

House Bill 4455 as introduced
First Analysis (3-31-98)

Sponsor: Rep. Beverly Hammerstrom
Committee: Constitutional and
Civil Rights

THE APPARENT PROBLEM:

In 1972, Congress enacted Title IX of the Educational Amendments of 1972 (20 U.S.C., section 1681 et seq.), which prohibits high schools and colleges that receive federal funds from discriminating on the basis of gender in the provision of any educational activity, including athletics. Title IX states that "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." Though it applies to all higher education programs or activities receiving federal funds, whether academic or athletic, Title IX most often receives publicity with regard to gender equity in college sports and athletic programs. On December 11, 1979, the then-federal Department of Health, Education, and Welfare (HEW) issued its final policy interpretation on "Title IX and Intercollegiate Athletics" (44 Fed. Reg. 7143 et seq.). When the Department of Education was established in 1980, it was given oversight in 1980 of Title IX through its Office for Civil Rights (OCR).

The 1979 policy interpretation was intended to explain the standards of the specific provisions relating to athletic opportunities in the regulation, and included a three-part test by which colleges and universities could judge and be judged regarding their compliance with Title IX: (a) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments (the "substantial proportionality" test); or, (b) where 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 that is demonstrably responsive to the developing interests and abilities of the members of that sex (the "history and continuing practice" test); or (c) where the members of one sex are

underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, 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 (the "effectively accommodating interests and abilities" test). In 1996, the Office of Civil Rights in the Department of Education issued another policy clarification of the three-part "effective accommodation test" that was sent to the presidents of all colleges and universities that have intercollegiate athletic programs. The press release on the 1996 policy clarification noted that if an institution has met any part of this standard, the OCR will find the institution in compliance with the participation provision of Title IX in the area of athletics.

Although an educational institution may comply with Title IX by meeting any one of these three tests, reportedly many colleges and universities are primarily, if not exclusively, using the "proportionality" test in order to comply with Title IX, with results that many people consider unfair to male undergraduate athletes. For, some colleges and universities are eliminating some of their men's "non-revenue" sports teams -- typically, wrestling, gymnastics, lacrosse, fencing, or swimming -- in order to achieve "proportionality." For example, last year Michigan State University eliminated its men's fencing and lacrosse teams last year, and proposed creating a women's crew team reportedly in order to meet the Title IX "proportionality" test.

Reportedly some colleges and universities, in an effort to comply with Title IX, also are discouraging so-called "walk on" male student athletes (that is, those without athletic scholarships) from participating in -- or even trying out for -- sports programs, instead restricting sports participation to only those male students recruited with athletic scholarships.

Many people believe these approaches to Title IX compliance to be unfair, and legislation has been introduced to address this issue.

THE CONTENT OF THE BILL:

The Elliott-Larsen Civil Rights Act prohibits a person from denying an individual "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status," and prohibits an educational institution from discriminating against an individual "in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex."

The bill would amend the act to prohibit an educational institution from (a) eliminating, or reducing the level of services or number of scholarships provided for, an existing intercollegiate or interscholastic athletic program, or (b) denying to a student the opportunity to participate in such an athletic program, solely to affect the overall ratio of male to female athletic participants at the educational institution. The bill also would say that an educational institution (or "a place of public accommodation or public service that [was] an educational institution") was not authorized or required to eliminate, or reduce the level of services or number of scholarships provided for, such existing intercollegiate or interscholastic athletic programs.

MCL 37.2302 and 37.2402

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The bill would correct what many feel has been an unfair situation in which men's college athletics programs have been reduced or eliminated in order to come into compliance with the federal Title IX requirements regarding gender equity in intercollegiate sports. Last year, for example, Michigan State University eliminated its men's lacrosse and fencing programs, and added a women's crew program, in order to comply with Title IX. Even when men's

programs aren't eliminated, testimony before the House Committee on Constitutional and Civil Rights by the captain of the University of Michigan football team indicated that male students were being discouraged or even prohibited from trying out for positions on sports teams in order to meet the "proportionality" requirements of Title IX, reserving places on the teams instead for scholarship athletes. This practice not only is unfair to male students who may want to play sports as part of their collegiate careers but it also can bar talented athletes from participation in intercollegiate sports. As the University of Michigan football team captain pointed out, he was a "walk on" (that is, had not had an athletic scholarship), as was the winning team's quarterback. The bill would ensure that athletic opportunities for collegiate athletes of either sex would not be unfairly reduced or eliminated solely in order to affect the overall ratio of male to female athletes participating in athletic programs at an educational institution.

Against:

Concerns have been raised over the possible effects of the bill. Some people have expressed concern that the bill could have the effect of freezing or reducing the participation of women in college athletic programs if colleges and universities were unable to add women's programs without being able to reduce or eliminate men's programs. Educational institutions are experiencing budget constraints, on the one hand, and federal requirements to provide gender equity in athletic programs on the other, and sometimes this may be the only way they could afford to achieve compliance with the federal Title IX requirements. While it may seem unfair to reduce or eliminate athletic opportunities for men in order to provide additional athletic opportunities for women, the fact remains that in many instances men's athletic programs still are more extensive and better supported than women's programs. For example, a recent Michigan NOW Education Task Force press release on Title IX points out that while great strides have been made in girls' participation in athletics since passage of the law in 1972 (when participation by girls increased from 7 percent, prior to passage of Title IX, to 46 percent currently), nevertheless inequities still exist in treatment, seasonal scheduling practices, facilities, coaching, and representation of women in Michigan High School Athletic Association decision making. Other people have raised the question of whether or not the bill would conflict with federal law, in which case even if it were enacted it could not supersede federal law, which would be controlling.

And still others have pointed out that the three constitutional universities, at least (Michigan State University, the University of Michigan, and Wayne State University), are autonomous bodies, and may well object to the legislature attempting to micromanage internal university affairs.

Response:

The bill would simply outlaw an unfair practice by colleges and universities, and would prohibit reducing or eliminating programs for either sex solely to reach some kind of artificial ratio. As several people have pointed out, there are three ways for educational institutions to comply with the gender equity requirements of the federal law, with so-called "substantial proportionality" being only one -- and the simplest, at least administratively -- of the three. The intent of Title IX always has been to expand opportunities for both men and women, and there never has been a mandate under Title IX that required a college to eliminate men's teams to achieve compliance. Thus the bill would not conflict with federal law, so much as instead providing colleges and universities with an incentive to achieve compliance either by showing a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of the underrepresented sex or by demonstrating that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. While perhaps more administratively complex than simply comparing ratios of student athletes to student enrollment, these two methods of achieving compliance with Title IX would continue to promote participation in athletic programs by both sexes without unfairly penalizing male students on "proportionality" grounds.

POSITIONS:

The Presidents Council of State Colleges and Universities has no formal position on the bill, but has questions about possible Title IX implications. (3-30-98)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.