

TITLE IX REINTERPRETED: OBLIGATION OF PUBLICITY

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“Success in life comes to those who simply refuse to give up; individuals with vision so strong that obstacles, failure and loss only act as teachings.”

-Silken Laumann

I. BACKGROUND

In May 1939, NBC aired the first-ever televised sporting event, a mens college baseball game between Columbia and Princeton. It was not until 36 years later that a women’s college sports team would be considered for television coverage. The head-start men received has had significant repercussions. To this day, women collegiate athletes continue to be denied equal access to the benefits of publicity—an expanded fan-base, an ability to build their brand, opportunities to attract attention from professional sports teams, agents, and Olympic committees. The list goes on.

Women’s athletics does not have to be, and in fact it should not be, this way, as Title IX protects college athletes from sex discrimination. It provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

The National Collegiate Athletic Association¹ has promulgated guidance regarding Title IX compliance that NCAA-member institutions must follow. According to the NCAA, as provided by the Office for Civil Rights, to comply with a large

* The author wishes to thank Professor William W. Berry III for his feedback and support throughout the writing process.

¹Hereinafter referred to as “NCAA.”

portion of the focus of Title IX, member institutions must meet one of three prongs:

- (1) "Provide participation opportunities for women and men that are substantially proportionate to their respective rates of enrollment of full-time undergraduate students;"
- (2) "Demonstrate a history and continuing practice program expansion for underrepresented sex; or
- (3) "Fully and effectively accommodate the interests and abilities of the underrepresented sex."

Including by apportioning athletic scholarship dollars proportional to the athletes' participation and providing equal treatment of athletes as provided by other provisions of NCAA guidance.² While efficient and effective, the shortened version of the Three-Part-Test only focuses on one piece of Title IX.

Three specific goals are included in the language of Title IX. (1) ...be excluded from participation in, (2) be denied the benefits of, (3) be subjected to discrimination. The first goal has been widely discussed and has been the focus of many Title IX disputes. It is the focus for the use of the Three-Part-Test, as stated above. The harsh reality is that a federal statute needed to be passed to just allow women a seat at the sports table. Although further clarification has been provided by the Office for Civil rights, disputes have all but died down. It seems that federally funded educational programs are falling in line with the obligation of Title IX and are providing women athletes with equal opportunities.

However, the NCAA has failed to address the second goal of Title IX: the benefits associated with participation. Participating in competitive sports, especially at the collegiate level, comes with a wide range of benefits. No one reaps the benefits more than the NCAA, but that is an entirely different argument to be left for a different article. Title IX, as it pertains to athletics, has been interpreted, clarified, and re-clarified several times. The most recent clarification and guidance provided by the Office for Civil

² NCAA, Title IX Frequently Asked Questions, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions>.

Rights was released in 2010. A review of each clarification results with a common issue; benefits are not mentioned. Specifically, benefits from publicity.

The reality is that the benefits an athlete receives from participation in intercollegiate athletics has likely not been on the radar of most Title IX advocates because the fight has been focused on just getting a seat at the table. It is now 2020, the seat has been sat in, and it is time to advocate for equality in all aspects of intercollegiate athletics, including publicity and the right to television coverage.

In the United States, primetime television is between 8pm and 11pm Eastern Standard Time (EST).³ Viewership peaks during those hours, and ad costs increase commensurately. Simply put, networks make the most money from programs run during those hours therefore they seek to only include the most financially benefiting forms of coverage.

In recent years, each of the Power 5 Conferences—the Southeastern Conference (“SEC”), Pac-12, Big 10, Big 12, and Atlantic Coast Conference (“ACC”)—has created its own television network. While men’s college football and basketball can count on receiving major-network coverage, the creation of Conference-specific networks has expanded television coverage beyond those sports.⁴ But women’s sports have continued to receive unequal coverage.

From February 1st to February 14th, between the hours of 7pm EST and 11:30pm EST, the SEC network broadcasted 72 programs. Of those, only 21 were women’s specific. Of those 21 women’s specific programs, 9 were aired on the secondary SEC+ Network.⁵ SEC Network+ is an alternate network that can only be accessed through the ESPN app.⁶ Between these dates and hours,

³ Glenn Halbrooks, Primetime Television Audience Viewing Pattern Changes, *thebalancecareers.com* (January 26, 2019), <https://www.thebalancecareers.com/when-is-prime-time-television-2315187>.

⁴ Eben Nov-Williams, College Sports, (September 27, 2017), <https://www.bloomberg.com/quicktake/college-sports-ncaa>.

⁵ The schedules used to calculate the provided statistics can be found at https://www.secsports.com/tv-schedule/_/date/20200214.

⁶ SEC Sports, What is the difference between SEC Network, SEC Network+ and SEC Network Alternate Channel? About SEC Network+, <https://www.secsports.com/article/23926730> (last visited Jan. 31, 2020).

SEC women's specific sports held 53 different games or competitions. SEC men's specific sports were scheduled for 27, yet mens sports still receive over television coverage between the hours of 7pm EST and 11:30pm EST. These coverage patterns are similar across other Conference networks.

The extreme difference in television coverage is permissible under the current interpretation of Title IX. Because the focus has remained on meeting the first goal of Title IX, "be excluded from participation in," publicity and television coverage has gone unnoticed. Television coverage is an added benefit, which is not the purpose of the first goal. It is time the Office for Civil Rights provide an up-to-date interpretation and clarification of what benefits intercollegiate athletes receive from participation in intercollegiate sports. This interpretation should include, and require, equal access to the benefit of publicity, to include television coverage.

Opponents of such an interpretation may argue that men's sports have a larger following, with higher rates of viewership, and thus generate more revenue. But the preference for men's sports derives from the history of inequality in women's and men's athletics—the very thing Title IX is designed to address. Providing unequal levels of publicity and television coverage only reinforces the unequal treatment of women intercollegiate athletes and denies them the full benefits of college sports, in violation of Title IX.

Rather than throwing their hands up and pointing to an uninterested audience, it is time that the Office for Civil rights, the NCAA, and their member institutions invest in women's sports. By promoting women's sporting events, they will build a following for women athletes and their teams and thereby build a revenue base, making the argument of lack of following a moot point. One practical way to do that is by requiring equal coverage of women's sports in contracts with broadcast networks for higher-value sports coverage (*e.g.*, Alabama football).

This article will review the current regulations and interpretations, identify their flaws, and present a solution to the issue of inequality of publicity.

II. REGULATIONS AND INTERPRETATIONS

Bylaw 2.3 of the NCAA Division I Manual covers gender equality. The manual provides that “It is the responsibility of each member institution to comply with federal and state laws regarding gender equity” and “The activities of the Association should be conducted in a manner free of gender bias,” respectively.⁷ The federal statute that governs these bylaws is Title IX of the Education Amendments of 1972, 20 USC § 1681. The specific provisions concerning athletics programs are at 34 C.F.R. § 106.4. The statute is enforced by the Department of Education’s Office for Civil Rights.

Title IX protections for college athletes can bring rise to 3 types of claims (1) scholarship claims; (2) effective-accommodation claims; and (3) equal treatment claims. For the purposes of this proposal, focus will remain on effective accommodation and equal treatment.

In order to continue to receive federal funding, an NCAA member institution must provide equal opportunities for both men and women in (1) athletic financial assistance (scholarships); and (2) athletic opportunities.⁸ Effective accommodation has been interpreted by courts to concern “the opportunity to participate in athletics...”⁹ While equal treatment concerns “...sex-based equal differences in the schedules, equipment, coaching, and other factors affecting participants in athletics.”¹⁰

In 1979 the Department of Education’s Office for Civil Rights published in the Federal Register the “Policy Interpretation of the Intercollegiate Athletic Provisions.”¹¹ The eleven page document provides clarifications of “the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy interpretation provides a means to assess an institution’s compliance with the equal opportunity requirements...”¹² The Office for Civil Rights

⁷ NCAA Bylaws, art. 2.3.1 and 2.3.3.

⁸ Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed.Reg. 71, 418 (Dec. 11, 1979).

⁹ *Biediger v. Quinnipiac University*, 928 F.Supp.2d 414, 436 (D. Conn. 2013).

¹⁰ *Id.*

¹¹ Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed.Reg. 71, 418 (Dec. 11, 1979).

¹² *Id.*

interpretation provides 3 separate sections, or major program components, for evaluation of an institution's compliance of Title IX: (1) Athletic Financial Assistance; (2) Equivalence in Other Athletic Benefits and Opportunities; and (3) Effective Accommodation of Student Interests and Abilities.¹³

In 1990 the Office for Civil Rights published the "Title IX Athletics Investigator's Manual." The 170-page document is intended for use in investigating a college athletics programs compliance of Title IX. The document provides a more in-depth explanation of the 3 major program components discussed in the 1979 interpretation. Both the 1979 interpretation and the 1990 manual have been used by courts to assist in their decisions on Title IX violations.

The Office for Civil Rights and courts around the United States have worked hand in hand to ensure equal opportunity for men and women within intercollegiate athletics. It seems as though the two have done a pretty good job at this, except they have not. While violations of the "Effective Accommodations of Interest and Abilities" portion of Title IX have almost been reduced to 0, largely in part because of the extensive litigations surrounding the topic, violations of "Equivalence in Other Athletic Benefits and Opportunities" has not. Not litigating the issue does not mean there have been no violations and it does not need to be addressed or updated. The issue is that the manual allows for the smaller program components under the major component to be left uninvestigated.¹⁴

There is very little guidance on how to evaluate compliance of the smaller program components. They are an afterthought, but this can be easily addressed and fixed. In fact, the method perfected by courts and the Office for Civil Rights to test for compliance of Title IX for "Effective Accommodations of Interest and Abilities" can also be used, with slight changes, to address violations of the "Equivalence in Other Athletic Benefits and Opportunities" section. It is important to understand how both major program components and the smaller component of

¹³ Id.

¹⁴ Valerie Bonnette & Lamar Daniel, Office for Civil Rights, Title IX Athletics Investigator's Manual (1990).

publicity are being interpreted and evaluated to move forward with the necessary reinterpretation and creation of a new test.

*A. Equivalence in Other Athletic Benefits and Opportunities:
Publicity*

The Department of Education's 1979 interpretation of Title IX as applied to college athletics includes a list of 10 "other benefits." While not exhaustive, the list includes: provision and maintenance of equipment and supplies, scheduling of games and practice times; travel and per diem expenses; opportunity to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; provision of locker rooms, practice and competitive facilities, provision of medical and training services and facilities; and **publicity**.¹⁵ While all benefits are important and deserve to be received by college athletes equally, for the purposes of this paper the focus will remain on publicity.

The NCAA website also lists several "other benefits" which includes publicity. The NCAA does not, however, provide an interpretation of what "publicity" means or includes. The Department of Education does, kind of. The interpretation is short, to say the least.

Per the 1979 interpretation, an athletic programs compliance of publicity will be examined by (1) Availability and quality of sports information personnel; (2) Access to other publicity resources for men's and women's programs; and (3) Quantity and quality of publications and other promotional devices featuring men's and women's programs.¹⁶ While the interpretation clarifies that the factors on the list are not exhaustive, in comparison to all the other benefits clarified, this interpretation leaves much room for further interpretation. It seems the Office for Civil Rights understood this because in 1990 the office released a much lengthier document to further clarify 1979 interpretation.

The Title IX Athletics Investigator's Manuals discussion on publicity, again, is short. The clarification consists of 3 pages of

¹⁵ Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed.Reg. 71,413 (Dec. 11, 1979).

¹⁶ Id.

questions and comparisons from a document that is 170 pages long. When investigating if a member institution is in compliance of Title IX through the publicity obligation 3 forms of data are requested.

- 1.) Copies of written policies, procedures, and criteria regarding providing publicity services to the men's and women's athletics programs, including samples of all publicity documents made available to the men's and women's programs (e.g., press guides, recruitment brochures, schedule cards, game programs, etc.)
- 2.) A description of all publicity and promotional services made available to the men's and women's athletics programs
- 3.) A list of the names of sports information personnel and the teams to which each person is assigned¹⁷

The manual provides a series of questions investigators should ask while conducting their investigations. The most relevant to television coverage being: "Who coordinates any radio and TV coverage? Explain."¹⁸ The manual further explains that the responsibility and efforts of providing equality through the benefit of publicity services such as newspapers, television, and other media falls on the member institution. No mention of how this is to be measured is included.¹⁹

The manual makes clear that benefits may not be exactly equal. The manual states "equivalent is defined in the Policy Interpretation as equal or equal in effect."²⁰ Some benefits may favor men, while others favor women, offsetting the disparity. These factors need to "have the same relevant impact."²¹ The manual gives the example of not providing socks to one team being less significant than not providing uniforms.

¹⁷ Valerie Bonnette & Lamar Daniel, Office for Civil Rights, Title IX Athletics Investigator's Manual (1990).

¹⁸ *Id.*

¹⁹ The manual includes extensive information, guidance, and tests on how an institution is to be evaluated for compliance for the other 2 major program components, but very little guidance for the 10 smaller components.

²⁰ *Id.*

²¹ *Id.*

The manual also provides guidance on disproportionalities that may be justified due to the “unique aspects” of the sport. This section could be the root of the argument defending why men’s sports receive more television coverage, yet no mention of publicity, or revenue from a specific sports publicity is made. The “Permissible Differences” section of the investigator’s manual focuses on “the comparison of benefits and services provided to athletes of each sex” with mentions of football and other differences like the replacement of equipment.²²

Although flawed, the manual lays the groundwork for necessary updates. Publicity in the 1990s is not what publicity is today. It’s time that the Office for Civil Rights recognize this and provide new guidance on the obligation of the right to equal amounts of publicity, to include a reinterpretation of the meaning of publicity to meet the needs of collegiate athletes of today, as well as a more detailed test for analyzing whether a member institution is providing equal opportunities of publicity to both their female and male athletes. An example of this being the tests used in the multiple cases involving a violation of the “Effective Accommodations of Interest and Abilities” section of Title IX.

B. Effective Accommodations of Interest and Abilities: 3-Part-Test

While Title IX’s obligation to the right to publicity has never been litigated, equal opportunity to effective accommodations has. A series of court cases have used and almost perfected the tests provided by the Office for Civil Rights to address this program component. The courts have also provided more detailed descriptions on each aspect of the tests, with guidance from clarifications published over the years by the Office for Civil Rights.

Per the Office for Civil Rights 1979 interpretation, 2 gender equity benchmarks are used to measure effective accommodation: (1) equity in athletic opportunities; and (2) equity in levels of competition.²³ To evaluate if a university has met these

²² Valerie Bonnette & Lamar Daniel, Office for Civil Rights, Title IX Athletics Investigator’s Manual (1990).

²³ Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed.Reg. 71,418 (Dec. 11, 1979).

benchmarks 2 tests are used: (1) the Three-Part-Test; and (2) the Levels-of-Competition test.²⁴ A court will conduct a 2 part analysis using these tests when evaluating if a member institution is in compliance with the “Effective Accommodations of Interest and Abilities” section of Title IX.²⁵ A member institution must meet both tests to be in compliance of Title IX.²⁶ The first 3-Part-Test focuses on participation opportunities²⁷ and will be used as the model for testing compliance of the obligation of publicity.

The Office for Civil Rights 3-Part-Test provides the starting point for how a federally funded educational program can remain in compliance with the “Effective Accommodations of Interests and Abilities” section of title IX. The Office for Civil Rights has made it clear that the 3-Part-Test provides three different avenues for compliance.²⁸

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

²⁴ The Office for Civil Rights has provided extensive guidance and several clarifications on the 3-Part-Test, but has very little information on the Levels-of-Competition test

²⁵ *Biediger v. Quinnipiac University*, 928 F.Supp.2d 414, 438 (D. Conn. 2013).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Norma v. Cantu*, Assistant Secretary for the Office for Civil Rights, Dep’t of Education, Dear Colleague Letter (Jan 16, 1996).

It is important to understand how each avenue of compliance is met, as this will be the model for testing compliance of publicity.

1. Substantial Proportionality: Prong 1

A member institution can satisfy prong 1, for the most part, mathematically. The Office for Civil Rights provided an initial clarification of how this prong can be met in 1996 and again in 2008.²⁹ This prong affords the institution a “safe harbor” and focuses on the participation rates of men and women.³⁰ A two-step process is used in evaluating substantial proportionality. The first step requires an analysis of “the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program.”³¹ “Participation opportunities” refers to countable intercollegiate-level varsity sports.³² This number is then compared to the gender demographic of the specific university in question.³³ For example, a university with a student population demographic of 45% female students and 55% male students should have an athletic program that reflects these percentages. Although the percentages do not need to be exact, they should be substantially proportional.³⁴

This prong seems simple to meet, but institutions have faced difficulties meeting the prong when listing their countable intercollegiate-level varsity sports. The 2006 clarification provided guidance for institutions to determine which intercollegiate athletic activities are considered countable under prong 1.³⁵ Factors such as an activity’s structure, administration, and team preparation and competition are all considered in determining an athletic activities countability.³⁶

If upon evaluation of prong 1, an institution is made aware that their athletics program is not substantially proportional to

²⁹ *Id.*

³⁰ *Id.*

³¹ Dep’t of Educ., Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, at 1 (Jan. 16, 1996).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Stephanie Monroe, Assistant Secretary for the Office for Civil Rights, Dep’t of Education, *Dear Colleague Letter* (Sep 17, 2008).

³⁶ *Id.*

their undergraduate demographic, the member institution can remain within compliance of Title IX by meeting prongs 2 or 3.

2. History and Continuing Practice: Prong 2

This prong requires an evaluation of the institution's history and continued practice of program expansion.³⁷ This prong looks at both the institution's past, present, and future plans to provide nondiscriminatory participation opportunities for the underrepresented sex.³⁸ An institution should demonstrate that it has been and is responsive to the developing interests and abilities of the underrepresented sex.³⁹

3. Fully and Effectively Accommodating Interests and Abilities of the Underrepresented Sex: Prong 3

The third and final prong requires an evaluation of the interests of the underrepresented sex.⁴⁰ It may be that there is in fact no interest by the underrepresented sex that needs to be accommodated by the institution and for this reason a disparity has developed. If the institution believes and can prove that its female students are less interested or able to participate in sports, their opportunities are not being denied.⁴¹ Where there is no interest an institution can provide men with more opportunities while not violating Title IX through this prong. If an institution has met this prong, it will not be required to provide information on substantial proportionality of the opportunities it does provide.⁴²

The Office for Civil Rights will consider 3 factors in determining compliance under part 3. All 3 conditions must be present for a judgment of noncompliance.⁴³ If there is an (a) unmet interest in a particular sport; (b) sufficient ability to sustain a

³⁷ Norma v. Cantu, Assistant Secretary for the Office for Civil Rights, Dep't of Education, Dear Colleague Letter (Jan 16, 1996).

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ Id.

team in the sport; and (c) a reasonable expectation of competition for the team, an institution will not have met this prong.⁴⁴

III. REINTERPRETATION AND TESTING FOR COMPLIANCE

There is no reason to reinvent the wheel when addressing the issues with the current interpretation of Title IX. The Office for Civil Rights and courts have all but perfected the 3-Part-Test and it has proven effective. For this reason, it will be the model for testing compliance of the obligation of publicity.

A reinterpretation of Title IX and test for publicity are not the only necessary changes that should come with this reevaluation. The Title IX Athletics Investigators Manual presents its own issues and requires adjusting. Publicity has never been litigated or at the forefront of a dispute. This could likely be largely in part because of the way the investigators manual is written. It is written to accommodate investigations into athletic programs in 1990, not 2020. The current manual allows for many program components to go uninvestigated. This should change and the solution is actually quite simple.

A. Investigators Manual

Besides the obvious issue of the document being 30 years old, the Office for Civil Rights Title IX Athletics Investigator's Manual, which provides guidance and the steps necessary for a thorough investigation into equal opportunities for male and female athletes at the collegiate level, is flawed. It actually does not ensure a thorough investigation of an institution's compliance with Title IX.

The manual provides that an investigation into a member institution's compliance of Title IX should include an analysis of each factor within a program component. An investigator should complete a thorough examination of all program components in order to evaluate an institution's compliance of Title IX.⁴⁵ There are 13 program components, three of which are permitted to have

⁴⁴ Id.

⁴⁵ Valerie Bonnette & Lamar Daniel, Office for Civil Rights, Title IX Athletics Investigator's Manual (1990).

their own separate investigations completed;⁴⁶ athletic financial assistance; accommodation of athletic interests and abilities; and other athletic benefits and opportunities.⁴⁷ Athletic benefits and opportunities should encompass 10⁴⁸ of the 13 program components. The manual permits less than all 3 major program components to be investigated. This is the major issue. Oftentimes not all program components are investigated. Outside of athletic financial assistance and accommodation of athletics interests and abilities, the remaining components are an afterthought. The manual is not set up to investigate the smaller components unless absolutely necessary. In fact, the manual provides little guidance as to how the smaller program components should be evaluated.

The manual suggests that one program component can be used to cross check disparities in another program component.⁴⁹ An example of this would include the cross comparison of travel and per diem with medical and training facilities and services. This cross comparison serves to eliminate conflict with using a certain mode of transportation because of the need for training staff to travel with teams to away games.⁵⁰ It is interesting that this example is used when both components mentioned are rarely investigated and are within components that are considered an afterthought. The use of cross checking is made to look like a proper form of checks and balances, but this would not be necessary if the manual required full investigations of every program component regardless of the reported issue.

The Office for Civil Rights should update its investigators manual and require a full investigation of all program components, with no exceptions. The Office for Civil Rights should also take the time to improve the manual to include tests for each program component to evaluate compliance, not just athletic financial assistance and accommodation of athletics interests and abilities. Some tests that have already been used can be easily

⁴⁶ Previously referred to as “major program components”

⁴⁷ Valerie Bonnette & Lamar Daniel, Office for Civil Rights, Title IX Athletics Investigator’s Manual (1990).

⁴⁸ Previously referred to as “smaller program components”

⁴⁹ Valerie Bonnette & Lamar Daniel, Office for Civil Rights, Title IX Athletics Investigator’s Manual (1990).

⁵⁰ Id.

adjusted to also evaluate the other program components. An example of this being the Three-Part-Test.

B. Reinterpretation: Publicity

With changes in the dynamic of college athletics should come changes in interpretation of the true meaning of equality under the protections of Title IX. Title IX has remained unaltered since its interpretation in 1979. Publicity of college athletics in 1979 is vastly different from publicity in 2020. Publicity is the current hot topic of discussion in college athletics today. The discussion may not specifically call out publicity, but publicity plays a large role in the changes happening today and the benefits athletes will now receive.

The NCAA is permitting athletes to receive more benefits from participating in college athletics now than ever before. Benefits that will likely create a disproportionality between the sexes if the issue of equal access to publicity is not addressed. The Board of Directors met recently to discuss and implement change in two major areas of interest for college athletes: (1) Extra benefits for athletes designated as ‘elite,’ and (2) Name, Image, and Likeness.

Many college athletes who participate in Olympic sports aspire to one day represent their countries in the Olympic Games. A college athlete’s ability to be seen plays a large role in being considered for Olympic teams. Many athletes depend on publicity to boost the likelihood of being seen by Olympic committees. Up until recently, those who were selected by their Olympic Committees were not provided any extra benefits for being designated as ‘elite.’ The 2020 NCAA National Convention changed that. The NCAA has created exceptions to their bylaws for athletes designated as ‘elite’ by the US Olympic and Paralympic Committee and the sport-affiliated national governing body, which includes international equivalents.⁵¹ A major benefit ‘elite’ athletes will now receive is the exception to time limits for athletically related activities. During a playing season collegiate athletes are limited to 20 hours of athletically related activity per

⁵¹ 2019/20 NCAA Bylaws, art., 17.1.7.10.7.2.

week and 4 hours of athletically related activity per day.⁵² An athlete designated as ‘elite’ may participate in individual workouts with coaching staff members without the activity being considered countable toward their 4 hours per day and 20 hours per week maximum.⁵³ Not all college athletes will be designated as elite and given this extra benefit, but they should be given equal access to all the tools to at least be considered.

Name, Image, and Likeness. This issue has been at the forefront of the collegiate conversation for years. Controversy has struck several universities due to this topic. Participating in violating the NCAA’s rules of amateurism has now become a crime. People are going to prison because of this issue. The NCAA has been strictly against their athletes profiting off of their name, image, and likeness for decades. Until recently. The NCAA Board of Directors met on April 28th, 2020 to hear the recommendations of a working group on modernizing the NCAA’s rules on name, image, and likeness.⁵⁴ The board left the meeting in support of proposed changes that will allow athletes to profit off their name, image, and likeness.⁵⁵ A short article on NCAA.org provided a perfect answer to the question ‘what is name, image, and likeness?’ The article states, “Most simply, ‘name, image and likeness’ are three elements that make up a legal concept known as ‘right of publicity.’”⁵⁶ College athletes will soon be given the added benefit to profit from their publicity. This added benefit will open a wide range of doors.

C. Evaluation of Compliance for Publicity

The changes needed to begin to evaluate a university’s compliance with the obligation of publicity are simple: (1) Define publicity and its components; and (2) Create a test.

⁵² 2019/20 NCAA Bylaws, art., 17.1.7.1.

⁵³ *Id.*

⁵⁴ ESPN Staff, *Players Getting Paid? Video Games Returning? Answering Your NCAA Name, Image and Likeness Questions*, (April 29, 2020), https://www.espn.com/college-football/story/_id/29113592/players-getting-paid-video-games-returning-answering-your-ncaa-name-image-likeness-questions.

⁵⁵ *Id.*

⁵⁶ Rachel Stark-Mason, *What Name, Image and Likeness Means for College Sports and How the NCAA is Turning to Student-Athletes to Navigate a Path Forward*, NCAA (2020), <http://www.ncaa.org/champion/name-image-likeness>.

The test for compliance of the obligation of publicity has already been created. The 3-Part-Test can be easily revamped to apply to publicity. While the test for effective accommodations of interest and abilities evaluates the undergraduate population, the test for publicity will evaluate the athletics program and its athletes alone. Because the investigators should evaluate every program component, they would have already found the university in question to be in compliance with effective accommodations of interest and abilities, so there would be no need to evaluate the undergraduate population. The test will also differ in that each step is evaluated separately. Non-compliance with step 1 will require an evaluation of step 2. Non-compliance with step 2 will require an evaluation of step 3.

1. Step 1 - Substantial Proportionality

This step will require an evaluation of the 3 different forms of publicity; (1) Printed Publicity; (2) Social Media; and (3) Television Coverage. No form of publicity can be cross used to meet substantial proportionality of the other. The reality is that very few other sources of publicity have the same impact as national, or even regional, television coverage. Allowing men significantly more television coverage while giving women a headline in the athletics section of the university's newspaper is outrageously disproportional. Substantial proportionality for publicity will be evaluated in the same way as it is for interest and abilities. Use of each form will depend on the demographics of the athletic population. For example, if the athletic population is split 55% male athletes and 45% female athletes, the use of publicity should be substantially proportional to these percentages. Factors to be considered will differ by type of publicity. The factors provided are not exhaustive.

Printed publicity may include, but is not limited to, magazine covers and articles (printed and electronic), game day promotions, and newspaper interviews (printed and electronic). Social media may include, but it is not limited to, Instagram, Facebook, TikTok, and Snapchat. Both will also require an evaluation of funds spent.

Television coverage will consist of evaluations of competitions and interviews with athletes. Use of screen time on primary networks and secondary networks will be taken into

consideration. For example, if women's competitions are only being aired on secondary networks requiring a special subscription, this will not be counted toward meeting substantial proportionality unless mens competitions are being aired on the secondary network in a similar fashion. Live and after-hours coverage will also be taken into consideration. Use of primetime coverage will be evaluated on its own. No other coverage will be used to meet compliance of primetime coverage.

If any of the 3 forms of publicity do not meet substantial proportionality, the institution will be required to move on to step 2.

2. Step 2 – Interest

Step 2 will require an evaluation of the underrepresented sex's interest in the form of publicity that did not meet the requirements in step 1. Where there is no interest in the form of publicity, there is no discrimination. Athletes of the underrepresented sex will complete surveys about each form of publicity. Each athlete should be given the opportunity to complete the survey, but they should not be required to be completed. Lack of interest in completing a survey on publicity shows lack of interest in the publicity itself.

This step will not require outside continued observation once the surveys are completed and the areas of interest are identified. No changes will need to be made where there is no interest. However, reaching this step will require the institution to reevaluate interest every year. An alternative to re-evaluations of interest would be to make the changes in order to meet step 1.

Where equality in publicity is not met and interest by the underrepresented sex is discovered, the institution will be required to move on to step 3.

3. Step 3 - Plan for Compliance

This step is the only step that requires ongoing outside monitoring by the Office for Civil Rights. An institution that has reached this step will be required to formulate a plan to meet compliance of publicity within the scope of Step 1. The institution is given the discretion to offer a timeline for compliance. The

institution will present their plan and timeline to the investigators, and if the plan is accepted implementation can begin.

CONCLUSION

Equal access to publicity is a right provided under the protections of Title IX. The Department of Education's regulation 88.41(c) permits the Director of the Office for Civil Rights to consider other factors when evaluating an organization's compliance of Title IX.⁵⁷ It is time for the Director to provide new guidance on compliance of Title IX that takes into consideration the movement within college athletics. Not providing a clear definition of "publicity" or guidance on how the obligation is to be met does not reflect the movement collegiate athletics has made in the past 40 years. The outdated 1979 interpretation and 1990 Investigation Manual may have made sense when the Power-5 Conferences did not each have their own television networks focused on promoting their athletic programs, or when a global pandemic did not threaten the end of in-person sporting events for the foreseeable future, or when the NCAA did not allow for collegiate athletes to receive compensation for their name, image and likeness. The reality is that collegiate athletics has changed. Women may be provided equal opportunity to participate in intercollegiate athletics but are being denied the full benefits that come with their participation. These are such benefits that men continue to reap without question because of a history of misogyny in the United States.

It is time for that to change.

⁵⁷ Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed.Reg. 71, 413 (Dec. 11, 1979).

