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## The NCAA News

### Lack of interest?

#### College athletics community stands back from new Title IX compliance tool

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The NCAA News**



Since the release of the federal government's 2005 clarification to Title IX policy and its accompanying model survey, Title IX advocates have been crying foul. The survey provides a way for institutions to skirt their obligations to female students, they say, instead of ensuring that all interested women have an opportunity to participate in intercollegiate athletics.

The NCAA Executive Committee even urged Association members not to use the procedures set forth in the clarification and called on the U.S. Department of Education to rescind the new analysis.

However, the government has not made any move to reconsider its clarification, and the model survey remains an permissible method of complying with Title IX.



Whether institutions are inclined to use that option, though, is unclear. A report released by the Department of Education's Office for Civil Rights (OCR) last month indicated that before the model survey, interest surveys alone were not a safe harbor.

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Many advocates for female athletes believe that practice should continue — if institutions do decide to use the model survey or any survey at all, they should use a method that will garner the highest response rate possible, such as making it mandatory to fill out the questionnaire in order to register for classes. Also, they believe the survey results should be considered along with other factors, such as participation in club or intramural sports, sports played in an institution's recruiting area and the availability of viable competition in the conference or geographic area.

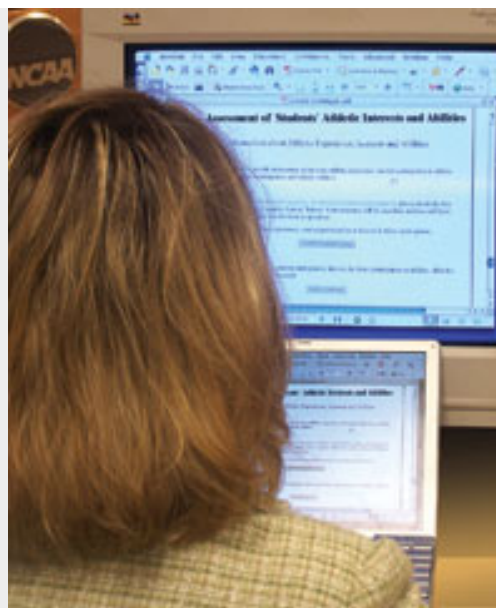
Right now, most institutions don't seem to be using the model survey at all, either alone or in conjunction with an assessment of other factors. Many people involved in the debate believe that the NCAA position has been a major influence.

Atlanta attorneys John Almond and Dan Cohen believe that schools should consider the OCR model survey as a way to gain compliance. In an article recently published in the *Vanderbilt Journal of Entertainment and Technology Law*, the Rogers and Hardin LLP attorneys analyzed the pros and cons of the survey.

"We had not seen much coverage that is very detailed in terms of what the additional clarification can provide, and also a lot of the coverage is more for general audiences," Cohen said. "Our article really takes a more practical approach than has been done before. Presumably each individual school is making a choice (not to use the survey), but we're not even sure that's happening. A lot of schools are not even sitting down and analyzing this thing, and we don't know why. Call it inertia."

Others, however, hope that schools have considered the tool and have chosen to discard it because they believe it ineffectively measures true interest. But the survey is still only a year old, and some institutions might consider its use. Advocates for female athletes say that if an institution does decide to use the model survey as an avenue to compliance, those results should not be the only factor considered.

Jennifer Alley, executive director of the National Association of Collegiate Women Athletics Administrators, said she would advise any institution looking at the survey not to use it as a stand-alone cure-all for Title IX compliance.



**The March 2005 clarification to Title IX policy provides a model survey that institutions can use to prove compliance with Prong Three of the anti-gender discrimination law. The survey can be distributed in a variety of ways, including via e-mail or as a requirement to register for classes. Advocates hope that in addition to the survey, institutions will find other ways to measure athletics interest among female students on their campuses. Photo by Marcia Stubbeman/ NCAA News.**

"The only justification in using the survey is to do some other types of communication as well," Alley said. "That would include face-to-face conversations with students on the club or intramural teams, or taking a look at your recruiting territories to determine what sports are appropriate to consider. Normally, students go to schools that offer the sports they are interested in, but a lot of times, students can get interested in sports through some other venue, whether it's club or intramural teams. You don't realize that they've never been exposed to something."

Christine Grant, former director of women's athletics at the University of Iowa, said she had no problem with the model survey itself, but like Alley, she believes it should be used in conjunction with other factors the OCR endorsed under a previous administration.

"If you want to use the survey, fine, but also use the other ideas listed in the 1996 clarification under President Clinton," Grant said. "There are other factors that the OCR said at that time ought to be taken into consideration."

However, some advocates believe the survey method of gauging interest is ineffective.

Neena Chaudhry, senior counsel at the National Women's Law Center, said that surveys in general, not just the model survey, are inadequate tools to determine interest in athletics among women, especially when used without any supporting information.

"There is no perfect survey. You can take the results of the survey and interpret them, but they have to be interpreted in the light of other factors," she said. "And there needs to be follow up, like other evaluations, talking to students and coaches and looking around and seeing what sports people in the area are playing that we don't have. I don't think you can rely entirely on a survey."

Janet Judge, a sports law attorney with Verrill Dana LLP, said even the OCR in its recent report concedes that some schools used other factors to determine interest in addition to the survey — at least before the clarification was issued. Judge also said the model survey is flawed, pointing to language within the survey that sets forth the pros and cons of athletics participation as an example. The survey specifically mentions the fact that most student-athletes would receive academic support not available to their peers, but also points out the missed class time and long hours spent practicing each week.

"It would appear that the better approach would be to design a survey with language that does not stereotype athletes and distribute it in such a way as to ensure interested or not interested responses," she said. "No interest is a valid response — just make sure that is what students are saying. Some schools are doing just that. They have tweaked the survey and make students respond in order to register, for example. In this way, they have made the survey more reliable and accessible."

"The survey can be tweaked, but be aware that if a school modifies the survey, there is no

guarantee that the OCR will approve it or give it the presumption of compliance. The OCR makes clear that schools may look to other indicia of interest to assess interest, but does not require it," she said.

The lack of a minimum response rate is also troubling, she said, suggesting that an improved survey with enhanced administration techniques might garner more accurate results.

"It would appear that the better approach would be to use a survey with better language in such a way that guarantees responses. Some schools have taken that approach. They make students respond to the survey to register for school. They have made the survey instrument more accessible," she said.

Chaudhry took particular issue with the coding of non-responses as non-interest.

"You want to try to administer any survey you're doing in a way that you get a high response rate," she said. "One of the clear problems is that you can determine a non-response as non-interest. That just doesn't make any sense."

While Almond said he couldn't say how he would advise individual clients because each case was unique, he couldn't imagine telling a school not to do everything possible to achieve a high response rate.

"If you didn't want to respond, you would need to do that consciously and maybe through repeated screens," he said. "That way, one can be comfortable that you're getting the highest level of response. That is the best way to do it, and if you really want to get the benefit of OCR deference, you better go as far as you can to comply with the recommendations."

Jeff Orleans, executive director of the Ivy Group, said he wouldn't advise any of the institutions in his league to use a survey at all, but in the event that a school was committed to the survey method of complying, he would recommend a different survey.

"If you're going to use a survey, go talk to someone who can talk to you about non-response rates and how you deal with non-responses and what's the most effective way to get a high response rate," he said. "If you're going to do a survey, do it as professionally as possible."

Surveys are particularly ineffective in Division I, he said, because the recruitment of athletes could eventually drive out the students who said they were interested in a sport in the first place.

"You do a survey of non-recruited athletes, they tell you what they want to play, and three years later none of them could make the team because you're recruiting athletes," he said.

Orleans said he believes the issue is not compliance with the law, but providing "real, equitable opportunity within our budget constraints."

Institutions should naturally be concerned with providing equal opportunities for both genders, he said, and compliance with Title IX will follow.

## OCR report shows surveys alone historically inadequate

A report presented to the Senate Appropriations Committee by the Department of Education's Office for Civil Rights (OCR) indicates that interest surveys alone have not historically been an adequate method of ensuring compliance with Title IX.

The report, requested by the Senate committee in response to an OCR clarification issued in March 2005 that provided a model survey designed to gauge interest in athletics, was submitted on March 17, 2006, exactly one year after the clarification was released.

The OCR staff analyzed 63 case files involving institutions that used interest surveys at least in part to gain compliance with Title IX. All of the files included in the examination were opened before the March 2005 clarification was issued and were in the system because OCR was investigating a complaint against the institution.

The analysis of the case files found that in about half of those cases, the surveys were fortified by other factors, including current student participation in club or intramural sports, sports offered and participation rates at local and feeder high schools, and intercollegiate sports sanctioned by the institution's athletics conference.

However, the report said that the 54 institutions involved in the analysis added a total of 70 athletics teams — 28 regardless of the results of the assessment and 42 because of the assessments.

Many of the surveys analyzed in the case file had limited or selective distribution and low response rates, though the OCR report points out that even those surveys resulted in the addition of teams.

The report indicates that the OCR has never allowed only an interest survey to serve as a method of compliance for Title IX. However, it also said that if the OCR model survey were administered correctly, it "has the potential to maximize the possibility of obtaining correct information and generating high response rates."

In a written statement, Donna Lopiano, executive director of the Women's Sports Foundation, said the report offers "no proof that it does either."

Neena Chaudhry, senior counsel with the National Women's Law Center, said the report proves that the clarification and its model survey are a clear break with previous policy of not allowing survey results alone to provide institutions with the presumption of Title IX compliance.

"I think the report confirms that in fact this is a substantive change, a change in the way they've been doing things and a change in policy, not just guidance on how to do a good survey," she said. "They talk about these cases they reviewed over a 14-year period, and there's no case in which they allow a school to use a survey alone to deny adding opportunities for women. They admit that in most cases, schools considered factors other than the survey. The report does not support their claim that this is not a change in policy."

Janet Judge, a sports law attorney with Verrill Dana LLP, said the report attempts to assert that surveys alone are sufficient, but history and the data presented in the report itself show that isn't the case.

"(The report) is a good summary of past behavior that realistically sheds little light on current practices," she said. "More than anything else, it tends to show that additional indicia of interest, while maybe not the major factor in adding sport programs in the sample examined, did result in the discovery of unmet interest in at least 10 percent of the cases, if not more. That appears to be significant if the purpose of Title IX is to accommodate such interest and ability."

Judge pointed out that while some athletics teams were added even for surveys that had low response rates, if the survey isn't accurately measuring interest and ability, it's not an effective tool and another method should be considered.

However, Eric Pearson, executive director of the College Sports Council (a coalition of coaching organizations), said the report paints a clearer picture of the historical use of surveys and clarifies the use of the model survey for institutions that were interested in it as a means of obtaining or keeping Title IX compliance. The model survey, he said, provides a true safe harbor from Department of Education repercussions. Pearson said that while the model survey is still a new device, he thinks it will grow more popular.

"Over time, more colleges and universities will look toward Prong Three (of Title IX, which allows schools to demonstrate compliance with the law by proving they are meeting the interests of the under-represented gender) and surveys," he said. "It just makes sense when it comes to losing your vulnerability to litigation and as a matter of covering all your bases."

Mike Moyer, executive director of the National Wrestling Coaches Association, said he was "encouraged" by the report.

"We hope the clarification stands," he said. "It's certainly a step in the right direction."

However, Jennifer Alley, executive director of the National Association of Collegiate Women Athletics Administrators, said she believes the report to Congress could be a step toward her organization's ultimate goal — the repeal of the clarification.

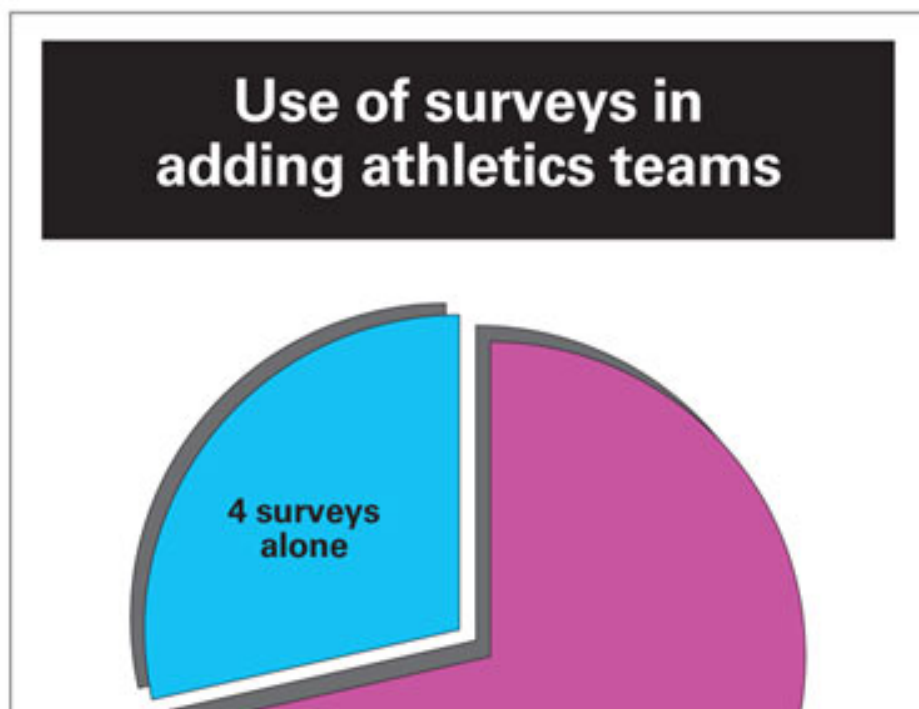
"I certainly think it provides grounds that electronic surveys or surveys alone have not been very productive or informative," she said. "In general, students don't respond very well."

Chaudhry said using the latest report as evidence in any lawsuit brought to challenge the clarification was “certainly possible,” though officials at the NWLC don’t know yet what individual schools are doing and whether a case will present itself in which such a challenge would be appropriate.

The report showed that some schools are indeed doing a comprehensive assessment of the interests and abilities of their students, and the OCR noted the past importance of evaluating those other factors as well. Judge said she hopes that all athletes benefit from such an assessment.

Despite the report, Judge expressed concern that some general counsels are recommending their institutions administer the survey exactly as suggested by OCR, simply because it is now a simple way to gain compliance with Title IX through the third prong. Though institutions that use the model survey may consider other factors, the survey itself will be the proof of Title IX compliance. Judge said that she believes the third prong will gain popularity, especially with schools that field football teams. Advocates would like any assessment of interest to be accurate and complete, and they don’t believe the model survey gets that job done.

“In light of the number of high school girls participating in high school athletics, it just seems like all athletes deserve a meaningful evaluation of their interest and ability — it just isn’t mandated by OCR right now,” she said.



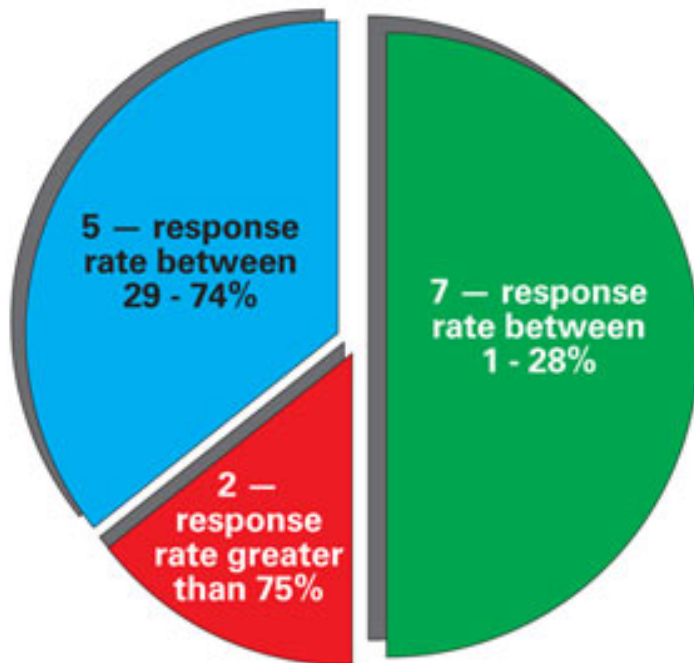


14 total surveys

Source:  
ED OCR

According to the OCR report issued March 17, 2006, the examination of 54 case files over the last 13 years showed that 10 of the assessments resulted in the addition of 14 total new teams. The vast majority of teams were added as the result of a combination of an interest survey and additional factors, possibly including interviews with coaches or athletes, participation on club or intramural teams, sports offered by local and feeder high schools and the availability of sufficient competition.

## Response rate of surveys used to add athletics teams



14 total surveys

Source:  
ED OCR

Additionally, the surveys used to add those 14 teams had a wide range of response rates, with half added as the result of a survey with a 28 percent response rate or less. While OCR pointed to these figures as a successful use of a survey, Janet Judge of Verrill Dana LLP questioned that assessment. Judge wondered whether a low response rate adequately fulfills the spirit of Title IX with an accurate measure of interest. She suggested that if another method would be more accurate, that should be standard practice.

**Graphic by Marcia Stubbeman/NCAA News**