Title IX Athletics Q & A

TEST ONE—How Could the Courts Get It So Wrong

Q **Our question is about test one (proportionality) of the three-part test for participation opportunities, and how close is close enough between rates of participation and rates of enrollment to comply. We have understood that the average participation per team for the underrepresented sex is the parameter for how close is close enough. The Department of Justice and the General Counsel's Office of the Department of Education submitted a brief in the Michigan State University case suggesting a much narrower standard. We find the brief, and the subsequent decision by the Sixth Circuit Court, to be troubling. What is your opinion about all of this?** (University General Counsel)

A "Troubling" is putting it much too politely. And, be forewarned, my answer herein is none too polite, as the courts seem inclined to write, and enable advocates — not experts — to write federal policy via their court rooms. The Department of Justice / Office of General Counsel – Department of Education (DOJ/OGC-ED) brief, along with the Sixth Circuit Court stamp of approval: 1) does *not* reflect the policy of the Office for Civil Rights (OCR) of the U.S. Department of Education, per the intent of the OCR experts who drafted the policy; 2) demonstrates a fundamental ignorance of intercollegiate and interscholastic athletics programs and their operations; and 3) reads like a brief written by administrative staff with no field experience. What is especially troubling is that the policy of the DOJ/OGC-ED/Sixth Circuit Court reads the word "reasonable" right out of the Javits Amendment – the 1974 amendment to the Title IX statute – in which Congress directed the Secretary "to prepare and publish . . . *reasonable* regulations for intercollegiate athletic activities considering the nature of the particular sports." [emphasis added] Pub. L. 93-380, title VIII, § 844, Aug. 21, 1974, 88 Stat. 612.

BACKGROUND

Michigan State University (MSU) announced in October 2020 that it would discontinue the men's and women's swimming and diving teams after the 2020-21 academic year. The women's swim team sued the University and sought a preliminary injunction requiring the continuance of their team. Michigan State University claimed compliance with Title IX per test one of the three-part test for participation opportunities.

The three-part test is OCR's policy for analyzing whether an institution is providing equitable participation opportunities under Title IX (institutions only need to meet one test of the three-part test to comply). If choosing to comply with test one, an institution must offer participation opportunities for women and men at rates substantially proportionate to their respective rates of enrollment. The courts and the briefs go to unnecessary lengths to distinguish "numbers" of participants from "rates" of participation. Stating that the acceptable difference under test one is a matter of comparing *rates* of enrollment to *rates*

of participation is simply a short-hand way to explain the difference that exists at a specific institution. Per OCR's 1996 "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (Policy Clarification), those ratios translate to a specific number of participants per the specific institution's program (see note 1 of "Notes" on page 17 for a brief explanation of the three-part test for participation opportunities and the two-part test for levels of competition). (1)

Michigan State's version of enrollment and participation figures, as outlined in the district court case, showed the following: women were 50.9% of the enrollment and 50.3% (450) of the intercollegiate athletes; men were 49.1% of the enrollment and 49.7% (445) of the 895 total intercollegiate athletes. There was a 0.6 percentage point difference between rates of participation and rates of enrollment (50.9% – 50.3% for women; 49.7% – 49.1% for men). Women's average team size was 35 (Michigan State had 13 women's teams; 450 ÷ 13 = 35). The number of women to be added to the program to achieve exact proportionality was 12. In effect: 450 women + 12 = 462; 462 women added to men's participation of 445 = 907; 462 of 907 = 50.9%, which matches women's enrollment of 50.9%. (The number to achieve exact proportionality after the teams were discontinued was estimated at 15 participants.)

The federal district court, citing OCR policy, found that because the number of women to be added to achieve exact proportionality – 12 – was less than women's average team size – 35 – the plaintiffs did not show that they were likely to succeed on their claim. The court denied plaintiffs' motion for a preliminary injunction, and found for the University. (2)

The plaintiffs on the women's swim team appealed to the Sixth Circuit Court of Appeals, and the Department of Justice, the Office of the General Counsel within the Department of Education, and representatives of various advocacy groups, filed amicus briefs in support of the plaintiffs. The Sixth Circuit Court, in a 2-1 majority decision, essentially found for the plaintiffs, vacated the district court decision, and remanded the case to the district court for further proceedings consistent with the opinion of the Sixth Circuit Court. (3)

THE DEBATE

The question being debated in the MSU case is what constitutes "substantial proportionality," in effect, how close is close enough between women's and men's rates of participation and their respective rates of enrollment to meet test one of the three-part test. OCR answered that question in its 1996 Policy Clarification. The debate concerns the interpretation of the 1996 Policy Clarification language, which states:

> "OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution." (4)

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DOJ/OGC-ED/Advocacy Groups/Sixth Circuit Court Perspective

In essence, the DOJ/OGC-ED/Sixth Circuit Court interpretation considers the number needed for a viable team for the specific sport in question at the specific institution to determine how close is close enough. Per the Sixth Circuit Court: "Based on the clear language of the guidance, a viable team is not an average one, but is instead one 'for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.'" "The district court erred when it compared the participation gap to the size of the average team at MSU, rather than the size of a viable team." The DOJ/OGC-ED argued in their brief, "If MSU can field a viable team of eight female tennis players, for example, it will not have satisfied prong one." (The district court had rejected plaintiffs' contention that a participation gap as small as eight athletes would not comply with test one.)

The practical result of the Sixth Circuit Court decision is that, to meet test one, an institution may be required to offer rates of participation within three participants of exact proportionality with rates of enrollment if the sport in question at that institution is rifle (considering interests, abilities, and competition), or 5 or 6 participants if the sport is golf, etc. (see note 5 for a list of women's average team sizes by sport for NCAA institutions). (5)

OCR-ED/District Court/Dissenting Sixth Circuit Senior Judge Perspective

The district court's interpretation relies on the average team size for the underrepresented sex (women in this case, whose average team size was 35 at Michigan State), as the number to use for determining how close is close enough to exact proportionality. (MSU's average team size is among the largest of women's average team sizes that this author has seen in 43 years of reviewing athletics programs for Title IX compliance.)

The district court's interpretation of the 1996 Policy Clarification is exactly the interpretation provided to this author, shortly after the issuance of the 1996 Policy Clarification, by her former colleagues at the Office for Civil Rights who drafted that policy. If OCR had intended for the number for a viable team to be dictated by the sport in question at the particular institution, it would have been easy enough to say so in its 1996 policy. And if, per the Sixth Circuit Court, ". . . a viable team is not an average one," then there is absolutely no purpose for OCR to write the sentence: "As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution."

Among OCR's many considerations, using the average team size precludes the endless debates about the exact number needed for a "viable team" for every single sport sponsored for women and men by the NCAA, NAIA, NJCAA, CCCAA, NWAC, other national athletics associations, and the high school athletic associations in the 50 states and the District of Columbia (secondary programs are also covered by the 1996 Policy Clarification, and according to data of the National Federation of State High School Associations, over 60 different sports are offered by member schools). (6) In stating that OCR may consider using the average team size as a frame of reference in analyzing the number for a viable team, OCR is indeed stating that the parameter to be used for a viable team *is* the average team size.

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Crafting federal policy for the challenging issues of civil rights mandates retaining the flexibility to enforce compliance on a case-by-case basis. Thus, the language of "may consider" in the 1996 Policy Clarification allows OCR flexibility in enforcing an appropriate remedy when evidence demonstrates artificial numbers manipulation by institution officials. Unfortunately, it also leaves open for debate the discussion currently in the courts.

The briefs submitted by the DOJ/OGC-ED and advocates allege that institutions would simply drop women's teams with small roster sizes, thereby increasing women's average team size and the number that is the parameter for determining how close is close enough for participation rates to be substantially proportionate to enrollment rates. This advocates-generated allegation fails to recognize that this is precisely the reason why OCR has written the words "may consider" in its 1996 Policy Clarification — to address the unlikely, but potential, actions of any institution engaged in artificial numbers manipulation that is unacceptable under Title IX. What is stunning is that the U.S. Department of Justice, and especially the Office of the General Counsel of the U.S. Department of Education, have adopted this advocates-generated claim and put this allegation in a written brief to a United States Appellate Court, because inherent in this allegation is that the Office for Civil Rights of the U.S. Department of Education does not know how to do its job. To accept an institution's discontinuance of women's teams with small roster sizes in favor of teams with larger roster sizes is to read the words "selection of sports" right out of the Title IX regulation at 34 C.F.R. § 106.41(c)(1). Reading the Title IX regulatory requirements right out of its enforcement strategy is not OCR's approach. The Title IX requirements at 34 C.F.R. § 106.41(c)(1), and the 1979 Intercollegiate Athletics Policy Interpretation's three-part test, do not boil down to a rote, test one numbers game that ignores what sports are actually offered to women and men. (7)

An institution that offers the sports of greatest interest to men, but offers sports of lesser interest to women because of larger roster sizes, would be cited by OCR for failure to comply with 34 C.F.R. § 106.41(c)(1) regarding the accommodation of interests and abilities. The DOJ/OGC-ED/advocates' argument that institutions would be able to discontinue, for example, women's basketball, cross country, golf, tennis, volleyball, or other teams with small roster sizes, in favor of teams with much larger roster sizes, is simply wrong. It is not acceptable under Title IX, and it would not be acceptable to OCR.

Undoubtedly, the OCR experts who wrote the 1996 Policy Clarification did not concern themselves with this allegation, because for OCR, comparing the selection of sports being offered to men and women is where any Title IX athletics investigation begins. This is a fairly quick analysis, since it does not take long to identify the extent to which an institution is offering the most popular sports to women and men. Furthermore, it is routine in OCR's investigations to review: the sports offerings and participation in an institution's club, intramural, and recreation programs; any feeder programs, e.g., interscholastic and community programs when analyzing an intercollegiate athletics program for compliance; and the results of any assessments of interest. This analysis is all part of identifying sports that an institution could offer that it is not currently offering.

When an institution claims compliance with test one, OCR reviews the status of each student-athlete, and analyzes the roster sizes of the sports being offered to ensure that they are not artificially inflated. OCR's interviews with coaches would include a series of questions regarding their preferences and success in coaching teams with varying roster sizes, and the answers to those questions may generate additional questions.

OCR's 1996 Policy Clarification elaborates on the definition of participants, and the language allows enforcement flexibility in stating: "As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR." The reasoning behind this definition is that anyone still on the team as of the first date of competition has received coaching and practice for weeks and has been provided the benefit of participation. This definition does not, of course, preclude OCR from questioning coaches about any athletes who are cut or added near the first date of competition. But, as is clear from the current debate, the 1996 policy does not address the many scenarios affecting participation; for example, athletes joining the team after the first date of competition are also counted as participants under Title IX.

The Biediger Court – Creating Policy Detrimental to Women

The first court to delve into counting athletes participant by participant was the district court in the case of *Biediger v. Quinnipiac University*. (8) In its 2013 decision, the Biediger Court: 1) created its own standard for counting participants, those with "genuine" opportunities, which included not counting an athlete who actually participated in a regular season contest; 2) did not count the participants on two women's teams as intercollegiate athletes, but then analyzed their contests as part of the intercollegiate program and found the University in violation of the two-part test because of those contests; 3) ignored written OCR policy and created policy harmful to women under the two-part test for levels of competition; and 4) hinted at using a number less than the average team size to determine how close is close enough. But perhaps most concerning — the Biediger Court implied policy that would destroy the three-part test and its protections for women in suggesting that emerging sports participation, when not counted under test one, may be counted under test two and/or three. Such a policy would allow athletics administrators everywhere to claim compliance with test two – program expansion for the underrepresented sex, or test three – full accommodation of the underrepresented sex, by counting all those participants on the women's club teams as intercollegiate athletes; just be sure to call those club teams "emerging sports" teams.

If future court cases look to any precedent considered set by the Biediger case, then in addition to the flawed analyses and the creation of, and implication of, policy detrimental to women, consider also that the Biediger Court was not faced with the particularly gnarly questions of who to count on football teams, since Quinnipiac University did not offer a football team. One can only wonder how many football athletes the Biediger Court might have decided do, and do not have, "genuine" participation opportunities, especially of those with circumstances more common for football, such as medically disqualified and spring add-on athletes who receive scholarships. Indeed, it is because of the many variants affecting participation, including those the Biediger Court likely never imagined, that OCR developed the policy that it did (see page 7).

OCR'S POLICY FOR HOW CLOSE IS CLOSE ENOUGH

Until 1996, OCR did not have an established policy for how close is close enough between participation and enrollment rates to meet test one, and made decisions on a case-by-case basis. In practice, differences of five percentage points were being accepted by some of OCR's regional offices. Five percentage points was also the difference accepted by the California National Organization for Women in an agreement signed on via consent decree by a California Superior Court. Cal-NOW had sued the Board of Trustees for the California State University system, and among other stipulations, the parties agreed to a parameter of five percentage points between rates of participation and rates of enrollment (the consent decree expired in 1999). (9) The DOJ/OGC-ED/Sixth Circuit Court assertion is unfounded and illogical that OCR intended for its policy to change radically from an enforcement history of five percentage points to citing institutions in violation of Title IX for, potentially, being a mere half a percentage point, e.g., six participants difference, from exact proportionality.

OCR's 1996 Policy Clarification was the end product of early to mid-1990s debates regarding test one and accusations by men's advocacy groups that Title IX is a quota law. The men's accusations were the unsurprising backlash to women's advocates who, beginning in 1992, declared that Title IX requires proportionality. The celebrated spokesman of the men's advocacy groups was Congressman Dennis Hastert of Illinois, who became Speaker of the U.S. House of Representatives in 1999. In a 1995 hearing called for by Congressman Hastert, he accused OCR of enforcing only the proportionality test (test one) and illegal quotas. Subsequent Government Accountability Office studies showed those accusations to be incorrect. As a result of the hearing, the congressional subcommittee instructed OCR to clarify that there are three distinct tests for compliance regarding equitable participation opportunities. (10, 11)

The OCR experts who drafted the 1996 Policy Clarification had investigated athletics programs with 80 participants each on the women's and men's track teams at one institution, and 18 participants each at another institution, and 22 football participants at one institution and 160 participants at another institution. Based on years of investigative experience, OCR's experts understood the endless debates that would occur about what number constitutes a "viable team" in every single sport sponsored at educational institutions nationwide. OCR's experts also understood the practical effect of using the average team size as the acceptable parameter, as OCR no doubt tested this approach on an array of cases before adopting it as policy. And, OCR recognized that its policy of using the average team size was indeed the flexibility necessary when creating — in accordance with the instructions of Congress — "reasonable regulations . . . considering the nature of the particular sports." OCR's 1996 Policy Clarification necessarily recognizes that numbers of participants are influenced by so many things, including:

- athletes who choose to quit a team, potentially at inopportune times;
- athletes who get injured at inopportune times and leave the team;
- athletes who are added to the team during traditional seasons;
- athletes who are added to the team during nontraditional seasons;
- coaches who cut athletes at times not convenient but to rid their team of troublemakers who are affecting team chemistry;
- coaches who cut athletes over concerns about the students' health and safety;
- the promising recruits who the coaches thought they had signed, but who decided at the last possible moment to attend another institution;
- gifted athletes who no one knew to recruit decide to walk-on to the team two weeks into the season;
- athletes who did not try-out because of a nagging injury, join the team after the first competitive event;
- mid-year transfers;
- mid-year enrollees;
- redshirts;
- medicals;
- medicals who receive scholarships;
- medically disqualified;
- medically disqualified who receive scholarships;
- spring add-ons;
- spring add-ons who receive scholarships;
- international student-athletes joining the team in mid-season because their visa applications were delayed by red tape;
- just plain homesick teenagers (so . . . he left the team, came back for three weeks, then left the team again, then . . .);
- rambunctious teenagers violating team rules and getting dismissed from the team;
- and athletes who receive athletic scholarship money but leave the team for personal reasons before the first contest.

The above list is not finite. New NCAA rules, still being refined, regarding "transfer portal" athletes have created even more challenges to counting participants accurately. Student-athletes may have their names placed on transfer portal lists indicating their willingness to transfer educational institutions. Coaches from other institutions may then recruit those athletes. A student-athlete transferring in mid-season may practice and compete at one school, and then practice and receive coaching but not compete at another school, in the same year. Under Title IX, it is possible for the individual athlete to be counted as a participant at two different institutions in the same year.

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Under OCR's definition of a participant, athletes who cannot participate due to injury, but who are nonetheless receiving an athletic scholarship, are counted as participants. The definition is understandable, as the award of an athletic scholarship makes clear the intent to have that individual on the team, and despite their injuries, those athletes are receiving the benefit of participation, i.e., a scholarship based on their athletic ability. The problem for coaches, of course, is that the injured athlete cannot practice and compete and help the team succeed. What happens if the coach wants to add someone to the roster to replace the injured athlete? Under OCR policy, the individual that is added to the roster would also be counted. What happens if that one individual puts the institution outside the magic number for the definition of proportionality apparently accepted by the majority decision of the Sixth Circuit Court? (This author has seen as many as seven football athletes in a given year who are counted as participants because they receive scholarships, yet due to injury are unable to practice or compete.)

EXAMPLES OF HOW CLOSE IS *NOT* CLOSE ENOUGH PER DOJ / OGC-ED / SIXTH CIRCUIT COURT

In 2013, the Biediger Court noted, in quoting the 2009 case of *Equity in Athletics, Inc., v. Department of Education* (12), that no institution had been cited for noncompliance with test one when the difference was 2.0 percentage points or less. The DOJ/OGC-ED/Sixth Circuit Court interpretation would require many – if not most – institutions to be well within 2.0 percentage points to meet their new standard of compliance for test one, as demonstrated by the figures on page 9. Indeed, Quinnipiac University would have needed to be within 1.2 percentage points of exact proportionality, per dicta of the Biediger Court; and potentially, the 0.6 differential at Michigan State is not close enough.

The following table shows the participation numbers and rates that are not close enough to enrollment rates to comply per the Sixth Circuit Court's new interpretation of Title IX. In these examples, each institution has an enrollment of 50.0% women and 50.0% men. The numbers/information in the columns are: 1) the total intercollegiate athletics participation; 2) the total female athletes; 3) the percent of total athletes who are women; 4) the total male athletes; 5) the percent of total athletes who are men; 6) the number to add to the underrepresented sex to achieve exact proportionality with enrollment; for example, for the institution with 800 participants, 392 of whom are women and 408 of whom are men, 16 athletes would need to be added to the women's program (392 + 16 = 408) to achieve participation that is 50.0% women (408 athletes) and 50.0% men (408 athletes); 7) yes or no whether the number to be added to achieve exact proportionality is sufficient for a viable team; and 8) the percentage points difference between rates of participation and rates of enrollment that *does not comply* with Title IX because the number of athletes to be added in column 6 is enough for a viable team.

For each example, the numbers show the potential compliance conclusion should golf be the sport in question at an institution that does not offer golf to men and women. Many institutions have golf teams with only six participants, and some with only five participants. The numbers in the table for golf list women as participating at six participants below exact proportionality. However, these same figures would apply in reverse, if the number of male participants is six participants below exact proportionality.

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The examples in the table assume that, regardless of the NCAA's average team sizes for women, 16 is, arguably, a minimally sufficient number of participants for all 21 championship sports sponsored for women by the NCAA. The asterisk (*) for programs with 400, 300, 200, and 100 total participants denotes that compliance is dependent on the sport in question at the specific institution.

1 intercollegiate program participation	2 women	3 percent women	4 men	5 percent men	6 number to add	7 sufficient for viable team?	8 percentage points difference that DOES NOT COMPLY
800	392	49.0%	408	51.0%	16	yes	**1.0**
GOLF	397	49.6%	403	50.4%	6	yes	**0.4**
700	342	48.9%	358	51.1%	16	yes	**1.1**
GOLF	347	49.6%	353	50.4%	6	yes	**0.4**
600	292	48.7%	308	51.3%	16	yes	**1.3**
GOLF	297	49.5%	303	50.5%	6	yes	**0.5**
500	242	48.4%	258	51.6%	16	yes	**1.6**
GOLF	247	49.4%	253	50.6%	6	yes	**0.6**
400	193	48.3%	207	51.7%	14	yes*	**1.7**
GOLF	197	49.3%	203	50.7%	6	yes	**0.7**
300	145	48.3%	155	51.7%	10	yes*	**1.7**
GOLF	147	49.0%	153	51.0%	6	yes	**1.0**
200	96	48.0%	104	52.0%	8	yes*	**2.0**
GOLF	97	48.5%	103	51.5%	6	yes	**1.5**
100	47	47.0%	53	53.0%	6	yes*	**3.0**
GOLF	47	47.0%	53	53.0%	6	yes	**3.0**

THE MAGIC NUMBER FOR A VIABLE TEAM BY SPORT IS . . . .

Some basic questions about the DOJ/OGC-ED/Sixth Circuit Court interpretation are these: If athletes who are on the team receiving coaching and practice are counted as of the first date of competition, per OCR policy, does the institution violate federal law if three athletes quit the day before the first contest, and the institution has challenges replacing those athletes? And, what happens if the coaches find replacement athletes, but they have questionable skills and primarily "ride the bench?" Will the institution be cited by the likes of the Biediger Court that chooses not to count such athletes because the court determines that those athletes are not receiving a "genuine" participation opportunity, or the next allegation/interpretation, those individuals are not genuine athletes? Does the phrase "reasonable regulations" written by the United States Congress really mean that if three adolescents quit their teams at the wrong time, the institution violates federal law? In the real world of athletics programs, that is the effect of the Sixth Circuit Court's interpretation, which begs the question, is that really the Sixth Circuit Court's interpretation of Congressional intent?

The OCR experts who drafted the 1996 policy knew that a policy requiring that participation be proportionate to enrollment within three participants (the average team size, and theoretically a viable team size, for women's rifle at NCAA Division III institutions) or seven participants (the average team size, and theoretically, a viable team size, for women's golf at NCAA Division III institutions) was unreasonable, in view of all of the factors that influence participation.

While at OCR, this author led the team investigating an NCAA Division I institution where the women's field hockey team had 13 participants for two consecutive years and competed at or near the NCAA maximum number of contests for field hockey. The average participation for NCAA institutions offering field hockey is 22. Now, if the sport in question at the defendant institution is field hockey, which number will the courts use – 22 or 13? Or, maybe it is 11, since 11 athletes are on the field at one time. There would be a parade of athletics experts testifying as to the minimum number that constitutes a "viable team" for field hockey, or any fill-in-the-blank sport. And indeed, the average participation numbers for women's volleyball is 17 across all NCAA member institutions. Per the Biediger Court, however, Quinnipiac University's volleyball team "required a mere fourteen players to compete this past season." The fact is, only six athletes play on the volleyball court at one time. Arguably, six is enough for a viable team, or if the team is to be competitive (do we consider competitive, or viable, or is competitive to be synonymous with viable?), it may have two or three substitutes to fill in for reasons of fatigue or injury; then, maybe nine is enough for a viable volleyball team (or would eight do the trick? – we need to know the exact number to avoid violating federal law).

If, indeed, the "viable team" size for the sport in question at the specific institution determines how close is close enough to meet test one, then OCR could simply issue a list of sports and the acceptable, magic number by sport for the 60 to 70 different sports offered nationwide at the interscholastic and intercollegiate levels. That, by the way, makes the language from the 1996 Policy Clarification less accurate, as the magic number would not "vary by institution" per the policy language so much as it would vary by sport. And, is the number for a viable team by sport also to differ by division level? The NCAA Division III average team size for women's water polo is 14, while for Divisions I and II, it is 21 and 20, respectively. Education

administrators everywhere will be curious which number is to be used, since a difference of one participant is the difference between complying with federal law and violating federal law. But again, the NCAA average for volleyball across all divisions is 17, and we're back to the Biediger Court, which has already implied kind of, sort of, that 14 really is enough for a volleyball team.

If the Sixth Circuit Court's version of policy becomes the new Title IX policy, then either OCR issues a list of sports and the acceptable numbers to use as "viable teams" by sport, or the federal courts will follow the lead of the Biediger Court and continue the trend of writing federal policy for Title IX athletics, rather than leave that to OCR, the federal agency with the legal authority to write policy; that federal agency whose alums include multiple U.S. federal court judges. And the question becomes, how many courts will enable advocates to write federal policy via the courts rather than let the federal agency with the experts and the legal authority to write policy actually write the policy.

The answer as to which advocates testifying as "experts" the courts rely on when making federal policy is extremely important, because the advocate that convinces the court that they are an expert and gets to be the one to make federal policy and decide it is *this* number versus *that* number for determining how close is close enough, is paramount – since, again, one number off can make the difference between complying with the law or violating the law. (One imagines university administrators lying awake at night thinking: Oh darn, did that young person really quit the team on the day before the first game? Oh, wait a minute, it was the day of the first game. No, it was the day after the first game. *Expletive!* — the assistant coach who normally records daily participation missed practice for three days due to a family emergency, and did not record in the CARA log which day the athlete actually quit! [And yes, in my interviews with compliance staff going through squad lists name by name – which is a routine part of my athletics program reviews – these conversations are already happening].) (13) And, does it really matter which day the athlete quit, because the Biediger Court may come right behind and say it is not a "genuine" opportunity, regardless of written OCR policy. Education administrators can never know for sure the number of athletes for Title IX compliance when the courts show a proclivity for second-guessing their participation counts.

Over the years, OCR has routinely taken the position that staff are civil rights professionals, not athletics professionals. Unfortunately, athletics professionals have taken the position that they are also civil rights professionals, going so far as to label themselves experts on federal civil rights policy, while continuously misinterpreting the Title IX athletics requirements in presentations, books, videos, writings, and the federal courts. This includes an advocate who has falsely claimed in federal court documents to have "helped write" OCR's 1979 Intercollegiate Athletics Policy Interpretation, and convinced at least one federal district court judge that this inaccurate representation of credentials is true. Does a federal judge being misled by an advocate now make this inaccurate claim of authorship a fact? And, does that now set precedent in the courts, where the courts repeat this to the point where the inaccuracy becomes "fact?" The courts continue to hear testimony from advocates, but not from those who truly are experts, the OCR staff who drafted the policy. Consequently, the courts are left with whom to believe, and if the courts do not like what they hear, they may be inclined to create their own policy, as the Biediger Court did – which again, in rejecting written Office for Civil Rights policy, created policy harmful to women.

FLUCTUATIONS IN PARTICIPATION — IT IS THE "NATURE OF THE PARTICULAR SPORTS"

Analyzing athletics programs for Title IX compliance has been my profession for 43 years and counting, including 15 years in OCR headquarters, and 28 years as a consultant. I know of no one in the United States who has reviewed as many athletics programs as I have for Title IX compliance. I have never seen an institution's athletics program where every single team has the exact same number of participants for two consecutive years. It is not the nature of sports. To illustrate this point, the actual participation numbers in consecutive years for 20 of my client institutions meeting or very close to meeting test one are included below in the "Notes." As shown in the tables, 294 of the 348 teams offered – 84% – do not have the same number of participants in consecutive years. Furthermore, the enrollment rates changed at 19 of the 20 institutions – 95% – in consecutive years. Women's enrollment increased at six institutions (increases ranging from 0.1 percent to 1.2 percent), while women's enrollment decreased at thirteen institutions (decreases ranging from 0.2 percent to 1.0 percent). Men were the underrepresented gender at some of these 20 institutions, where men's average team sizes range from 18 to 44 participants, while women's average team sizes range from 14 to 31 participants (the institution with 31 as the women's average team size is the same as one of the institutions with 44 as the men's average team size). (14) (See note 15 regarding secondary institutions, which are also covered by this policy, where girls' average team sizes may, for example, be 10-15 participants; those numbers may translate into differences of 1.0 to 1.5 percentage points between rates of participation and rates of enrollment.) (15)

My recent conversation with an NCAA Division I-FBS women's gymnastics coach who has 20 years of experience is typical. The coach prefers to have 15 to 18 athletes on her team. When asked about the 22 athletes on her roster, she explained that in some years, there may be athletes who are excellent on all four apparatus, while in many years, there are athletes who are excellent on one or two apparatus. The challenge of developing the skill sets of the specific athletes on the team in the current year, combined with injuries that occur in gymnastics, means that in some years she is "glad to have 22 athletes" on her roster. This is not an isolated scenario for a single coach. I have heard this same explanation *hundreds* of times in interviewing coaches over the course of four decades. The number of athletes coaches choose to keep on their teams in any given year is influenced significantly by the varying skills of those athletes in that given year.

The comments of a highly respected and nationally known female athletics administrator, who has also had a successful coaching career, further illustrate this point. According to the administrator, a targeted roster size per coaches' and administrators' discussions may be exceeded or missed depending on several factors. Conference rules regarding the sizes of travel squads can affect coaches' choices about the preferred number of athletes for their teams. The success in recruiting in a given year can affect the number of walk-ons a coach may try to encourage and retain. Recruited student-athletes' choices not to enroll, student-athletes withdrawing from school for personal reasons, injuries, mid-year enrollees, may all influence the roster sizes even when coaches have identified a specific number that is ideal for their team.

Consider the possibility should the women's gymnastics coach be free to recruit and retain the best athletes available in a specific year: women's gymnastics has 15 participants one year and 22 the next when a particularly successful recruiting year yields a crop of promising first year students; the result – a difference of 7 participants from one year to the next – for a single team. Multiply that difference of 7 by 20 teams, and overall program participation numbers can vary significantly from one year to the next. And, while rates of participation may change annually, these rates are compared to rates of enrollment, which may also change annually.

For the institution that chooses test one (proportionality) as its compliance method, some controls by administrators are appropriate. However, I know of no one in the field of athletics who believes that administrators should dictate to coaches the exact number of athletes to be on their teams. Indeed, the 2009 Biediger Court takes Quinnipiac University to task for administrators dictating the number of athletes to have on their teams without consulting the coaches. Despite this apparent admonition, administrators dictating to coaches the number of participants that must be on their teams is exactly what will have to happen if the absurdly narrow interpretation proposed by the DOJ/OGC-ED/Sixth Circuit Court becomes the new interpretation of the Title IX athletics provisions. The women's gymnastics coach will not have the freedom to choose between 15 and 18 participants; administrators will be required to dictate to the gymnastics coach the exact number of athletes that must be on her team. And then what, the institution will be accused of having artificial participation numbers that are not the numbers preferred by the coaches.

The advocates-generated interpretation accepted by the Sixth Circuit Court appears not to consider the following scenario: the women's gymnastics coach keeps 22 on the team; or another women's coach exceeds what is instructed by administrators; or several women's coaches exceed by one participant what is instructed by administrators; or two or more women's teams must add athletes to replace athletes who were injured or who quit, and all of those athletes – the injured, those who quit, and those athletes who were added as replacements – are counted under Title IX. And, this year, men are the underrepresented gender. The men's golf team, which was cut due to pandemic woes, sues to be reinstated, arguing that six participants is enough for a viable golf team. Turns out, a couple of athletes quit the men's soccer team on the day before the first game when finding out they were not named to the starting lineup, and . . . OOPS — *the institution is now seven participants away from exact proportionality — and violating federal law.* And, if the courts are inclined to follow the lead of the Biediger Court and apply their own interpretation of a "genuine" participation opportunity and not count an individual who actually participates in a regular season contest, then institutions may have little hope of complying with test one.

Of course, as a sideline to all of this is that the litigation opportunities are endless. This is particularly true if the courts are willing to entertain allegations based on EADA data — rarely accurate for Title IX participation counts — or web rosters — which are by far the least accurate for Title IX participation counts. (16) How much money will it cost the institution in a court case if athletes quit or get injured at inopportune times? How many six-figure settlements will institutions be paying out to attorneys of would-be plaintiffs who merely threaten litigation? Attorneys everywhere must be salivating over the idea of getting rich quick just by threatening litigation and having their boilerplate settlement agreements ready for institution officials to

sign away money to the attorneys, money that would be better spent on the students (institution officials, who are already beyond stressed because they have been dealing with covid-stressed students for two years and counting, and who have more important things to deal with, like covid-testing, would no doubt be inclined to settle and make it go away as quickly as possible).

In writing its 1996 Policy Clarification, OCR states that flexibility in its policy is necessary due to the natural fluctuations in participation and the natural fluctuations in enrollment. The policy promoted by the DOJ/OGC-ED/Sixth Circuit Court allows no flexibility. Per the dissenting Senior Judge in the Sixth Circuit, the 2-person majority's decision "is tantamount to requiring perfection, not substantial proportionality." In essence, the magic number designated by sport – a number that may be as small as three – is absolute, and the absolute number by sport is to be determined by whomever, if these *unreasonable* regulations regarding the nature of the particular sports are cemented as the new Title IX policy.

In the 26 years that I have reviewed athletics programs subsequent to the issuance of OCR's 1996 Policy Clarification, my experience is that most institutions must have participation rates within about 2.0 percentage points difference from enrollment rates to meet test one. OCR's policy of using the average participation per team for the underrepresented sex allows for larger parameters for the smallest of programs, such as 3.0 percentage points, and smaller parameters for the largest of programs, such as 1.7 percentage points. In effect, OCR's 1996 policy of using the average team size has had exactly the result that I expect my former colleagues who wrote this policy had intended. In accordance with the directions of the United States Congress, OCR developed a reasonably tight standard that allows for the flexibility necessary based on the "nature of the particular sports," and the recognition from years of experience in analyzing programs for compliance, that there are *natural* fluctuations in participation and enrollment annually that must be considered and accommodated.

CONCLUSION

The DOJ/OGC-ED/Sixth Circuit interpretation of OCR's 1996 "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" is *not* the interpretation of Title IX policy per the intent of the OCR experts who wrote that policy. Rather, the interpretation of the federal district court and the dissenting Sixth Circuit Senior Judge is the interpretation intended by the OCR experts who wrote that policy. In the opinion of this author (whose professional career and graduate school research constitute 45 years of Title IX athletics specialization), the interpretation promoted by the DOJ/OGC-ED/Sixth Circuit Court is untenable; per that interpretation, test one (proportionality) — a test that the courts have traditionally referred to as a "safe harbor" — will be safe no more.

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SUMMARY POINTS

The DOJ/OGC-ED/Sixth Circuit Court interpretation of OCR's 1996 "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" is *not* the interpretation of Title IX policy per the intent of the OCR experts who wrote that policy.

Among OCR's many considerations, using the average team size as the acceptable parameter for how close is close enough precludes the endless debates about the exact number needed for a "viable team" for over 60 women's and men's sports offered by member institutions of the NCAA, NAIA, NJCAA, CCCAA, NWAC, other national athletics associations, and the high school athletic associations in the 50 states and the District of Columbia.

The briefs submitted by the DOJ/OGC-ED and advocates allege that institutions would simply drop women's teams with small roster sizes, thereby increasing women's average team size and the number that is the parameter for determining how close is close enough for participation rates to be substantially proportionate to enrollment rates. What is stunning is that the U.S. Department of Justice, and especially the Office of the General Counsel of the U.S. Department of Education, have adopted this advocates-generated claim and put this allegation in a written brief to a United States Appellate Court, because inherent in this allegation is that the Office for Civil Rights of the U.S. Department of Education does not know how to do its job. To accept an institution's discontinuance of women's teams with small roster sizes in favor of teams with larger roster sizes is to read the words "selection of sports" right out of the Title IX regulation at 34 C.F.R. § 106.41(c)(1). Reading the Title IX regulatory requirements right out of its enforcement strategy is not OCR's approach. The Title IX requirements at 34 C.F.R. § 106.41(c)(1), and the 1979 Intercollegiate Athletics Policy Interpretation's three-part test, do not boil down to a rote, test one numbers game that ignores what sports are actually offered to women and men.

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Until 1996, OCR did not have an established policy for how close is close enough between participation and enrollment rates to meet test one, and made decisions on a case-by-case basis. In practice, differences of five percentage points were being accepted by some of OCR's regional offices. The DOJ/OGC-ED/ Sixth Circuit Court assertion is unfounded and illogical that OCR intended for its policy to change radically from an enforcement history of five percentage points to citing institutions in violation of Title IX for, potentially, being a mere half a percentage point, e.g., six participants difference, from exact proportionality.

In 2013, the Biediger Court noted that no institution had been cited for noncompliance with test one when the difference between participation and enrollment rates was 2.0 percentage points or less. As shown on page 9, the Sixth Circuit Court interpretation would require many, if not most institutions to be not just within — but *well within* — 2.0 percentage points to meet the Court's new standard of compliance for test one.

Does the phrase "reasonable regulations" written by the United States Congress really mean that if three adolescents quit their teams at the wrong time, the institution violates federal law? In the real world of athletics programs, that is the effect of the Sixth Circuit Court's interpretation, which begs the question, is that really the Sixth Circuit Court's interpretation of Congressional intent?

At 20 client institutions meeting or very close to meeting test one, 84% of the teams offered did not have the same number of participants in consecutive academic years. Moreover, the rates of enrollment changed at 95% of these institutions in consecutive academic years.

NOTES

1) Civil rights laws have two basic requirements: equal access; and equal treatment of those who have gained access. The Title IX athletics policies follow this same pattern. The equal access requirement for athletics programs is addressed by an issue labeled as the "accommodation of interests and abilities." Within that issue, there is a three-part test for participation opportunities and a two-part test for levels of competition. Institutions need only meet one test of the three-part test and one test of the two-part test. The three tests of the three-part test are (paraphrased):

    1) provide participation opportunities for women and men at rates that are substantially proportionate to women's and men's rates of enrollment; or

    2) if students of one sex are underrepresented, demonstrate a history and continuing practice of expanding the participation opportunities for the underrepresented sex as their interests and abilities develop and evolve; or

    3) if students of one sex are underrepresented, fully accommodate the under-represented sex by offering every team for which there is sufficient interest and ability for the team, and sufficient competition for that team in the institution's normal competitive region.

    The two tests of the two-part test are:

    1) whether the competitive schedules for men's and women's teams afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

    2) demonstrate a history and continuing practice of upgrading the competitive opportunities for the historically disadvantaged sex as their abilities develop.

    Compliance with the two-part test is nearly universal at the postsecondary level.

2) *Balow, et al, v. Michigan State University, et al.,* Case No. 1:21-cv-44; February 19, 2021, in the United States District Court, Western District of Michigan, Southern Division

3) Sixth Circuit Court decision *Balow, et al, v. Michigan State University, et al.,* No. 21-1183, decided and filed February 1, 2022

4) See the full text and our summary of OCR's January 16, 1996 "Clarification of Intercol-legiate Athletics Policy Guidance: The Three-Part Test" at www.TitleIXSpecialists.com

5) The following shows the 2019-20 average participation for women's sports sponsored by the NCAA at the three division levels – Divisions I, II, and III. The NCAA reports calculate the participation numbers to the tenth of a percent. Those figures are rounded in the tables below.

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NCAA 2019-20 Participation for Championship Women's Sports				
Championship Sports	**Division I**	**Division II**	**Division III**	**Overall**
basketball	15	15	15	15
beach volleyball	17	17	15	17
bowling	10	9	10	9
cross country	17	13	13	14
fencing	16	15	16	16
field hockey	24	23	22	22
golf	8	8	7	8
gymnastics	18	20	20	19
ice hockey	24	26	24	24
lacrosse	33	24	21	25
rifle	7	5	3	7
rowing	63	30	29	49
skiing	14	9	12	12
soccer	29	29	26	28
softball	22	22	20	21
swimming	30	21	20	23
tennis	9	9	10	10
indoor track	40	32	29	34
outdoor track	40	30	28	33
volleyball	17	17	17	17
water polo	21	20	14	19

NCAA 2019-20 Participation for Emerging Women's Sports				
Emerging Sports	**Division I**	**Division II**	**Division III**	**Overall**
archery	NA	NA	NA	NA
badminton	NA	NA	NA	NA
esports*	0	1	5	4
equestrian	40	27	24	31
rugby	32	31	27	30
squash	14	NA	13	14
synch. swimming	20	NA	6	15
team handball	NA	NA	NA	NA
triathlon	9	6	7	7
wrestling	NA	18	6	10

* The Office for Civil Rights has not issued policy regarding esports as an athletic sports team per 34 C.F.R. § 106.41 of the Title IX regulation. In this author's opinion, esports are not intercollegiate sports per the Title IX regulation, but rather, extracurricular activities to be reviewed under 34 C.F.R. § 106.31; to label esports as an intercollegiate sport begins the slippery slope of policy whereby the chess club, the French club, and any other activities where competitions may be operated electronically would qualify as intercollegiate sports.

6) NCAA – the National Collegiate Athletic Association was founded in 1906 and administers intercollegiate athletics programs for over 1,000 member institutions that are four-year postsecondary institutions; member institutions are divided into Divisions I, II, and III; Division I is further divided per the sport of football – Division I-FBS (Football Bowl Subdivision) institutions may award 85 full scholarships for football athletes; Division I-FCS (Football Championship Subdivision) institutions may award 63 full scholarships for football athletes; and Division I non-football institutions do not offer football

NAIA – the National Association of Intercollegiate Athletics was formalized in 1952 and administers intercollegiate athletics programs for approximately 250 institutions that are four-year postsecondary institutions

NJCAA – the National Junior College Athletic Association was founded in 1938 and administers intercollegiate athletics for approximately 525 member institutions that are two-year colleges

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CCCAA – the California Community College Athletic Association was founded in 1929 and oversees intercollegiate athletics for approximately 108 two-year community colleges in California

NWAC – the Northwest Athletic Conference, formerly the Northwest Athletic Association of Community Colleges, was founded in 1946 and administers intercollegiate athletics for approximately 36 two-year community colleges in Idaho, Oregon, Washington, and the Canadian province of British Columbia

NFHS – the National Federation of State High School Associations writes the rules of competition for interscholastic athletics programs for all 50 states and the District of Columbia

7) The Title IX statute (1972) is the law written by the United States Congress that prohibits sex discrimination in federally funded education programs. The Title IX regulation (1975) implementing the statute was written by employees of the Office for Civil Rights and provides greater specificity. Federal agencies have the authority to issue policies on the regulations they enforce. The Intercollegiate Athletics Policy Interpretation (1979), also written by OCR employees, explains OCR's policy interpreting the Title IX regulation. Other significant policy documents issued by OCR are: the Title IX Athletics Investigator's Manual (1990) (co-authored by the author of the article herein); the "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (1996); and guidance regarding the award of athletic scholarships (1998). Except for the 1990 Investigator's Manual, the full text of these documents and this author's summary thereof are on the Good Sports, Inc., website at www.TitleIXSpecialists.com.

8) *Biediger v. Quinnipiac Univ.,* 616 F. Supp. 2d 277 (D. Conn. 2009); 728 F. Supp. 2d 62 (D. Conn. 2010); *Biediger v. Quinnipiac Univ.,* 691 F.3d 85 (2d Cir. 2012); 2013 WL 789612 (D. Conn. March 4, 2013)

9) *California National Organization for Women v. The Board of Trustees of the California State University*, Civil No. 949207 (Cal. Sup. Ct. Oct. 20, 1993)

10) May 9, 1995, hearing of the U.S. House of Representatives Subcommittee on Postsecondary Education, Training and Life Long Learning (of the larger House Committee on Economic and Educational Opportunities (attended by the author)

11) Government Accountability Office studies requested by Congresswoman Cardiss Collins of Illinois (1996 GAO study—GAO/HEHS-97-10) and Congresswoman Patsy Mink of Hawaii, principal author of Title IX (2000 GAO study—GAO-01-128); GAO studies showed that 27% of postsecondary institutions investigated by OCR were trying to meet test one.

12) *Equity in Athletics, Inc., v. U.S. Department of Education*, 675 F. Supp. 2d 660, 682-83 (W.D. Va. 2009); 639 F.3d 91 (4th Cir. 2011), cert. denied 565 U.S. 1111 (2011)

13) CARA log: in the last few years, NCAA institutions have been recording a daily "countable athletically related activity" log with the intent of ensuring that athletes are not practicing more than the 20 hour per week limit set by the NCAA; CARA activities include practices and competitions, skill instruction, and workouts directed by coaches.

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14) The following tables contain actual participation numbers from institutions that are clients of Good Sports, Inc., of which the author is President. The sports offered are not listed to protect the identity of the institutions. None of the institutions have enrollment rates that are 50.0% women and 50.0% men. All of the institutions are meeting test one or very close to meeting test one of the three-part test, and no institution had the same participation numbers in consecutive years for every single team. Only 54 of 348 teams (16%) had the same number of participants, and only one institution had the exact same enrollment, to the tenth of a percent, in consecutive academic years. In effect, in consecutive academic years, teams' participation numbers differed 84% of the time, while the rates of enrollment changed at 95% of the institutions.

INSTITUTION 1				**INSTITUTION 2**			
WOMEN		**MEN**		**WOMEN**		**MEN**	
35	33	17	15	6	8	20	18
19	17	23	25	15	13	12	16
30	31	28	32	16	18	12	10
37	43	10	10	16	13	81	86
16	15	10	11	18	23	15	28
15	15	113	108	16	13	20	18
26	22	34	32				
28	28						
12	9						
11	9						
36	40						
17	18						
282	**280**	**235**	**233**	**87**	**88**	**160**	**176**

Institution 1 – of the 19 teams offered, only two women's teams and one men's team have the exact same participation numbers in consecutive years; women's enrollment increased by 0.6 percentage points in consecutive years.

Institution 2 – of the 12 teams offered, no teams have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.8 percentage points in consecutive years.

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INSTITUTION 3				INSTITUTION 4			
WOMEN		MEN		WOMEN		MEN	
16	15	14	15	11	12	11	12
35	19	7	8	47	45	17	16
50	49	39	55	10	9	22	21
24	23	15	12	45	46	109	125
50	47	40	54	25	27	34	34
9	9	86	98	18	19	56	47
20	19			27	29	54	54
5	9			10	11		
16	15			18	15		
				69	72		
				17	17		
225	**205**	**201**	**242**	**297**	**302**	**303**	**309**

Institution 3 – of the 15 teams offered, only one women's team and no men's teams have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.2 percentage points in consecutive years.

Institution 4 – of the 18 teams offered, only one women's team and two men's teams have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.1 percentage points in consecutive years.

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INSTITUTION 5				INSTITUTION 6			
WOMEN		MEN		WOMEN		MEN	
21	20	35	32	17	16	18	22
21	19	33	33	7	13	9	13
44	30	19	19	10	7	10	11
17	13	10	9	9	9	30	26
28	29	29	34	20	27	13	12
26	24	19	17	19	25	19	23
26	28	11	8	19	33	24	26
12	12	19	19				
20	18	25	27				
15	14						
15	14						
245	**221**	**200**	**198**	**101**	**130**	**123**	**133**

Institution 5 – of the 20 teams offered, only one women's team and three men's teams have the exact same participation numbers in consecutive years; women's enrollment remained the same to the tenth of a percentage point in consecutive years.

Institution 6 – of the 14 teams offered, only one women's team and no men's teams have the exact same participation numbers in consecutive years; women's enrollment increased by 1.2 percentage points in consecutive years.

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INSTITUTION 7				INSTITUTION 8			
WOMEN		MEN		WOMEN		MEN	
33	31	29	23	14	15	14	17
15	20	16	14	8	9	128	118
22	21	17	18	8	8	41	41
24	27	42	47	17	18	16	19
12	9	45	45	66	63	26	33
15	18	31	31	27	31	7	8
10	8	22	19	31	37	43	37
13	14	48	51	33	34	42	36
23	29	10	15	32	30	41	44
14	13			64	62		
				16	15		
181	**190**	**260**	**263**	**316**	**322**	**358**	**353**

Institution 7 – of the 19 teams offered, no women's teams and only two men's teams have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.4 percentage points in consecutive years.

Institution 8 – of the 20 teams offered, only one women's team and one men's team have the exact same participation numbers in consecutive years; women's enrollment increased by 0.2 percentage points in consecutive years.

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INSTITUTION 9				INSTITUTION 10			
WOMEN		MEN		WOMEN		MEN	
17	18	12	12	17	15	42	35
16	15	4	6	8	8	14	8
32	31	10	11	27	27	42	35
11	12	36	36	7	7	10	11
16	11	13	15	24	24	113	120
21	21	12	12	27	24	15	15
20	19	107	115	16	9		
10	7			45	37		
8	10			45	39		
44	51			15	15		
44	51						
14	15						
253	**261**	**194**	**207**	**231**	**205**	**236**	**224**

Institution 9 – of the 19 teams offered, only one women's team and three men's teams have the exact same participation numbers in consecutive years; women's enrollment decreased by 1.0 percentage points in consecutive years.

Institution 10 – of the 16 teams offered, five women's teams and one men's team have the exact same participation numbers in consecutive years; women's enrollment increased by 0.5 percentage points in consecutive years.

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INSTITUTION 11				INSTITUTION 12			
WOMEN		MEN		WOMEN		MEN	
17	16	30	30	19	20	98	110
30	26	102	106	8	10	8	9
8	8	10	12	8	9	16	15
24	20	28	30	19	20	29	32
9	9	10	10	16	14	30	29
39	37	17	15	16	16	29	26
27	28	28	30			18	16
30	30						
15	18						
39	37						
238	**229**	**225**	**233**	**86**	**89**	**228**	**237**

Institution 11 – of the 17 teams offered, only three women's teams and two men's teams have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.1 percentage points in consecutive years.

Institution 12 – of the 13 teams offered, only one women's team and no men's teams have the exact same participation numbers in consecutive years (at Institution 12, men are the underrepresented gender); women's enrollment decreased by 0.4 percentage points in consecutive years.

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INSTITUTION 13				INSTITUTION 14			
WOMEN		MEN		WOMEN		MEN	
60	49	14	16	14	16	43	43
8	8	9	10	20	17	16	15
31	33	16	19	29	33	19	18
21	26	112	119	6	7	11	11
28	29	35	35	21	23	10	10
21	20	24	23	9	9	34	36
30	28	11	11	52	51	56	55
9	10	61	53	55	48	118	120
15	14	63	52	25	20		
59	50	28	34				
15	13						
297	**280**	**373**	**372**	**231**	**224**	**307**	**308**

Institution 13 – of the 21 teams offered, only one women's team and two men's teams have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.2 percentage points in consecutive years.

Institution 14 – of the 17 teams offered, only one women's team and three men's teams have the exact same participation numbers in consecutive years; women's enrollment increased by 0.2 percentage points in consecutive years.

Title IX Athletics Q & A

INSTITUTION 15				INSTITUTION 16			
WOMEN		MEN		WOMEN		MEN	
14	13	14	15	16	9	18	16
12	11	15	19	21	14	27	18
27	33	12	10	28	23	30	26
15	17	28	28	19	16	44	42
29	24	7	6	27	21	44	40
35	26	23	15	28	31	11	11
7	6	23	14	16	18		
35	24	36	35				
15	11						
189	**165**	**158**	**142**	**155**	**132**	**174**	**153**

Institution 15 – of the 17 teams offered, no women's teams and only one men's team have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.3 percentage points in consecutive years.

Institution 16 – of the 13 teams offered, no women's teams and only one men's team have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.6 percentage points in consecutive years.

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INSTITUTION 17				INSTITUTION 18			
WOMEN		MEN		WOMEN		MEN	
26	23	14	15	12	10	87	95
28	28	32	25	15	15	15	14
22	22	97	113	31	22	12	11
19	17	62	61	21	23	10	13
14	13	21	22	14	14	27	27
64	71	28	28	26	29	30	35
19	28	54	60	53	50	36	35
26	28	27	27	51	50		
21	21			13	14		
67	77			9	12		
29	26						
14	14						
349	**368**	**335**	**351**	**245**	**239**	**217**	**230**

Institution 17 – of the 20 teams offered, four women's teams and two men's teams have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.6 percentage points in consecutive years.

Institution 18 – of the 17 teams offered, only two women's teams and one men's team have the exact same participation numbers in consecutive years; women's enrollment increased by 0.3 percentage points in consecutive years.

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INSTITUTION 19				INSTITUTION 20			
WOMEN		MEN		WOMEN		MEN	
14	15	15	16	12	13	27	31
16	17	13	13	22	20	126	133
7	11	29	26	18	14	11	13
26	30	8	8	26	21	13	15
42	41	24	29	10	5	8	7
9	8	29	29	19	21	39	39
44	43	35	30	37	44	35	31
44	41	122	120	23	25	35	51
16	17			51	47	39	49
				23	32	40	39
				7	9		
				30	25		
				37	42		
				19	13		
218	**223**	**275**	**271**	**334**	**331**	**373**	**408**

Institution 19 – of the 17 teams offered, no women's teams and three men's teams have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.7 percentage points in consecutive years.

Institution 20 – of the 24 teams offered, no women's teams and only one men's team have the exact same participation numbers in consecutive years; women's enrollment decreased by 0.9 percentage points in consecutive years.

15) The OCR experts who drafted the 1996 Policy Clarification intended for the average team size for the underrepresented sex to be the parameter for how close is close enough between rates of participation and rates of enrollment to meet test one of the three-part test. Those OCR experts knew that the 1996 policy would apply to high school and middle school programs, in addition to collegiate athletics programs. In this author's experience, the average team sizes for high school programs are often much smaller than for intercollegiate programs, and may be, for example, between 10 and 15 participants for girls. Thus, it is not unusual to identify a 1.0 to 1.5 percentage points difference between rates of enrollment and rates of participation as the acceptable parameter at secondary institutions. Undoubtedly, the OCR experts who drafted the 1996 Policy Clarification considered all of these possibilities – at the intercollegiate and interscholastic levels – when creating the policy for how close is close enough. Determining participation at secondary institutions is much less complicated as, among other considerations, there are no redshirts, scholarship awards, nontraditional seasons, or medical status affecting participation counts. Furthermore, many secondary schools may easily add sub-varsity teams as interests and competition warrant.

16) The Equity in Athletics Disclosure Act (EADA), enacted in 1994 and amended in 1998, requires institutions that participate in federal student loan programs and operate intercollegiate athletics programs to complete an online survey annually for the federal government. Institutions must report information regarding participation, coaching, scholarships, recruitment expenditures, and budgets. The instructions for counting participants under the EADA differ from those for counting participants under Title IX.

"Web rosters" refers to the lists of athletes by team that institutions feature on their athletics websites. Web rosters are often generated by an institution's sports information staff. In the experience of this author, institutions have done the following for their website rosters: not listed redshirt athletes, which may be as many as 10 to 20 football athletes, in addition to redshirt athletes on other teams (redshirt athletes are counted as participants under Title IX); removed the names of those who quit the team or were injured and can no longer practice or compete, even though those athletes may have left the team after the first competitive event; failed to add athletes who join the team after the first contest; listed student managers, who are not participants; listed student athletic trainers, who are not participants; included only the travel squad athletes on the website, and not the full team; listed all athletes who tried out for the team, and/or were in the team picture taken before the first practice, even though several athletes may have quit, been injured, or cut before the first contest; listed multi-sport athletes on only one website roster; or simply overlooked including an athlete on the web roster. This list is not exhaustive.

"Redshirt" is not a Title IX term, but is a term used by athletics professionals for athletes who, because of injury or concerns often related to physical preparedness, may practice with a team and/or receive other team benefits, but may not participate in a contest. This exclusion from competitive events may save a year of the four years of eligibility permitted by the athletics governing association.

ABOUT THE AUTHOR

Valerie McMurtrie Bonnette has specialized in the Title IX athletics provisions for 43 years: 15 years in the Washington, D.C., headquarters office of the Office for Civil Rights (OCR), U.S. Department of Education, and 28 years as a consultant to educational institutions. At OCR, Bonnette served as a senior program analyst in the Policy Development Division. Bonnette co-authored OCR's Title IX Athletics Investigator's Manual, which has been cited in numerous federal court cases. Bonnette led and participated on OCR teams investigating allegations of sex discrimination in athletics programs. Her duties included the review of hundreds of Title IX athletics case files submitted by OCR's regional offices to the headquarters office. In the course of her work, Bonnette created new policy and refined existing policy for Title IX athletics. In 1994, Bonnette founded Good Sports, Inc., and conducts reviews of institutions' athletics programs in the same manner as federal investigations, advising educational institutions regarding their compliance concerns and methods for remedying those concerns.

Bonnette wrote her master's thesis on Title IX athletics in the mid-1970s. In 1977, Bonnette became a summer intern at OCR Headquarters, working on Title IX athletics issues that included meetings with David S. Tatel, then Director of the Office for Civil Rights (Mr. Tatel is currently a Senior U.S. Circuit Judge with the U.S. Court of Appeals for the District of Columbia Circuit). Bonnette was a permanent staffer in OCR Headquarters from January 1980 to June 1994. The combination of professional work and graduate school research culminates in 45 years of Title IX athletics specialization.

Bonnette is a former athlete at the middle school, high school, collegiate, and semi-professional levels, having participated in seven different sports.

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