

TITLE IX AND THE “E-MAIL SURVEY” EXCEPTION: MISSING THE GOAL

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I. INTRODUCTION

This Note will examine the “e-mail survey” provision of Title IX compliance, as introduced by the Office for Civil Rights, a subdivision of the United States Department of Education, in 2005. The “e-mail survey” provision allows schools to technically comply with Title IX, while missing the purpose of the law entirely. The provision presumes that only women—and not men—should be asked if they really care about sports participation. It is also predicated on an assumption of sex difference in the fair application of federal law. Women and men are equally deserving of sports opportunities, even though historically, only one group has had such access. Furthermore, the use of “interest” as the decisive benchmark is troublesome because it is too complex to measure and should not be the justification for limited athletic opportunities for women.

I will argue that not only is the “e-mail survey” provision practically ineffective, it subverts the purpose of the legislation. Sports opportunities for women are valuable not only to the women who take advantage of them, but also for men and the community in general. Undoubtedly, there must be better ways to help schools comply with Title IX while still promoting women’s athletics. I offer one possible solution, which will creatively address some of the shortcomings of the “e-mail survey.” While one solution is proffered, the main purpose of this Note is to show that the way in which the Office for Civil Rights went about its clarification of the law is troublesome, and future changes should include invitations for others to comment and suggest solutions.

Ultimately, such attacks on progress made for women’s access to athletics, like the “e-mail survey” exception, serve to remind everyone that while progress has been made, the work is not finished. Vigilance must be maintained to preserve existing rights and expand women’s access to sports and educational opportunities. Complacency is not an option.

II. THE BACKGROUND OF TITLE IX

Title IX of the Education Amendments of 1972 was enacted to redress gender discrimination in the educational setting. The impact of the legislation is unquestionable. The differences between pre-Title IX and

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post-Title IX are plainly evident. Once sports opportunities were made available, women's participation increased tremendously, suggesting the time was more than ripe for a fix. However, discrimination still exists, and continues to hamper women's access to athletics. As a result, opportunities for women still fail to be equal to men. The following section will examine the situation prior to the federal legislation, the legislation specifically, and the results to date.

A. BEFORE TITLE IX

The differences in educational opportunities before and after Title IX was enacted are striking. Several authors have noted, however, that it may be difficult for students who went to school in the post-Title IX era to comprehend how starkly different life could have been.¹ Women were treated completely differently than men, and although anecdotes are unable to paint the full picture, such illustrations may help. For example, “[i]n high schools, prior to this amendment, girls were expelled for being married or pregnant.”² As for sports, “[i]n physical education classes and athletic programs, boys got the locker rooms, the gym time, the teams, the funding.”³ Testing for these physical education classes was often unequal.⁴ Additionally, “[the boys] enjoyed the uniforms, coaches, fancy electronic scoreboards.”⁵ In contrast, “[g]irls had team practice early in the morning or at night so that boys could get the prime-time after-school use of facilities.”⁶ Beyond on-site facilities, “boys had air-conditioned buses transporting them to games,” while girls had to find their own transportation, either by carpooling or having their parents drive them.⁷

In colleges, among other disadvantages leveled against them, women were given “different access to ‘extracurricular activities.’”⁸ In other words, only men were allowed to get involved in certain activities, and women had a limited selection of activities from which they could choose to participate.⁹ Title IX was intended to guarantee freedom from what we now call “gender discrimination,” and protect women's access to games, training, athletic equipment, and scholarship funding.¹⁰

¹ See, e.g., Maureen Mullen, *Honors Come Due for Title IX Generation*, THE BOSTON GLOBE, Feb. 17, 2008, available at

http://www.boston.com/news/local/articles/2008/02/17/honors_come_due_for_title_ix_generation/?page=1; Chris Reade, *The Rule of the Games*, THE PALY VOICE, Feb. 8, 2005, available at http://voice.paly.net/view_story.php?id=2550; *Congratulations Title IX on 35 Years!*, TITLEIX.INFO, http://titleix.info/content.jsp?content_KEY=2785&t=homepage.dwt.

² COLETTE DOWLING, *THE FRAILTY MYTH: WOMAN APPROACHING PHYSICAL EQUALITY* 152 (Random House 2000).

³ *Id.*

⁴ See, e.g., Editorial, *Reducing Discrimination in Schools*, WASH. POST, June 23, 1974, at C6 (“[A] high-school senior was denied her diploma because she had failed to pass written tests in badminton and tennis—tests required only for girls.”).

⁵ DOWLING, *supra* note 2, at 152.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Interestingly, “[t]he struggle to get a physical education equal to men’s has been longer and harder for women than gaining equal access to an academic education.”¹¹ The same arguments were used in the fight against women’s physical education as in the fights for access to education. Opponents to the changes claimed that “giving money to [women’s] courses and teams will take money away from men’s.”¹² They also charged that Title IX would ruin athletic programs and perhaps even bring integration into locker rooms.¹³ Further arguments against physical education for women were that “expecting too much of them is futile because their bodies aren’t up to it” and that “women aren’t really interested in sport, at least not as interested as men, and that any money spent on their physical education is money down the drain.”¹⁴ Arguments against these claims are discussed further below. Needless to say, arguments against women’s opportunities are often based in sexist beliefs and rhetoric.

Numerically, there was significant room for improvement. Title IX would open the doors for women. In 1971, the year before Title IX was signed into law by President Richard Nixon, less than three hundred thousand girls in high school played team sports.¹⁵ In 1972, women made up only fifteen percent of college athletes and garnered a meager two percent of the college athletic budget.¹⁶ Needless to say, big changes were on the horizon.

B. TITLE IX

Over three decades ago, Title IX of the Educational Amendments of 1972¹⁷ was passed to address sex discrimination in the educational setting.¹⁸ The law was passed after several congressional hearings in 1970.¹⁹ Those hearings “documented the pervasiveness, perniciousness, and long-range consequences of sex discrimination in educational policy, practices, and attitudes.”²⁰ As legislation goes, Title IX was much like “other feminist reforms of the 1960s and early 1970s, in that its goals were to provide access to traditionally male structures, and to provide equality of opportunity once inside.”²¹

Specifically, the language of Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

¹¹ DOWLING, *supra* note 2, at 152–53.

¹² *Id.* at 153.

¹³ Editorial, *supra* note 4.

¹⁴ DOWLING, *supra* note 2, at 153.

¹⁵ *Id.* at 154.

¹⁶ *Id.*

¹⁷ 20 U.S.C. §§ 1681–1688 (2006).

¹⁸ J. RALPH LINDGREN & NADINE TAUB, *THE LAW OF SEX DISCRIMINATION* 276 (West Publ’g Co. 2d ed. 1993).

¹⁹ *Id.*

²⁰ *Id.* at 276–77.

²¹ Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1634 (1997).

education program or activity receiving Federal financial assistance[.]”²² The overall goal of this law was to eliminate sex discrimination in the educational setting. To reach that goal, the law would be implemented so as to expand all types of educational opportunities for women, from girls in pre-school up through women in graduate school.

One of the major focuses of Title IX was to increase athletic opportunities in school. Schools are now required to provide parity in number of, and types of, athletics teams for women and men. The Department of Education, and specifically its subdivision, the Office for Civil Rights (“OCR”), was charged with implementing the regulation of Title IX.²³ The regulation implementing Title IX contains specific provisions governing athletic programs²⁴ and the awarding of athletic scholarships.²⁵

In part, the regulation requires recipients of federal funding “to provide equal athletic opportunity for members of both sexes and to effectively accommodate the interests and abilities of their male and female students to participate in intercollegiate athletics.”²⁶ In the Intercollegiate Athletics Policy Interpretation,²⁷ published in 1979, the Department of Education established a three-part test that OCR will apply to determine whether an institution is effectively accommodating student athletic interests and abilities.²⁸

Title IX, as implemented, offers schools three options (or three prongs) from which the school may choose to satisfy the requirements of Title IX, or risk losing federal funding. The prongs “provide three independent ways for schools to show that they are providing equal participation opportunities;”²⁹ they are as follows:

- Prong 1: The percentages of male and female athletes are about the same as the percentages of male and female students enrolled in the school (the “proportionality” prong); *or*
- Prong 2: The school has a history and continuing practice of expanding opportunities for the underrepresented sex—usually women; *or*
- Prong 3: The school is fully and effectively meeting the athletic interests and abilities of the underrepresented sex.³⁰

Every school that receives federal funding must meet one of the three prongs of the test set forth by the Department of Education, or risk losing the federal money. The Department of Education is tasked with the job of

²² 20 U.S.C. § 1681.

²³ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE I (Mar. 17, 2005), *available at* <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf> [hereinafter 2005 ADDITIONAL CLARIFICATION].

²⁴ 34 C.F.R. § 106.41 (2005).

²⁵ *Id.* § 106.37(c).

²⁶ 2005 ADDITIONAL CLARIFICATION, *supra* note 23, at iii.

²⁷ 44 Fed. Reg. 71,413 (Dec. 11, 1979).

²⁸ 2005 ADDITIONAL CLARIFICATION, *supra* note 23, at iii.

²⁹ Fact Sheet, Nat’l Women’s Law Ctr., Title IX “Clarification”: What’s At Stake 2 (Apr. 2005), *available at* <http://nwlc.org/pdf/whatsatstake.pdf> [hereinafter Title IX “Clarification”].

³⁰ *Id.*

monitoring Title IX compliance. The OCR investigates complaints of such discrimination and may, at its discretion, conduct compliance reviews.³¹ Still to this day, as discussed below, hundreds of complaints are lodged every year citing violations of Title IX.

C. LIFE AFTER TITLE IX

Since the legislation was signed into law in 1972, advancements for women in sports have been increasing dramatically. In the past three plus decades, "the passage of antidiscrimination legislation, together with broader cultural changes in gender roles, has transformed women's sports."³² The overall environment is more encouraging, and women are almost expected to participate in sports from a young age. Culturally, the inclusion of women's sports has been viewed more as the positive that it is rather than the legal requirement from which its development began. One woman noted in a letter to the editor of the *The Washington Post* that, "[w]hen I was a little girl, little girls were cheerleaders. Then came Title IX. . . . [which] reaffirms the notion that little girls can be whatever they want to be."³³

Many concrete changes have been made as a direct result of Title IX. One example, noted in a 1976 article in *The Washington Post* referring to a local high school, is that "[f]or the first time, girls' basketball games are being played at night, giving them the higher status of the male extracurricular teams as well as a chance for parents and other community residents to view the action."³⁴ Another example was the debut of a varsity lacrosse team for the Georgetown University women in 1977. With varsity status and financing required by Title IX, the women were given "full use of trainers, equipment managers and maintenance personnel at GU."³⁵ The lacrosse players noted their frustration with the previous lack of a team.³⁶ Several players developed interest in the sport "after watching or playing the sport with male friends."³⁷ Now they are able to play on the same level as their male counterparts.

Sheer statistics illustrate the advancements made in recent years: "The number of female athletes in high school interscholastic competition increased from 300,000 (7 percent of all participants) in the early 1970s to over two million (38 percent) in the early 1990s."³⁸ A wide variety of teams are now available, and opportunities for girls now include hockey, boxing, field hockey, and much more.³⁹ Further, by 1995, women made up thirty-seven percent of all college athletes.⁴⁰ Increasing still, a more recent

³¹ 2005 ADDITIONAL CLARIFICATION, *supra* note 23, at 1.

³² Deborah L. Rhode, *Beginning at Birth*, in *SPEAKING OF SEX* (Harvard Univ. Press 1997), reprinted in *WOMEN AND THE LAW* 215, 216 (Judith G. Greenberg et al. eds., Found. Press 2d ed. 1998).

³³ Laurie Ann Garey, Letter to the Editor, *Spotlight on Women Athletics*, WASH. POST, Apr. 12, 1991, at A18.

³⁴ Megan Rosenfeld, *Teens: Feminism 'Not Cool'*, WASH. POST, May 9, 1976, at A1, A12.

³⁵ Ellen Goldman, *GU Women Debut in Varsity Lacrosse*, WASH. POST, Apr. 21, 1977, at C13.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Rhode, *supra* note 32, at 216.

³⁹ *Id.*

⁴⁰ DOWLING, *supra* note 2, at 154.

statistic shows that “[i]n 2004–05, a record 166,728 women competed at the college level, representing 42% of college athletes nationwide.”⁴¹

Women’s participation in sports is critical, not only to the world of sports, but to the women involved. Participating in sports in elementary school, high school, college, and beyond serves to protect women against disease. “[E]xercise and sports participation may play a protective indirect role in the risk of breast cancer.”⁴² With the number of overweight and obese adolescent girls on the rise, keeping girls and young women active and healthy is, and should continue to be, a priority.⁴³ Participating in sports requires women to remain active, which will help in this fight against obesity. Moreover, studies indicate that high school athletes are less likely to smoke than their non-athlete peers.⁴⁴ Both men and women who played sports in high school not only were less likely to smoke, but were also less likely to smoke years after participating.⁴⁵ Additionally, new studies suggest that regular participation in sports reduces the risk of developing blood clots by thirty-nine percent in women.⁴⁶ Further, today more than forty percent of women over the age of fifty have osteoporosis. Protection against this disease comes from playing sports and participating in weight-bearing exercises that are necessary to establishing bone mass.⁴⁷

In addition to the documented physical benefits, sports participation is psychologically and sociologically valuable to women. High school female athletes are more likely to demonstrate high academic achievement and to graduate from high school.⁴⁸ Moreover, “[g]irls and women who play sports have higher levels of confidence and self esteem and lower levels of depression.”⁴⁹ Additionally, “[g]irls and women who play sports have a more positive body image and experience higher states of psychological well-being than girls and women who do not play sports.”⁵⁰ Sports participation also helps women advance later in life in the workforce, by teaching and reinforcing the skills needed to succeed in the corporate

⁴¹ *Building on the Success of 35 Years of Title IX: Hearing Before the Subcomm. on Higher Education, Lifelong Learning, and Competitiveness of the H. Comm. on Education and Labor*, 110th Cong. 2 (June 19, 2007) (statement of Marcia D. Greenberger, Co-President, National Women’s Law Center) [hereinafter Greenberger].

⁴² WOMEN’S SPORTS FOUND., EXERCISE AND BREAST CANCER RESEARCH FINDINGS (May 16, 2001), available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/body/article.html?record=99>.

⁴³ 2004 Fact Sheet, Nat’l Ctr. for Health Statistics, Obesity Still a Major Problem (Apr. 14, 2006), available at http://www.cdc.gov/nchs/pressroom/06facts/obesity03_04.htm (noting that “[b]etween 1999 and 2004, there was a significant increase in the prevalence of overweight among girls (13.8% in 1999 to 16.0% in 2004)”).

⁴⁴ *Researchers from the Abramson Cancer Center Find That Participation in Organized High School Activities Lowers Risk of Smoking*, UNIV. OF PA. ABRAMSON CANCER CTR. NEWS, Dec. 6, 2007, available at http://www.pennccancer.org/penn_news.cfm?ID=344.

⁴⁵ *Id.*

⁴⁶ K.J. Van Stralen et al., *Regular Sports Activities Decrease the Risk of Venous Thrombosis*, 5 J. OF THROMBOSIS & HAEMOSTASIS 2186 (2007).

⁴⁷ WOMEN’S SPORTS FOUND., BENEFITS—WHY SPORTS PARTICIPATION FOR GIRLS AND WOMEN (July 26, 2007), available at <http://www.womenssportsfoundation.org/Content/Articles/Issues/Body-and-Mind/B/Benefits--Why-Sports-Participation-for-Girls-and-Women-The-Foundation-Position.aspx>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

structure.⁵¹ I will discuss more of the health and wellness benefits of sports in Section IV, Part B.

While the progress is undeniable, discrimination and inequality still remains in athletics—particularly as a disparity between women’s and men’s opportunities.⁵² On all levels, men’s activities continue to receive priority in funding and treatment. “In high school, boys still receive disproportionate resources and have greater choices of sports.”⁵³ Moreover, “[a]t surveyed colleges where women constitute more than half the student body, they account for only a third of the athletes, a fourth of athletic dollars, and less than a fifth of recruiting expenditures.”⁵⁴ As for athletic opportunities beyond the players, “[w]omen coach fewer than half of women’s teams and about 1 percent of men’s teams, and almost never head athletic programs.”⁵⁵ This is critical, as it means that there are fewer female role models and fewer women in visible leadership positions. Clearly an ancillary intended benefit of Title IX was to increase the visible presence of positive female leadership. This disparity suggests that, though improvements are evident, there is a significant amount of work to be done if the goals of Title IX are to be fully realized.

Moreover it is important to remember that increases in participation can be deceptive. In reality, it has taken most schools a very long time, if at all, to meet the standards of Title IX in the years since it was enacted. “By the mid-1990s, *only one of some 600 institutions* met the standard of gender equity established by the National Collegiate Athletic Association (NCAA): ‘fair and equitable distribution of overall athletic opportunities, benefits and resources,’ and an absence of gender-based discrimination against athletes, coaches, and administration.”⁵⁶

The National Women’s Law Center (“NWLC”) studied Title IX compliance and presented the findings of its surveys before Congress in 2007. The NWLC concluded that, presently: (1) discrimination against girls and women in sports remains widespread; (2) schools’ second-class treatment of female athletes, even when they are given a chance to play, is a particular concern; (3) coaches fear retaliation if they complain, so the burden typically falls on students and their parents to protest discrimination; and (4) discrimination complaints filed by or on behalf of female athletes were far more likely to be meritorious enough to secure changes than complaints filed by or on behalf of male athletes.⁵⁷ Some may argue that, because the OCR is more likely to find Title IX violations when women complain, this could be further evidence of gender stereotyping. In fact, no evidence suggests that men’s complaints are more meritorious than women but are receiving less scrutiny; the statistics may simply reflect the distance that women still need to travel in order to reach parity.

⁵¹ *Id.*

⁵² Rhode, *supra* note 32, at 216 (“[T]his striking progress masks equally striking inequalities.”).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* (emphasis added).

⁵⁷ Greenberger, *supra* note 41.

The data for these results shows that there were “416 athletics complaints filed with OCR between January 1, 2002 and December 31, 2006—likely just a fraction of the number of complaints that were raised informally with schools during that period.”⁵⁸ Moreover, “[t]he OCR complaints challenged discrimination against girls or women 11 times more frequently than they claimed discrimination against males, demonstrating concretely that the playing field is still far from level for female athletes.”⁵⁹

Further, the results of the surveys showed that “[w]hile more than one-quarter of the complaints overall challenged schools’ failures to provide sufficient participation opportunities for girls and women, more than half—54%—challenged inequitable treatment of girls’ or women’s teams once female athletes were allowed to play.”⁶⁰ “Among complaints filed by or on behalf of girls, moreover, fully 60% of the allegations concerned inequities in treatment of female teams.”⁶¹ The details of the treatment complaints—“particularly those concerning disparities between girls’ softball and boys’ baseball teams, such as in the quality of softball versus baseball fields—identified blatant and egregious inequities that had persisted for many years.”⁶²

As a result, “[s]chools made changes to their athletics programs in response to complaints filed by or on behalf of female athletes at close to five times the rate at which they made changes in response to complaints filed by or on behalf of male athletes.”⁶³ “As a corollary, OCR found no violation in almost double the number of complaints filed by men as in complaints filed by women.”⁶⁴ The volume of complaints and conclusions made by the OCR should not be overlooked or dismissed; such statistics suggest that discrimination continues to exist and that Title IX is still a necessary tool to be used to remedy that discrimination.

In response to challenges to the persistent inequalities, explanations are varied and in dispute. “To many men, the disparities in opportunity simply reflect disparities in interest,”⁶⁵ such that opportunities match interest, and so there is no need to continue pushing for change. The flawed logic behind this belief is that “[u]ntil society ‘undergoes a radical transformation,’ gender disparities will remain ‘a fact of American life.’”⁶⁶ In response to such an argument, it is important to remember that “[h]ad that argument prevailed in legislative arenas, many female athletes would still be stuck with hula hoops.”⁶⁷ Furthermore, “[u]ntil more proportionate opportunities are in place, we cannot really gauge male and female interest levels.”⁶⁸ The problems with attempting to gauge interest are discussed more fully below in Section IV, Part E.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Greenberger, *supra* note 41.

⁶⁴ *Id.*

⁶⁵ Rhode, *supra* note 32, at 216.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

Ultimately, Title IX has provided a big start to gender equality in athletics. The legislation can take credit for significant increases to women’s participation in sports in the high school and college settings. The benefits to such increases in participation are too numerous to list, but beginning to break down gender stereotypes and gender roles is among the most important. Progress has stalled, however, and inequality still exists in the opportunities and funding. Discriminatory arguments continue to fight against women’s progress, and have been effective in limiting women’s access to sports.

III. THE RECENT TITLE IX CLARIFICATIONS

For years, the OCR has been struggling to provide a clear understanding of the Three-Prong Test. In 1996, the OCR published a “Clarification” of the Three-Prong Test (“1996 Clarification”),⁶⁹ which was a set of tips and an agency interpretation of Title IX, designed to provide schools with additional information of what would be deemed compliance with Title IX.⁷⁰ The 1996 Clarification examined the three prongs, and stated that, as for Prong Three, its purpose was to allow schools to be in compliance with Title IX if they were “effectively accommodating” the interests of students who were members of the underrepresented sex.⁷¹ In determining whether the school was “effectively accommodating” the students’ interests, the OCR would consider “(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.”⁷² The 1996 Clarification set forth that only if the OCR found that all three of these specific conditions present, then it would be determined that the school was not complying with the regulations of Title IX.⁷³

Further findings and recommendations on Title IX enforcement and compliance were again made in 2003,⁷⁴ after United States Secretary of Education Rod Paige established the Secretary of Education’s Commission on Opportunity in Athletics (“Commission”) in 2002. The Commission was 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.⁷⁵ The 2003 Commission Report, responding to requests and complaints from schools, made twenty-three recommendations overall.⁷⁶

⁶⁹ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (Jan. 16, 1996), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter 1996 CLARIFICATION] (stating that “[i]f an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement”).

⁷⁰ 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, 10 (2005).

⁷¹ 1996 CLARIFICATION, *supra* note 69.

⁷² *Id.*

⁷³ *Id.*; see Almond & Cohen, *supra* note 70, at 11.

⁷⁴ U.S. DEP’T OF EDUC., SEC’Y OF EDUC.’S COMM. ON OPPORTUNITY IN ATHLETICS, “OPEN TO ALL”: TITLE IX AT THIRTY (Feb. 28, 2003), available at <http://www.ed.gov/about/bdscmm/list/athletics/title9report.pdf> [hereinafter 2003 COMMISSION REPORT].

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

Among the many recommendations, the Commission advised that interest surveys be used to monitor interest in sports to demonstrate compliance with “effectively accommodating” students’ interests in sports under Prong Three.⁷⁷ Interestingly, the recommendation to use surveys to measure interest in sports was one of the eight recommendations that was not adopted unanimously.⁷⁸ Dissenting members of the Commission argued that because “interest levels change, interest surveys could never adequately capture student interest in athletics.”⁷⁹

Then, a mere two years later, another clarification (“2005 Additional Clarification”) was issued.⁸⁰ Prepared by the OCR, this clarification specifically outlined a new way in which schools could “effectively accommodate” student interest in sports, and thereby comply with Title IX through Prong Three.⁸¹ This new method, referred to as the “e-mail survey” exception or the “model survey,” allowed schools to gauge interest in women’s sports by sending out an e-mail to all of the women in the school.⁸² The level of response received from that e-mail survey would determine the level of interest, and the school need only satisfy that level of interest.⁸³ Further examination of this option is provided below, along with arguments against it as a reliable source of binding information.

IV. THE “E-MAIL SURVEY” EXCEPTION: A THREE-PRONG LOOPHOLE

The 2005 Additional Clarification widens the door for schools to use e-mail surveys to determine women’s interest in sports. The surveys “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.”⁸⁴ Perhaps more troubling is 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.”⁸⁵ The data, however, will only be deemed valid if the survey is administered “in a manner consistent with the . . . recommendations in the User’s Guide.”⁸⁶

In order to be deemed consistent with the recommendations, the school must follow the four following guidelines. “First, the Model Survey must be administered periodically to permit schools to identify developing interests.”⁸⁷ “Second, an institution properly administers the Model Survey if it conducts a census whereby the Model Survey is provided to all full-

⁷⁷ *Id.* at 38.

⁷⁸ *Id.* at 64–65.

⁷⁹ *Id.*

⁸⁰ 2005 ADDITIONAL CLARIFICATION, *supra* note 23, at 1.

⁸¹ *Id.* at iv.

⁸² *Id.*

⁸³ *Id.* at iv–v.

⁸⁴ Almond & Cohen, *supra* note 70, at 13.

⁸⁵ 2005 ADDITIONAL CLARIFICATION, *supra* note 23, at 6.

⁸⁶ *Id.*

⁸⁷ *Id.*

time undergraduates, or to all such students of the underrepresented sex.”⁸⁸ “Third, schools must administer the census in a manner that is designed to generate high response rates, and students must have an easy opportunity to respond to it.”⁸⁹ “Fourth, schools must include in the census at least the full list of sports recommended in the Model Survey.”⁹⁰

Furthermore, the 2005 Additional Clarification affords that, if the survey is properly administered, as required above, a student’s failure to respond to it can be considered evidence that he or she actually lacks “interest” as contemplated by Prong Three.⁹¹ Thus, if the results of the survey reveal a lack of interest in further athletic opportunities, along with nonresponses, the school will be considered by the OCR to be in sufficient compliance of the third prong.⁹²

The following sections will examine why the “e-mail survey” exception is bad for Title IX, bad for women, and bad for everyone. First, e-mail is at best an uncertain method of communicating effectively with students. Secondly, a survey that seeks information from women alone ignores half of the student population and assumes that women’s sports are only valuable to women. Moreover, this system is predicated on sex differences in the application of the law. Ultimately, it misses the point of Title IX entirely; interest gauging should not be about measuring “actual” interest, because of the record of historic discrimination and the impossibility of judging actual interest until opportunities are more fully equal.

A. THE SURVEY IS INEFFECTIVE IN PRACTICE

There have been several articles written over the past two years about the impracticality of this method.⁹³ These articles argue that sending an e-mail is not an effective way to communicate with students, particularly at the university level. Because students receive an enormous volume of e-mail communications from the school, they argue, it is likely that these e-mails will get deleted or overlooked by a sizable portion of the recipients.

The OCR, however, suggests that the survey can and should be administered by electronic mail (aka e-mail).⁹⁴ As described by Robin M. Preussel in her article in the *Sports Lawyers Journal*, “[o]ne need only to have been a student receiving such Web-based surveys or be a member of

⁸⁸ *Id.* Ideally, the Model Survey will be administered to both men and women, but this is not a requirement. *Id.*

⁸⁹ *Id.* “[S]chools may either require students to complete the census or provide the census in a context in which most students will complete it.” *Id.*

⁹⁰ *Id.* at 7 (“That list includes all varsity sports, including ‘emerging sports,’ currently recognized by the three national intercollegiate athletic associations to which most schools belong.”).

⁹¹ 2005 ADDITIONAL CLARIFICATION, *supra* note 23, at 7.

⁹² *Id.*

⁹³ See, e.g., Ronnie Wade Robertson, *Tilting at Windmills: The Relationship Between Men’s Non-Revenue Sports and Women’s Sports*, 76 MISS. L.J. 297 (2006); Robin M. Preussel, Note, *Successful Challenge, Ruling Reversed: Why the Office of Civil Rights’ Survey Proposal May Be Well-Intentioned But Misguided*, 13 SPORTS LAW. J. 79 (2006).

⁹⁴ 2005 ADDITIONAL CLARIFICATION, *supra* note 23, at 5.

an institution or organization attempting to administer such surveys to know that response will be limited at best.”⁹⁵

Furthermore, Preussel interviewed a variety of women in the sports and academic arena, and found similar feelings about e-mail surveys.⁹⁶ First, “Yale University Senior Associate Director of Athletics, Barbara Chesler, noted the deficiencies of using a Web-based survey, ‘students get more than ten of these per day . . . it is ludicrous to believe that they will take the time to fill this one out.’”⁹⁷ Preussel also contacted University of Alabama’s Associate Athletic Director and Senior Woman’s Administrator, Marie Robbins, who voiced her concerns about nonresponsiveness to the survey, noting that “[in spite of the newly announced Additional Clarification,] we already tried the survey route and did not find it helpful [due to the low level of response].”⁹⁸

Not only is there significant anecdotal evidence to suggest e-mail surveys are troubling, hard statistics reported from schools shows that the response rates are potentially extremely low. The National Center for Education Statistics (“NCES”), in an effort to better understand schools’ uses of the surveys, reviewed the OCR files of 132 cases of possible noncompliance with Title IX that the OCR investigated during the period of 1992–2002.⁹⁹ These investigations involved “130 colleges and universities in 43 states.”¹⁰⁰

Of the 130 institutions under investigation, over two-thirds of those schools—eighty-six—used an interest survey to meet the third prong of Title IX.¹⁰¹ The NCES found that one significant problem with the use of these surveys was that response rates reported by the institutions are typically low.¹⁰² Specifically, “[o]ne-half of these institutions reported the data needed to compute their survey response rates; the range varied from 8 percent to 70 percent.”¹⁰³ Furthermore, the NCES found that “[c]oupled with the problem of low response rates is the lack of attention to questions of nonresponse bias.”¹⁰⁴

In the User’s Guide, a companion to the 2005 Additional Clarification, the OCR addresses the issue of nonresponse for e-mail surveys.¹⁰⁵ The OCR’s suggestion to schools is simply to make the response to the survey required and threaten disciplinary action or other restrictions if not completed.¹⁰⁶ The OCR goes on to admit that while “rates of nonresponse may be high with this procedure [i.e., the e-mail survey], nonresponse is

⁹⁵ Preussel, *supra* note 93, at 117.

⁹⁶ *See id.* at 117–18.

⁹⁷ *Id.* at 118.

⁹⁸ *Id.* (alterations in original).

⁹⁹ U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, USER’S GUIDE TO DEVELOPING STUDENT INTEREST SURVEYS UNDER TITLE IX 2 (Mar. 2005), available at <http://nces.ed.gov/pubs2005/2005173.PDF> [hereinafter USER’S GUIDE].

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 3.

¹⁰² *Id.* at 8.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ USER’S GUIDE, *supra* note 99, at 12.

¹⁰⁶ *Id.*

interpretable as a lack of interest.”¹⁰⁷ Essentially, the OCR admits that while e-mail survey is at risk for high nonresponse rates, and while none of its tests “explicitly considered any kind of nonresponse bias analysis to determine whether those students who did not respond to the survey differed in interests and abilities from those who responded,”¹⁰⁸ it is still fair to treat nonresponse as a lack of interest.

The problems with this method are too great to be written off so easily by the OCR. Schools should not be allowed to circumvent federal law by employing a method that is known to result in high nonresponse rates. “[S]imply because an undergraduate woman decides not to take the time to fill out a survey, it may not mean that she is uninterested in athletic opportunities at her school.”¹⁰⁹ Moreover, the OCR, upon recognizing the inherent flaw in its testing method, has, instead of trying to remedy that flaw, equated it with lack of interest. Essentially, this method imputes onto its own inadequacy, the exact opposite of its desired result. The OCR recognizes that, because of a weakness in the method, students may inadvertently miss or intentionally ignore the survey, thereby imposing a de facto penalty of reducing the likelihood that women’s athletic opportunities will increase. Compliance with a significant federal law should not be able to hang on a series of e-mails to students.

B. THE SURVEY PRESUMES ONLY WOMEN SHOULD BE ASKED IF THEY CARE ABOUT SPORTS

This new compliance option is not only practically ineffective, but denies the full benefits of Title IX. The value of sports for women is not only for the women involved. Indeed, women can empower themselves by participating in athletics. Equally as important as personal empowerment, however, is the way that women’s access to, and participation in, athletics reshapes gender roles. When women participate in a sport, it can change the way everyone thinks about women, and the way everyone thinks about the sport.

Sports offer many benefits to female athletes. Women can “empower themselves by developing the confidence and self-esteem that they will need to succeed in school, the workplace, and the rest of their lives.”¹¹⁰ Physically and psychologically, sports can make women stronger and more resilient. First, “[s]ports help many women and girls gain more confidence in their everyday interactions.”¹¹¹ Moreover, “[s]ports can increase girls’ feeling of self-worth by providing them a forum in which to learn how to assert themselves and, in team sports, to do so when others are relying on them.”¹¹² Further, “sports can increase the confidence of women and girls . . . by helping them develop better relationships with their bodies.”¹¹³ By

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Preussel, *supra* note 93, at 118.

¹¹⁰ Note, *Cheering on Women and Girls in Sports*, *supra* note 21, at 1637.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 1638.

playing sports, girls and women learn to view their body differently—as a powerful tool, instead of simply as a thing of beauty that needs protection and is only valuable if physically perfect.¹¹⁴

Beyond physical and psychological benefits, sports can offer women a way to change the world. “In addition to providing a source of individual survival strategies and empowerment, sports can also give women and girls the ability to transform existing social structures.”¹¹⁵ As women and girls join teams and participate in sports, they “can learn valuable teamwork skills.”¹¹⁶ As a result of these experiences, “[t]his cooperative aspect of playing team sports can help women and girls work better with others, both in the classroom and in professional institutions generally.”¹¹⁷

Moreover, “if more girls play sports with boys at an early age, boys and girls will necessarily view each other differently from the way they currently do.”¹¹⁸ Cultural stereotypes can be broken down from the beginning with the new generation. “If girls always participate with the boys in youth soccer leagues and the like, men may come to see women’s participation in professional institutions as a given.”¹¹⁹ Further, “[g]irls may also learn to view boys as less intimidating, which would provide them with the confidence and skills necessary to succeed within professional institutions in later life.”¹²⁰ As a result, “this increased confidence will reinforce men’s acceptance of women’s participation.”¹²¹ Ultimately, “integrating sports at an early age has the potential to change the nature of gender hierarchy.”¹²²

The benefits of altering men’s perceptions of women and gender roles are intuitive as to women. However, by authorizing the surveying of women alone, the OCR has ignored the possibility these changes are desirable for men as well. Moreover, in doing so, it has undercut the spirit of Title IX in a way that undermines its importance. By surveying only women as to their interest, a university seems to imply that athletic participation and the equality of opportunity has benefits only realized by women. As outlined above, women athletes have the potential to alter the fundamental way both men and women view their gender roles. To be truly faithful to the egalitarian spirit of Title IX, it should be recognized that this restructuring of gender ideology necessarily benefits both sexes. Moreover, the effect would perpetuate themselves; as men see more women athletes and their perceptions of women’s roles and abilities shift, their interest in seeing increased female involvement in sports should increase concomitantly. By failing to ever account for male interest, the OCR precludes ever measuring this positive effect.

¹¹⁴ *See id.*

¹¹⁵ *Id.*

¹¹⁶ Note, *Cheering on Women and Girls in Sports*, *supra* note 21, at 1638.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 1638–39.

¹²² Note, *Cheering on Women and Girls in Sports*, *supra* note 21, at 1639.

C. THE SURVEY EXCEPTION IGNORES THE PRINCIPLE OF TITLE IX

One of the main purposes of Title IX is to eradicate sex discrimination in athletics. In 1972, the federal government responded to a series of reports that documented pervasive discrimination against women in sports. The government took steps, like passing Title IX, to require schools that receive federal funding to fix the problems. The burden was on the school to change their policies and create equal opportunities for women. Not only did the schools have to change, they had the burden of showing that they were fully meeting the interests and abilities of their female students when they provided less than their fair share of sports opportunities.¹²³

But now, the new e-mail survey exception “shifts the burden to female students to show that they are entitled to equal opportunity.”¹²⁴ Women must now “prove that their schools are not satisfying their interests and that they are entitled to more opportunities.”¹²⁵ “Schools are presumed to comply with the law if the survey does not show enough interest or response, unless female students can provide ‘direct and very persuasive evidence’ to the contrary.”¹²⁶

This burden shift is a dangerous turn of events because the original purpose of Title IX was to require formal equality. The athletic structures were (and arguably still are) set up to benefit men and leave women out. Title IX was enacted to force structural equality, and this interest survey provides a significant change. It may act as a loophole to the requirements that women be given the same opportunities as men. Instead of forcing change to the disproportionate and discriminatory structure outright, the burden is now on the women to demand such change based on interest. Where Title IX was developed to forbid the exclusion of women, now women must compel the school for their inclusion. This change to the underlying structure of Title IX is a complete contradiction of the original purpose and principle of the legislation. Requiring women to prove that they are worthy of equality is one of the most troubling aspects of this new regulation.

D. THE SURVEY IS PREDICATED ON SEX DIFFERENCE IN APPLICATION OF FEDERAL LAW

Structurally, Title IX demands formal equality for women in the athletic and educational system. Not only is the e-mail survey, which is based solely on interest, a serious and significant departure from the historical application of Title IX as discussed above, it also suggests that men and women are different and therefore not entitled to the same opportunities. Men’s interest in sports is assumed, but women must demonstrate their interest—and so, impliedly, must demonstrate their equality—in order to receive equal treatment. Women are assumed to be different, less interested in sports. This shifting of the burden represents a

¹²³ Title IX “Clarification,” *supra* note 29, at 3.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 2.

codification of alleged “sex differences.” The recent clarifications make women prove that there are no differences in order to obtain equal access and opportunities.

One explanation of this perverse notion of inherent sex differences in sports is that formal equality is required only when the two groups are similarly situated, and men and women inherently do not have similar interests in sports.¹²⁷ However, the proponents would need to consider “whether men’s and women’s relative athletic preference is a natural, and thus permissible, basis for disparate treatment, or whether that gender difference is constructed by social structures.”¹²⁸ As explained below, it is inappropriate to rely on the premise that any difference in interest among the genders is inherent, as any such observable difference is likely to actually be the result of social structures. Consequently, this justification of the burden shifting paradigm created by the e-mail survey method is flawed in its theory.

Alternatively, and independent of that analysis, this burden shifting undercuts the spirit and intent of Title IX, in its result. Though it seems facially apparent, it bears repeating that the intent of the legislation is to cultivate equality between the sexes. The survey method has a result, as explained above, of presuming inequality. This result creates a burden that was not intended by the original legislation, and it places that burden squarely on women. Moreover, it is not in keeping with the spirit of any legislation designed to promote equality to advance a system that presumes inequality. The mere existence of the legislation and the changes that it intends should naturally promote a perception of equality in the minds of the public. Permitting Title IX and the e-mail survey exception to rely on alleged sex differences in interest as the basis for continued inequality removes even the potential for that secondary benefit.

E. “INTEREST” IS TOO COMPLEX AND PROBLEMATIC TO DETERMINE FROM A SURVEY

At the center of the e-mail survey is an effort by the school to ascertain interest. But, by attempting to assess current interest in sports teams and desired athletic opportunities for women, the school sets itself up for failure on a number of fronts. First, this method overlooks the value in having athletic opportunities for future students. Furthermore, and perhaps more problematic, actual interest may be too complex of a metric to measure. The concept of interest, as measured in the e-mail survey, is predicated on incorrect assumptions about the ways in which interest is generated. For example, women may decide to join teams in which they had no prior interest if that team became available.

Social scientists have agreed that it is a “complex problem” to establish how interested women are in athletics.¹²⁹ For one, “[s]ocial structures,

¹²⁷ See Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 847 (2006).

¹²⁸ *Id.*

¹²⁹ *Id.* at 825.

including signals from universities that devalue women’s sports as compared to men’s, have influenced women’s interests in athletics and are responsible, to some degree, for lack of athletic interest among women.”¹³⁰ These signals may be based in historic precedent, but they are still coming through all too strong. And “[a]s long as these social structures continue to relate to athletics in a gender-specific manner, it is impossible to isolate the extent to which women’s interest in athletics is socially constructed.”¹³¹ Therefore, it is ineffective to try to determine interest within this structure of historical discrimination.¹³²

Moreover, “[s]ocial scientists, advocates, and the courts have recognized that opportunity, combined with other social forces, generates interest.”¹³³ Courts have repeatedly concluded that “[i]nterest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience.”¹³⁴ Since interest is generated in such a complicated and intricate way, the results of the survey “are likely to merely reflect and reinforce the status quo in which women’s athletic opportunities are disproportionately lower than men’s.”¹³⁵

Critics of the regulation anticipate that the results of the surveys will “simply serve as an echo chamber, ‘institutionaliz[ing] the very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports.’”¹³⁶ Universities offer fewer female athletic opportunities as a result of continued stereotypes about women’s lack of interest and lack of abilities in sports.¹³⁷ But, because fewer opportunities are available, the stereotype is reinforced because fewer women actually play.¹³⁸ As a result, the true scope and possible measurement “of women’s interests and abilities in athletics is obscured by the component of espoused interest that is socially constructed by stereotypes of women’s interests.”¹³⁹ “As such, interest can neither be measured nor fairly employed as a benchmark for compliance.”¹⁴⁰

Typically, surveys will only reveal that opportunities in sports have been, in the past, limited.¹⁴¹ “So even if surveys reveal a lack of interest by women in particular sports, that is most likely because they have not had the chance to play those sports.”¹⁴² One way that interest is generated is from access to the game. When the survey reveals a lack of interest from lack of opportunities in the past, “[t]o limit their future opportunities based on such surveys would be doubly unfair.”¹⁴³ The NWLC advocates a more

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.*

¹³³ Buzuvis, *supra* note 127, at 841.

¹³⁴ Title IX “Clarification,” *supra* note 29, at 3 (quoting *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996)).

¹³⁵ Buzuvis, *supra* note 127, at 841.

¹³⁶ *Id.* at 846 (alteration in original).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Title IX “Clarification,” *supra* note 29, at 3.

¹⁴² *Id.*

¹⁴³ *Id.*

inclusive and expansive concept for women's athletics: "schools should follow the motto of the movie *Field of Dreams*: 'If you build it, they will come.'"¹⁴⁴

Another criticism charged by the opponents of the e-mail survey, is that because public comment or scrutiny was not invited before the release of the 2005 Additional Clarification by the OCR, it is difficult to estimate whether any of these problems were considered throughout the development and adoption of the e-mail survey.¹⁴⁵

Ultimately, the e-mail survey exception also "ignores the reality of how teams are created."¹⁴⁶ Typically, teams are created by schools through an effort of recruiting athletes or encouraging students with an interest to visit the campus and ultimately attend; as a result, students who have an interest in a particular sport not offered by the school are unlikely to attend that school.¹⁴⁷ "But the new Clarification ignores this reality by allowing schools to claim that they are providing enough opportunities for women based only on a survey of current students' interests."¹⁴⁸

V. SOLUTIONS

The e-mail survey exception as set forth in the 2005 Additional Clarification is merely one method of addressing Title IX compliance, albeit a flawed approach. I offer another creative solution to the problem. Instead of relying on impractical e-mail surveys that are intended to measure a troublesome "interest," there may be better ways to help women realize the full extent of possibilities available under Title IX.

Perhaps a more accurate way to measure interest among female students, and a more practical way to ensure that opportunities are available on an equitable basis, is simply to make funding available on a provisional basis. I propose that universities make funding for women's and men's athletic programs available to any quorum of students that submits a request to the school and is able to show that enough interested students can be provided to field a team. By making the system for men's and women's teams the same, the school would not be unfairly placing a burden on one group. Rather, the school would be required to respond to the demands of all of its students. This could be one example of a different approach to Title IX compliance. It is important to note, however, that having a proportionate number of teams for men and women is still arguably the most effective system to reach gender equality in sports opportunities. But, if that is not feasible for some reason, this could be another way to achieve compliance and equality.

In this solution, for example, if a university does not currently have a women's soccer team, but a group of students (perhaps a few less than the number of players needed for that team) expresses an interest in creating

¹⁴⁴ *Id.*

¹⁴⁵ Buzuvis, *supra* note 127, at 841.

¹⁴⁶ Title IX "Clarification," *supra* note 29, at 3.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

one, the school is obligated to fund the program for an experimental period—I would propose perhaps four seasons. This would be an immediate response to interest, instead of waiting for the school to organize its resources to accommodate interest, as is provided under the Title IX guidelines now. As interest in a fledgling program grows, the school would be required to increase funding proportionally. If interest in the program was not sustained, the school could discontinue the program, provided that ample opportunity had been presented to allow it to take root. The program would then be available to be restarted at the next announcement of interest from students or teachers interested in coaching and seeking players.

Under such a system, the interest is readily apparent, and the school is given the leeway to provide only the funding necessary to support the demonstrated interest. The school might, in fact, save resources and work hours by avoiding analysis of a survey or strategizing more complex ways to gain interest. Under this system, there is no problem of nonresponse bias, or problems with the failure of students to respond. Moreover, this solution allows other women the opportunity to see a program in action and presents a means of cultivating interest in the student body as a whole. Additionally, this system presents opportunities to gauge interest among the entire student body population and the community at large. Finally, by placing the onus on students to initially organize their own programs, such a system furthers other pro-social benefits of athletic culture. Female athletes, indeed all student athletes, would be immediately placed in leadership positions and would be actively working in their communities as organizers. This visibility of female leadership and a more actively engaged student body as a whole is truly within the spirit of the Title IX legislation.

While this system would appear to place the burden on women to demand change, which was one criticism of the e-mail survey provision, it would also require prompt action from the school in response. Whereas the e-mail survey would elicit student’s interest, the school would then simply have to work towards meeting that interest. Nothing was required of the schools immediately. Here, the school would be required to help make the team a reality quickly.

Along with this system, there would need to be educational outreach to schools and students so that information about this system would be made widely known and available. If students do not know of this system for reforms, then it is effectively obsolete. Efficient communication is key; spreading the message to current and future students, as well as faculty and administrators, would be essential to the system’s success. This system would be good for schools that do not have teams in which prospective students may be interested. It would prevent schools from being foreclosed as an option because the desired team could be started quickly. Ultimately, students would have the capability of effecting change. Furthermore, outreach efforts, familiarization with the facilities available, and role modeling would help generate awareness of opportunities. This would help students move beyond their existing attitudes that have been shaped by social forces, and lead to more active participation on their part.

While this is one possible solution, it is not the only one. This solution is presented to illustrate that there are countless ways to make the purpose of Title IX a reality for women. Had the OCR provided advance notice of its intention to clarify the guidelines, perhaps the e-mail survey would not have been the only suggestion, or changes to the clarification could have been made to avoid the resulting furor.

VI. CONCLUSION

Title IX has unquestionably gone a long way to improve conditions for women. Women have increased access to sports and educational opportunities. As a result, the cultural winds have shifted, and girls' participation in sports at a young age is more expected and encouraged than ever. But, progress is incomplete. Attacks on women's access continue in a variety of guises. One not so veiled guise is the "e-mail survey" exception, which seeks to halt the progress of Title IX. This "clarification" lets schools off the hook and undermines the purpose of the legislation. Women have come too far to let a misguided attempt like this derail access to sports. Vigilance must be maintained. Women deserve access and opportunities in sports just as much as men do.

It is interesting to ponder how such an e-mail survey concept would have played out in the area of school desegregation. Could Jim Crow school districts have satisfied their equal protection obligations by surveying black students and then showing that the district is meeting the level of interest that survey returns show in attending a majority-white school? Such an example sounds ridiculous, because the concept of desegregation goes beyond "interest" to equality for all. The same can and should be said for women—interest should not be the deciding factor in changing existing discriminatory structures. Equality means equal, not simply enough so that no one will complain too loudly.

To be fair, one significant, and persistent, criticism of Title IX is that men's teams suffer disproportionately as the law is enforced. I will not deny that certain men's teams, particularly men's wrestling and men's swimming, are often among the first to be eliminated if the school chooses that route to compliance.¹⁴⁹ But instead of allowing backlash to fall upon Title IX, schools should seek ways to comply with Title IX without eliminating teams, such as trimming costs from more expensive sports or being more resourceful with athletic finances. Many schools have shown that it is possible to focus on the expansion of sports opportunities for all, instead of eliminating teams to be deemed Title IX compliant.

Ultimately, it is important to remember that everyone should have plenty of opportunities and flourish in sports, both men and women. Ideally, there would be an abundance of opportunities for everyone. But, if limitations must be placed on one group, women should not suffer unjustly. Men have had the benefit of funding and opportunities for decades, and

¹⁴⁹ See Preussel, *supra* note 93, at 100–01.

women should not be punished today because they have been punished in the past. No one group is more deserving of access to sports.

Lastly, while not subject to Title IX, the Olympics have been a direct beneficiary of the progress made by this legislation. Olympic female athletes would not have reached such a level in their sports without opportunities at all of the lower levels. However, even the Olympics are not fully equal in its opportunities. As an example of the vigilance that must be maintained, the National Organization for Women (“NOW”) has begun lobbying for parity in Olympic sports. Women ski jumpers are not allowed to compete, and NOW is urging the International Olympic Committee to “right this wrong immediately.”¹⁵⁰ NOW President Kim Gandy argued that “[t]he exclusion of women from this sport, which is open to men, is unwarranted and unfair. We reject outdated notions that ski jumping is not ‘appropriate’ for women because it is disproportionately hazardous to their health.”¹⁵¹

Progress towards equality is not finished. As this example shows, women’s opportunities are not yet equal to men’s, and while Title IX has demanded vast improvements, progress may be eradicated without continued fighting. The world of sports should not be a zero-sum game; women’s opportunities do not have to mean the elimination of opportunities for men. Creative solutions can be developed to help all athletes have plenty of opportunities. But, women must not be penalized for the lack of teams historically. Men are not more deserving because they have had opportunities longer.

¹⁵⁰ Statement of NOW President Kim Gandy at Women’s Ski Jumping USA Rally (Feb. 24, 2008), available at <http://www.now.org/press/02-08/02-24.html>.

¹⁵¹ *Id.*

