

What Esports Ruling Means For College Title IX Compliance

By **Christina Stylianou and Gregg Clifton** (March 24, 2023)

As esports have grown in popularity and commercial relevance, particularly as a professional pursuit, their place among colleges and universities has also escalated.

The question of whether collegiate esports teams fall under the same legal umbrella as other college athletic programs and are subject to Title IX — the federal law that prohibits discrimination on the basis of sex at federally funded educational institution — is just now beginning to reach the courts for consideration.

In June 2022, the Florida Institute of Technology announced its intention to cut five of its varsity sports programs, among them the men's rowing team, and transition those sports to club-level competition.

In response, six members of the men's rowing team brought a lawsuit against the university in October 2022 in the U.S. District Court for the Middle District of Florida — *Navarro v. Florida Institute of Technology Inc.* — alleging three violations of Title IX.

The rowers then moved for a preliminary injunction, asking the court to reinstate the men's rowing team at the Florida Institute of Technology until their case could be heard on the merits. While the rowers' allegations in the complaint and their arguments in the motion involve an established sport, the university, in its opposition, raised an argument that requires the acceptance of esports as an actual sport for purposes of Title IX compliance in order to hold merit.

U.S. District Judge Carlos E. Mendoza's decision last month on the rowers' motion provides the first judicial interpretation and decision of the question, ultimately determining, at least for now, that esports do not fall under the purview of Title IX.

In order to demonstrate entitlement to a preliminary injunction pursuant to U.S. Court of Appeals for the Eleventh Circuit case law, the rowers were required to establish several factors, one of which is that their case has a substantial likelihood of success on the merits.

To properly assess this likelihood of success requirement, the district court analyzed the facts alleged against the Title IX requirements binding the school.

The test for equal participation opportunity in athletic programs under Title IX, as set forth by the Office of Civil Rights, or OCR, considers "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," according to Title 34 of the Code of Federal Regulations, Section 106.41(c)(1).

Universities can demonstrate compliance with this requirement by satisfying any one of the following three components of the test, also known as the three-part test, which was laid out in OCR guidance from 1996:

1. Intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or



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2. Where the members of one sex are underrepresented among intercollegiate athletes, 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; or

3. Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion as described at number 2 above, the institution can demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

The rowers argued that the university failed to satisfy any of the pathways provided by the three-part test. Responding in opposition to the rowers' argument, the university only focused on the athletes' argument with respect to the first pathway, i.e., substantial proportionality.

Asserting this prong, the rowers claimed that the university had fallen short of establishing substantial proportionality between its student enrollment and athletic participation for 16 of the preceding 18 years. They produced evidence showing that:

- In 2018-2019, the university's enrollment totaled 3,261 undergraduate students — 2,325, or 71.3%, of whom were men, and 936, or 28.7%, of whom were women. Of their 533 athletes, however, only 342, or 64.2%, were men. This amounted to a shortfall, or so-called participation gap, of 132 athletic opportunities for men.
- In 2021-2022, the shortfall was 117 opportunities for men.
- In 2022-2023, the shortfall is 121 opportunities for men.

Since the university was already in violation of Title IX for disproportionate male athletic participation, the rowers argued that the school could not legally cut a viable men's team.

The university responded by arguing that the calculation should be expanded to include full-time undergraduates enrolled in the school's online-only program among the total undergraduate population and male esports student-athletes among the male athlete count.

In calculating the participation gap in this manner, the shortfall would only amount to 0.16%, or three male athletes. The university argued that its coed esports program should be considered an athletic program pursuant to Title IX, as it is supported through its athletic department and treats its esports student-athletes similarly to its traditional student-athletes.

The university asserted that esports athletes: have access to the same support services, like athletic trainers; are selected through tryouts; will be eligible to receive scholarships beginning in fall of 2023; and prepare and compete pursuant to a set schedule determined by the National Association of Collegiate Esports and National Esports Collegiate Conference.

The OCR does not specifically define the word "sport." It explained in its 2008 "Dear Colleague" letter, however, that an institution's established sports can be counted for Title IX purposes if the institution is a member of an intercollegiate athletic organization, e.g.,

the NCAA, and if the organization's nondiscretionary requirements satisfy the factors announced by the OCR.

And while the letter does not establish a specific definition for "athletic ability," it does indicate that the determination as to whether an activity is deemed a sport for purposes of Title IX may consider whether the selection of teams and participants is based on factors related primarily to athletic ability. The letter also provides that:

It is OCR's policy to encourage compliance with the Title IX athletics regulations in a flexible manner that expands, rather than limits, student athletic opportunities. By disseminating [its] list of factors [to be considered in determining whether an activity may be deemed a sport subject to Title IX], OCR intends to provide institutions with information to include new sports in their athletics programs, such as those athletic activities not yet recognized by governing athletics organizations and those featured at the Olympic games, if they so choose.

In analyzing esports' potential status as a sport under Title IX in the Navarro case, Judge Mendoza cited the U.S. Court of Appeals for the Second Circuit's *Biediger v. Quinnipiac University* decision in 2012.

In *Biediger*, the Second Circuit held that competitive cheerleading could not be found to be a sport for Title IX purposes, as it was not sanctioned by the NCAA.

The Second Circuit acknowledged that Quinnipiac's athletic department structured and administered the competitive cheerleading program consistent with its other varsity sports, that the practice time, regimen and venue were also consistent, and that the season length and purpose of the team was comparable to varsity sports.

However, it ultimately concluded that the lack of off-campus recruitment and the lack of a uniform set of rules, intercollegiate competition or progressive playoff system distinguished it from traditional varsity sports.

By contrast, in *Navarro*, Judge Mendoza found that, where cheerleading involves physical, athletic ability, esports requires no athletic ability.

Additionally, there are no rules for the 13 recognized competitive esports video games that are promulgated by an esports national governing organization and sport governance associations have no control over the rules of the games themselves. The NCAA, for its part, voted not to govern college esports in 2019.

There was also no evidence that the Florida Institute of Technology's esports program recruits off-campus or that it competes in a progressive playoff system.

And lastly, there was no evidence that the school's esports participants practice or compete in a manner consistent with other varsity teams. Taken together, the court "could not hold that the school's esports program provided genuine athletic participation opportunities under Title IX."

Moreover, since esports participants could not be included in the calculation of the participation gap under the substantial proportionality prong of the three-part test, the university would have a shortfall of 62 male athletes even if online students were included among the total student enrollment headcount.

Therefore, the court found that it did not need to decide at this time whether online-only students should be included in the calculation of the participation gap and the university's failure to satisfy any prong of the three-part test resulted in a finding that the rowers were indeed substantially likely to succeed on the merits.

The rowers were also able to satisfy the remaining three requirements necessary to demonstrate their entitlement to a preliminary injunction. The motion was, therefore, granted by the court and the university is now required to reinstate the men's rowing team and to refrain from eliminating any men's intercollegiate athletic team until the matter can be decided on the merits by either trial or a further order of the court.

It is worth noting that, while the factors considered by the district court largely align with the OCR's guidance on determining whether an activity is a sport under Title IX, the court's reasoning that esports do not require athletic ability and, therefore, should not be deemed a sport, seems to contradict the OCR's overarching policy of taking an inclusive approach to the determination.

In fact, the NCAA today recognizes several sports that can be argued to require less physical activity than other traditional sports.

Moreover, while the OCR explicitly highlighted an aim to include activities that were perhaps not yet even recognized by the Olympic Games, today, the Olympics include a vast number of sports that the NCAA does not count among its ranks and have even recently launched their own esports series.

Of greater concern is that esports have long held a reputation for excluding female participants — with participation as low as a reported 5% in professional esports and 8.2% in college esports — and fostering an environment of sex discrimination and sexual harassment, cyberviolence and abuse.

This does not even address the issue of offensive, sexualized content included within some of the games themselves, which no sport governance association would be able to control.

Given this preexisting environment, carving out exceptions for college esports from Title IX enforcement begins to enter dangerous territory, as it could permit loopholes for bullying behavior to continue unchecked.

This is not to suggest that the district court should have deviated from the OCR's proscribed factors in its assessment in order to reach a different result, but merely to point out the potential issues that may either spring from the decision or continue to exist, albeit inadvertently.

It bears remembering that Title IX does not apply only to collegiate athletics. Title IX was implemented to address sex discrimination and harassment at federally funded educational institutions, generally.

Therefore, judicial findings like that of the district court in Navarro that esports do not constitute a sport within the purview of Title IX would not remove college esports from the law's reach entirely.

At this time, it is unclear whether the Florida Institute of Technology will seek to appeal the decision to the Eleventh Circuit or how the Eleventh Circuit would ultimately decide the issue. It is even less clear how the issue would be decided if it arose in other jurisdictions.

Nevertheless, the decision is profound in its inaugural bright line holding that esports are not subject to Title IX scrutiny. Going forward, colleges and universities can be guided by the Navarro decision in their internal Title IX audits but should continue to keep an eye on case law that may alter or qualify the determination or may reach entirely different — and controlling — holdings in their respective jurisdictions.

Of course, as Title IX will still apply to college esports — as programs existing within the greater umbrella of federally funded educational institutions, irrespective of whether it is considered a sport under Title IX — enforcing gender equity and combating sexual harassment and abuse in these programs should always remain a concern for colleges and universities.

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