciding whether to implement the Model Survey. For some schools, the question will turn on how confident their athletic departments are of their present Title IX compliance efforts. For other schools, it may

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164. See, e.g., *Save Title IX*, *supra* note 94 ("Because the new Clarification authorizes an approach to providing equal opportunity for female athletes that falls far short of Title IX requirements, schools that choose to use the survey authorized by the Clarification as their sole means of evaluating compliance with the law could be vulnerable to legal challenges by students denied access to participation opportunities as a result. If those challenges are successful, students could be entitled to monetary relief, among other remedies.").

165. See 2 AM. JUR. 2D *Administrative Law* § 236 (2004).

166. But see Rick Taylor Statement, *supra* note 15, at 79 (testifying that the OCR refused to acknowledge Northwestern's efforts since 1987 to expand its women's programs under Prong Two because Northwestern cut women's sports between 1984 and 1987 when Title IX did not apply under the decision of *Grove City College v. Bell*, 465 U.S. 555 (1984)).

167. See, e.g., *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150 (1991) (quoting *Lyng v. Payne*, 476 U.S. 926, 939 (1986) and citing *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)); see also *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046-47 (8th Cir. 2002); *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996); *Kelley v. Bd. Of Trs., Univ. of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994); *Horner v. Ky. High Sch. Athletic Assn.*, 43 F.3d 265, 274-275 (6th Cir. 1994); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3rd Cir. 1993); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993). Note, however, that a school might be required to pay a prevailing plaintiff's attorneys' fees if she successfully attacks the school's use of the Model Survey. See, e.g., *Mercer v. Duke Univ.*, 401 F.3d 199, 212 (4th Cir. 2005).

depend on budgetary factors. For yet others, concerns about public relations or their views of the Model Survey in the context of the ongoing Title IX policy debate may assume greater importance. Factors that lead one school to use the Model Survey might not be very relevant to another institution's decision.

There are legal risks, however, for all schools – even those meeting the proportionality requirements of Prong One – that do not seek to measure and respond to the interests of their potential student-athletes.

Thus, most schools should seriously consider implementing the procedures recommended in the Additional Clarification, including the Model Survey, to gain certainty and the benefit of legal presumptions in a regulatory environment that is vague and subjective in many respects. The Additional Clarification's recommendations may be implemented as part of a multi-faceted Title IX compliance program – used in addition to, rather than as a substitute for, a school's existing Title IX compliance efforts. Such a proactive approach to compliance should enable a school to remain in the good graces of the OCR and should help avoid negative publicity from interest groups that oppose the Model Survey.

This recommendation applies especially to schools that are unable to comply with Prong One, as they should already be monitoring the interests and abilities of their students in any event in order to show compliance under either Prong Two or Prong Three. The opportunity offered by the Additional Clarification for such institutions to put themselves in a position to reap the benefit of the OCR's deference in this area seems too valuable to forego.

Furthermore, even those schools that currently comply with Title IX under Prong One cannot be assured of future Title IX compliance under Prong One as student demographics continue to change. Women became a majority of college students in the 1980s and today comprise roughly fifty-seven percent of all college students.<sup>168</sup> This changing population target makes sustaining proportionality under Prong One difficult. A one or two percent fluctuation in undergraduate population in any given school year could throw a school's athletic department out of the safe harbor of Prong One and expose it to civil litigation or an OCR investigation if it has not taken other steps to comply under Prong Three. Indeed, if a Prong One school at any point in the future attempts to rely on Prong

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168. Karen Blumenthal, *Title IX's Next Hurdle; Three Decades After Its Passage, Rule That Leveled Field For Girls Faces Test From Administration*, WALL ST. J., Jul. 6, 2005, at B1.

Three in defending itself against an investigation, litigation, or a negative media campaign, it will be helpful if it can show that it has historically been cognizant of and responsive to the interests of the underrepresented gender, as demonstrated by its use of the Model Survey.

For a proportional school planning to maintain compliance under Prong One despite any change in demographics, the results of the Model Survey also will help it make the most informed allocation of departmental resources to preserve its proportionality. By continually monitoring its students' athletic interests, for example, a school will be able to assess which women's team would be most popular to add (and most successful if added). Further, if a school can rely on Prong Three's safe harbor, Title IX would not provide any reason for the school to eliminate a men's sport or to impose a "roster cap" on any men's team – steps disfavored by the OCR that schools sometimes take in an effort to achieve Prong One proportionality.<sup>169</sup>

If a school now within Prong One's safe harbor chooses to implement the Model Survey for any of the reasons mentioned above, it will retain complete control over how to respond to Model Survey results demonstrating unmet interest. A proportional school need not even engage in an assessment of its interested students' abilities, much less implement any new varsity team in response to Model Survey interest, while using the Survey to collect valuable data for analysis and use when its student demographics change.

Any school that decides to implement the OCR's suggestions from the Additional Clarification, as part of a multi-faceted Title IX compliance program or alone, should do so with the goal of maintaining the credibility of its compliance program, which will help eliminate criticism and improve the school's prospects in the event of litigation. Further, the Additional Clarification seems to imply that the OCR will give more deference to a school conducting a proactive compliance program than to a school that simply reacts to requests to add new programs if and when they arise. Ways to maximize the transparency of a Prong Three compliance program, as discussed more fully throughout this Article, might include the following:

- Administer the Model Survey periodically.
- Survey all undergraduate students (male and female).
- Make sure that the Survey is administered in a manner designed to generate high response rates (such as making it a mandatory part of the registration process) and is adequately explained.

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169. ADDITIONAL CLARIFICATION, *supra* note 1, at 5.

- Predetermine, for each sport, the level of requisite interest from Model Survey responses that will trigger proceeding to the assessment process.
- Predetermine the process for assessing ability for each sport, which will likely include well-publicized meetings and tryouts.
- Outline, for each sport, expectations for the prospective team's talent level, such as with an athletic department mission statement.
- During the assessment process, avoid consolidating the decisions about requisite ability level in the hands of a single coach, who could later be attacked (fairly or unfairly) for having an agenda. Instead, select a panel with varying vantage points, including disinterested third parties, to make the assessments.

## V. CONCLUSION

The current debate surrounding Title IX and the Additional Clarification is policy-focused. Administrators of institutions seeking to comply with Title IX, however, need to focus not on the policy issues, but on protecting their institutions from OCR or third-party challenges to their Title IX compliance. The Model Survey is a tool that should not be ignored.

Use of the Model Survey as one component of an ongoing and comprehensive Title IX compliance program would likely be beneficial to most institutions. Indeed, if a non-proportional school chooses not to use the Model Survey, it will nevertheless need to employ some other tool to gauge its students' interests and abilities – the results of which would not receive the OCR's deference. The results of the Model Survey, on the other hand, can be objectively assessed within the framework suggested in the Additional Clarification, and can give the school assurance as to whether it has successfully navigated into the OCR's Prong Three safe harbor. Even if unmet interest is demonstrated by the Model Survey, a school can largely direct the manner in which it carries out its assessment process to evaluate the other Prong Three components – and receive the OCR's deference thereto – so long as it follows the OCR's procedural guidance.

Title IX compliance officers should seriously consider whether, by failing to implement the Model Survey, they are leaving their institution vulnerable to an OCR or third-party Title IX challenge – a challenge against which Model Survey results could provide a legal safe harbor.

