

Court Refuses to Count Esports Participants in Title IX Case



Are esports actual sports? While the question may seem like a harmless one, the answer could have a significant impact on colleges that offer both esports programs and traditional intercollegiate sports.

If esports are considered a sport within the purview of Title IX, the courts will need to consider the number and gender of team members when reviewing whether participation opportunities for male and female athletes are provided in numbers proportionate to their respective enrollments.

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Substantial proportionality under Title IX is determined on a case-by-case basis, and although many courts, when considering the proportionality test, have drawn a bright line around a 2 percent variance between gender participation and enrollment, the law is clear that there are no strict numerical formulas or cookie cutter answers to what satisfies the test.

In *Navarro v. Florida Institute of Technology (FIT), Inc.*, 2023 U.S. Dist. LEXIS 27519; 2023 WL 207826, the court was asked to determine whether esports are sports, and if so, whether it falls within the purview of Title IX.

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Pulling for reinstatement

In June 2022, the Florida Institute of Technology announced that it was going to discontinue five varsity sports programs, including men's rowing, and transition each to club-level status. In October, six current and former members of the men's rowing team went to court seeking a preliminary injunction that would immediately reinstate the men's rowing team at FIT until the court could decide their Title IX claim.

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 education program or activity receiving Federal financial assistance" 20 U.S.C. §1681(a).

Even though FIT is a private institution, the court concluded that — since it received federal funds — it is subject to the requirements of Title IX. As to whether FIT was in violation of the law, the court ruled that Congress explicitly delegated to the Secretary of Health, Education

and Welfare (HEW) the task of promulgating regulations implementing Title IX, including prescribing standards for intercollegiate athletic activities.

HEW, through the U.S. Department of Education's Office for Civil Rights (OCR), assesses equality with respect to participation opportunities using a three-prong test: 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 that is demonstrably responsive to the developing interest 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.

The athletes assert that FIT failed to satisfy each part of the test. FIT disputes this assertion only as to the first pathway, which furnishes a safe harbor for those institutions that have distributed athletic opportunities in numbers "substantially proportionate" to the gender composition of their student bodies. To determine substantial proportionality, OCR requires the court to begin with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program.

After determining the number of athletic participants, the next step is to calculate the participation gap, which is the difference between the

school's participation rate and its full-time undergraduate student enrollment. The gap is substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team — that is, a team for which there are enough interested and able students and enough available competition to sustain an intercollegiate program.

The athletes alleged that FIT was in violation of the proportionality test. In support of their argument, the rowers noted that FIT's undergraduate enrollment for the 2018-19 school year was 3,261 total, comprised of 2,325 (71.3 percent) men and 936 (28.7 percent) women. For 2018-19, FIT had a total of 533 athletes, only 342 of whom were men. Thus, men represented 64.2 percent of FIT athletes compared to their 71.3 percent undergraduate enrollment. This represented a shortfall of 132 athletic opportunities for men. FIT had a similar shortfall of 117 opportunities for men in 2021-22 and a shortfall of 121 opportunities for men in 2022-23. Since FIT was in violation of Title IX, the athletes argued that the school could not legally cut a viable men's team.

Gaming the system

In response, FIT proposed a different calculation. FIT argued that when full-time undergraduates attending FIT's online-only division are included, along with esports athletes, FIT satisfies the proportionality test. When online and esports students are added into the equation, FIT noted that the participation gap for the 2021-22 academic year was only three male students, or .16 percent. This would be a substantially proportionate participation gap because a varsity team cannot be supported by just three students.

The court noted, however, that FIT's math assumes two conditions: 1)

its esports program offers genuine participation opportunities for intercollegiate athletics, and 2) full-time students enrolled in FIT's online-only division are properly counted in its total enrollment for Title IX purposes. In addressing the two conditions, the court found that Title IX does not have a specific definition of the term "sport." In examining the esports program at FIT, the court found that esports teams were supported through the athletic department; esports athletes were treated similarly to other athletes on campus, with access to the same support services, including athletic trainers; and the athletes were selected through tryouts, and prepared and competed on a set schedule as determined by the National Association of Collegiate Esports and the National Esports Collegiate Conference.

Even so, the court refused to hold that esports was a sport under Title IX. In support of its conclusion, the court emphasized that esports does not require athletic ability. The court also noted that there were more than 13 different video games recognized in esports competition, with none of the rules for the games promulgated by an esports national governing organization. The games are owned and created by a commercial vendor and leased to the players, and therefore esports governance associations have no control over the rules of each game itself. Finally, the court noted that FIT's esports program did not recruit off-campus or compete in a progressive playoff system. As a result, the court concluded that it could not find that FIT's esports program provided athletic opportunities under Title IX.

As for the second condition, that full-time students enrolled in FIT's online-only division should be counted in its total enrollment for Title IX purposes, the court held that by FIT's own calculations, when its esports program is not considered for Title IX purposes, FIT is not in

compliance with Title IX's requirements.

Title IX protects men, too

While the court only granted the athletes a preliminary injunction preventing FIT from eliminating the men's rowing team or any men's intercollegiate athletic team at the institution pending a full Title IX review, the case is important for a couple of reasons.

First, with an increasing number of schools adding esports teams, offering athletes scholarships to play esports, and running those teams out of the athletic department, a ruling that esports programs cannot be counted as sports participation opportunities for the purposes of determining a school's Title IX compliance is significant. This is especially true since, unlike FIT, most colleges and universities fail the proportionality test because they offer too many opportunities to men. If esports were counted, due to the fact most college esports gamers are male, colleges and universities would have faced an even larger gender imbalance.

Second, most Title IX cases filed by male athletes after their sports have been eliminated fail because the courts have ruled that Title IX provides institutions with flexibility regarding how they comply with the law. Therefore, if a school has a larger percentage of male athletes compared to male students, cutting a male athletic program to bring itself into compliance with Title IX is reasonable. *Navarro v. Florida Institute of Technology*, however, illustrates that Title IX not only applies to female athletes, but covers discrimination against male athletes, too.

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