TITLE IX ATHLETICS

January 13, 2021

Presented by:

Monica D. Batanero, Sr. Associate General Counsel
and
Kaitlyn Schwendeman, Assistant General Counsel
Monica D. Batanero  
Senior Associate General Counsel  
mbatanero@sclscal.org

Areas of Expertise
General Education Code & Student Issues (including student discipline, interdistrict transfers; general student issues, student’s and parent’s rights); Governance (Brown Act, Public Record Acts, conflicts); Special Education/Section 504

Experience
Ms. Batanero has over 14 years of experience in administrative law; over 10 years of experience in education law. Ms. Batanero’s practice touches upon myriad legal issues relating to students and school personnel. She advises school districts, county offices of education and special education local plan areas statewide regarding all aspects of special education law, student discipline and anti-discrimination laws. In addition to regularly participating in IEP meetings, Ms. Batanero has represented clients before the Office of Administrative Hearings, the California Department of Education and the Office for Civil Rights. Ms. Batanero also assists school districts in negotiating agreements and reaching settlements with parents regarding special education issues. Ms. Batanero also assists school districts and County Boards of Education at all levels of the student discipline process and conducts investigations on behalf of her clients of allegations of discrimination. Prior to joining SCLS, Ms. Batanero worked in education law in Southern California representing school districts in special education matters as well as addressing various legal matters as they arose. Ms. Batanero is a Member of the California State Bar and the California Council of School Attorneys.

Education
Juris Doctorate, University of San Francisco School of Law (2003); Master of Science in Gerontology, University of Southern California (1999); Bachelor of Science in Gerontology, University of Southern California (1998).

School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as a preventative law firm, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.
Experience
Ms. Schwendeman’s practice is concentrated in special education and Section 504 law, collective bargaining negotiations, and student and personnel matters. She regularly counsels school districts and county offices of education on a wide range of day-to-day legal issues. Ms. Schwendeman has appeared before the California Department of Labor Standards and Enforcement and the Department of Education’s Office of Civil Rights, as well as other administrative agencies tasked with investigating and enforcing civil rights and labor laws.

Prior to joining SCLS, Ms. Schwendeman practiced special and general education law in New York State for three years at a law firm in Albany, New York. She then joined a boutique law firm in San Francisco, practicing private-sector labor and employment law. During law school, Ms. Schwendeman served as a law clerk to former Justice Melvin P. Schweitzer, New York State Supreme Court, Commercial Division, in New York County. Before becoming an attorney, Ms. Schwendeman taught music in the New York City public schools.

Ms. Schwendeman is a member of the State Bar of California and the State Bar of New York.

Education
B.Mus, University of Hartford, Hartt School of Music, summa cum laude (2010)
J.D., Fordham University School of Law (2015)

Year joined SCLS: 2019

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Title IX Athletics

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<table>
<thead>
<tr>
<th>Presentation Slides</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. OCR Policy Interpretation: Title IX and Intercollegiate Athletics, December 1979</td>
<td>25</td>
</tr>
<tr>
<td>2. OCR Dear Colleague Letter on Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, January 1996</td>
<td>45</td>
</tr>
<tr>
<td>3. OCR Dear Colleague Letter on Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance, July 2003</td>
<td>56</td>
</tr>
<tr>
<td>4. OCR Letter to Mr. Giesler on Response to 1979 Athletics Guidance Applying to High School Athletics, March 2008</td>
<td>59</td>
</tr>
<tr>
<td>5. A. OCR Dear Colleague Letter on Athletics, April 2010</td>
<td>63</td>
</tr>
<tr>
<td>B. OCR Intercollegiate Athletics Policy: Three-Part Test – Part Three</td>
<td>76</td>
</tr>
<tr>
<td>6. OCR Athletics Interest and Abilities Assessment</td>
<td>83</td>
</tr>
<tr>
<td>7. CDE FAQs on Transgender Students Equity and Access</td>
<td>84</td>
</tr>
<tr>
<td>8. CIF Guidelines for Gender Identity Participation</td>
<td>93</td>
</tr>
<tr>
<td>9. Education Code § 221.9 - Athletics</td>
<td>95</td>
</tr>
<tr>
<td>10. OCR Resolution Agreement - Coalinga - Huron Joint Unified School District</td>
<td>96</td>
</tr>
<tr>
<td>11. Education Code § 51521 - Solicitations</td>
<td>99</td>
</tr>
</tbody>
</table>

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Title IX Athletics
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Presented by:
Monica Batanero, Sr. Associate General Counsel
Kaitlyn Schromd, Assistant General Counsel
School & College Legal Services of California

Agenda

• What is Title IX?
• Title IX and Athletics: The Three-Part Test
• Title IX and Athletics: OCR’s “Laundry List”
• Title IX and Athletics: Other Issues
• Title IX Enforcement
• Next Steps: Data Review and Policy Revision

I. What Is Title IX?
What Is Title IX?

“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 educational program or activity receiving federal financial assistance.”


What Is Title IX in Athletics?

“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”

34 C.F.R. 106.41

Requirements Under Title IX

- Once an institution knows* of sex discrimination, it must respond promptly by:
  - Contacting the complainant (the person alleged to be the victim) to explain process of filing a formal complaint
  - Offering supportive services to the complainant
- Procedural requirements:
  - Adoption of certain policies
  - Adoption and publication of a fair grievance process that complies with new Title IX regulations
  - Designation and publication of Title IX Coordinator(s)
  - Fair and equitable investigations and proceedings
General Response to Sexual Harassment

- Once a recipient has **actual knowledge** of sexual harassment in an education program or activity of the recipient, it must respond promptly in a manner that is **not deliberately indifferent**.
- A response is deliberately indifferent only if it’s response to sexual harassment is **clearly unreasonable in light of the known circumstances**.
- The 2001 Guidance (now rescinded) stated that recipients must take action in response to sexual harassment that is reasonably calculated to stop harassment and prevent recurrence of harassment.
- DOE has clarified that it will not unrealistically hold recipients responsible where the recipient took action that was not clearly unreasonable in light of the known circumstances, and a perpetrator of harassment reoffends.

Actual Knowledge

“**Actual knowledge** means notice of sexual harassment or allegations of sexual harassment…Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent.”

Receiving Actual Knowledge

- **K-12:**
  - Any elementary and secondary school employee.
- **CCD:**
  - The institution’s Title IX Coordinator, or any official who has authority to institute corrective measures on behalf of the recipient.
II. Athletics: The Three-Part Test

Important Policy/Guidance Documents

• 1979 Policy Interpretation: Title IX and Intercollegiate Athletics (Attachment 1)
• 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Attachment 2)
• 2003 Further Clarification of Intercollegiate Athletics Policy Guidance (Attachment 3)
• 2008 Letter to Mr. Gieseler (Attachment 4)
• 2010 Dear Colleague Letter on Athletics (Attachment 5)

Athletics: Where Title IX Applies

• Title IX applies to:
  • Interscholastic,
  • Intercollegiate,
  • Club, and
  • Intramural athletics;
• Offered by the institution;
• With respect to:
  • Athletic participation opportunities (the 3-part test), and
  • Athletic benefits and treatment (the laundry list).
OCR’s Analysis

- **Step 1**: OCR compares components of the boys’ program and the girls’ program on an overall basis, not on a sport-by-sport basis.
- **Step 2**: Where disparities are noted, OCR considers whether the differences are negligible.
- **Step 3**: Where the disparities are not negligible, OCR determines whether they are the result of legitimate nondiscriminatory factors.
- **Step 4**: OCR determines whether disparities result in the denial of equal opportunity to male or female athletes.

Athletics: What *Is* Required

1. Equal athletic opportunities for members of both sexes.
   - “Equal” = equivalent or equal in effect
   - The overall effect of any difference or disparity must be “negligible”

2. Effective accommodation of students’ athletic interests and abilities.

Athletics: What *Is Not* Required

- “[I]dentical benefits, opportunities or treatment”
- “[T]he same benefits [] provided for male and female teams in the same sports”
- Male and female programs be “mirror images” of each other
- Cutting or reduction of teams to reach proportionality – *heavily disfavored by OCR*
Athletics: The Three-Part Test

• Recipients can demonstrate compliance with Title IX in 3 ways:
  • Provide participation opportunities for male and female students substantially proportionate to their respective enrollments.
  • For the sex currently or historically underrepresented in sports, show a history and continuing practice of expanding programs that is responsive to the interests of that sex.
  • For the sex currently or historically underrepresented in sports, demonstrate that the district is meeting the interests and abilities of that sex with current programming.

Part 1: Substantially Proportionate Participation Opportunities

• Step 1: Determine the number of participation opportunities afforded to male and female athletes in the applicable athletic programs.
  • Step 2: Determine whether athletic opportunities (actual participants) are substantially proportionate to enrollment.

Case Example

• 1,133 students enrolled (2010-11)
  • 575 boys (50.75%)
  • 558 girls (49.25%)
• 1,470 athletic opportunities (2010-11)
  • 782 boys (53.20%)
  • 688 girls (46.80%)
• Disparity of 2.45% between the girls’ representation in overall student body and athletic participation rate
• Approx. 70 athletic opportunities needed for girls to achieve parity (“equal athletic opportunity”)
Part 2: History and Continuing Practice of Expanding Programs

• District can show it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex.

• Demonstrates an institution’s past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.

• Participation opportunities = the number of athletes actually participating in applicable athletics.

Case Example

• By 1990, district had established 7 girls’ athletic teams.
• District added a varsity girls team in 1996 based on requests from students and coaches.
• District added a varsity girls team in 2000 in response to an athletic association survey demonstrating interest.
• In 2003, District eliminated a viable girls team and a viable boys’ team as part of budget reductions.
• District has taken no action relating to girls sports since eliminating a team in 2003.

Part 3: Meeting Interests and Abilities with Current Programming

• Relative to the selection of sports offered and the levels of competition.

• District must be able to demonstrate there is (a) no unmet interest in a particular sport; (b) insufficient ability to sustain a team in the sport; and (c) no reasonable expectation of competition for the team.

• There may be an imbalance in athletic opportunities between the sexes but it does not reflect discrimination.
Interest Survey Example

<table>
<thead>
<tr>
<th>Sport</th>
<th>Interests/Ratifications</th>
<th>Future Participation</th>
<th>Current Participation</th>
<th>Prior Participation: Participation at the sport you are interested in or have participated in this sport?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basketball</td>
<td>Intramural/Club/Other</td>
<td>High School</td>
<td>Intramural/Club</td>
<td>College High School Intramural Club Other</td>
</tr>
<tr>
<td>Ice Hockey</td>
<td>Intramural/Club/Other</td>
<td>High School</td>
<td>Intramural/Club</td>
<td>College High School Intramural Club Other</td>
</tr>
<tr>
<td>Soccer</td>
<td>Intramural/Club/Other</td>
<td>High School</td>
<td>Intramural/Club</td>
<td>College High School Intramural Club Other</td>
</tr>
<tr>
<td>Track &amp; Field</td>
<td>Intramural/Club/Other</td>
<td>High School</td>
<td>Intramural/Club</td>
<td>College High School Intramural Club Other</td>
</tr>
</tbody>
</table>

Assessing Student Athletic Interests and Abilities

- District may use a nondiscriminatory method of its choosing, including a student questionnaire or open forum
- Should reach a wide audience of students
- Should be open-ended regarding the sports students can express interest in
- Should take into account schools and communities from which the institution draws its students
- Must be done regularly
- Does not require elaborate scientific validation of assessments

FAQs

1. If our district has no equivalent girls team, do we have to allow girls to try out for the boys team?
2. If our district has no equivalent girls team, do we have to start a girls team in that sport?
3. Does the district have to have the same number of boys’ and girls’ teams?
4. If a boy wants to participate on a girls team, does he have a right to?
III. Athletics: OCR’s Laundry List

Title IX Coordinator should regularly evaluate the equity of the institution’s athletics opportunities.

Whether equal athletic opportunities are provided to both sexes is based upon a “laundry list” of factors.

- Equipment and supplies
- Scheduling of games and practice time
- Travel and per diem allowances
- Opportunity for coaching and academic tutoring
- Assignment and compensation of coaches and tutors
- Provision of locker rooms and practice and competitive facilities
- Publicity
- Recruitment
- Support services
Laundry List #1: Equipment and Supplies

- Includes: uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight-training equipment

- Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  - (1) The quality;
  - (2) The amount;
  - (3) The suitability;
  - (4) The maintenance and replacement; and
  - (5) The availability.

You Decide: Title IX Violation?

1. The girls basketball team paid full price for shoes ($120) but the boys basketball team paid a discounted price ($40).

2. The girls basketball and softball teams had uniforms made for boys, and the girls volleyball team shared uniforms with the middle school team.

3. The booster club funded LCD screen/projector for the boys football and hockey teams to watch game films.

Laundry List #2: Scheduling of Games and Practice Times

- Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  - (1) The number of competitive events per sport;
  - (2) The number and length of practice opportunities;
  - (3) The time of day competitive events are scheduled;
  - (4) The time of day practice opportunities are scheduled; and
  - (5) The opportunities to engage in available pre-season and post-season competition.
You Decide: Title IX Violation?

1. The boys teams had a total of 95 (or 29%) of their games scheduled during primetime on Friday nights. The girls teams had a total of 70 (or 21%) of their games scheduled on Friday nights.

2. Most of the girls’ basketball practices are at 5:30 pm, while most of the boys’ basketball practices are at 3:00 pm.

3. Girls’ teams participated in 59% of allowable events, while boys’ teams participated in 70% of allowable events.

Laundry List #3: Travel and Per Diem Allowances

- Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  - (1) Modes of transportation;
  - (2) Housing furnished during travel;
  - (3) Length of stay before and after competitive events;
  - (4) Per diem allowances; and
  - (5) Dining arrangements.

Laundry List #4: Coaching and Academic Tutoring

- Coaching compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  - (1) Relative availability of full-time coaches;
  - (2) Relative availability of part-time and assistant coaches; and
  - (3) Relative availability of graduate assistants.

- Academic tutoring compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  - (1) The availability of tutoring; and
  - (2) Procedures and criteria for obtaining tutorial assistance.
Laundry List #5: Assignment and Compensation of Coaches and Tutors

- Assessed based on whether compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.
- OCR acknowledges that nondiscriminatory factors can affect the compensation of coaches, including:
  1. Range and nature of duties;
  2. Experience of individual coaches;
  3. Number of participants (athletes);
  4. Number of assistant coaches supervised; and
  5. Level of competition.

Laundry List #5: Assignment and Compensation of Coaches and Tutors, cont’d

- Assignment of coaches
  - Training, experience, and other professional qualifications
  - Professional standing

- Compensation of coaches
  - Rate (per sport, per season), duration of contract, conditions of contract renewal, experience, nature of coaching duties, working conditions, and other terms/conditions of employment

You Decide: Title IX Violation?

1. The football team took a trip to NYC on a charter bus for a football game. No similar opportunity was provided to any girls team.

2. The football coach was paid more than any other coach.

3. The District budgeted for 4 assistant coaches, who were all assigned to boys’ teams.
Laundry List #6: Locker Rooms, Practice and Competitive Facilities

- Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  - (1) Quality and availability of the facilities provided for practice and competitive events;
  - (2) Exclusivity of use of facilities provided for practice and competitive events;
  - (3) Availability of locker rooms;
  - (4) Quality of locker rooms;
  - (5) Maintenance of practice and competitive facilities; and
  - (6) Preparation of facilities for practice and competitive events.

You Decide: Title IX Violation?

1. Both boys and girls soccer teams have assigned locker rooms. The boys have exclusive use of the locker room, while the girls share the locker room with umpires and football officials.
2. The boys locker room has a bench with a white board for team usage, a coach’s office, and a coach’s locker room. The girls locker room does not.
3. The lockers for football players are larger than the lockers for any other sports team.
4. The boys baseball team plays games at a stadium for a Double-A professional baseball team, while the girls softball team plays at a community park, with a poorer quality field, poorer dugouts, and a seating capacity of 1/70th of the stadium.

You Decide: Title IX Violation?

1. The girls soccer field is mostly dirt, is not adequately watered, does not have dependable lines, and has caused knee/ankle injuries due to poor condition. The boys soccer team practices on the football field, which is watered and maintained.
2. The boys’ lacrosse field has a permanent scoreboard and permanent stands for fans. The girls’ field does not, and players have to carry equipment (scoreboard, portable stands) from the school 500 yards to the field on game days.
3. The softball field lacks lights, outfield fencing, dugouts, bullpens, a scoreboard, concession stands, or nearby restrooms. The baseball field has all of these features.
Laundry List #7: Medical and Training Facilities and Services

• Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  • (1) Availability of medical personnel and assistance;
  • (2) Health, accident and injury insurance coverage;
  • (3) Availability and quality of weight and training facilities;
  • (4) Availability and quality of conditioning facilities; and
  • (5) Availability and qualifications of athletic trainers.

You Decide: Title IX Violation?

1. A physician attends only football games to address injuries.

2. District has two weight training centers. One is more modern and less crowded, and the other is older and more crowded, although still adequate. More female athletes are assigned to the older weight training center than male athletes.

3. Both male and female athletes share the same weight training facility, but it is open for fewer hours during the seasons with more female athletics.

Laundry List #8: Housing and Dining Facilities and Services

• Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  • (1) Housing provided; and
  • (2) Special services as part of housing arrangements (e.g., laundry facilities, parking space, maid service).
Laundry List #9: Publicity

• Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  • (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.

You Decide: Title IX Violation?

1. The District only markets/promotes games for the football team and boys' and girls' basketball teams – the only profitable teams.

2. The District website allows for the purchase of tickets to 4 boys' sports and 2 girls' sports.

3. Local media covers boys basketball and football games, but no girls' athletics games.

One Additional Note on Publicity

• Districts often justify the allocation of relatively more resources for teams/programs that draw more crowds or produce more revenue for the program or District.
• District has an obligation under Title IX to ensure equitable treatment and opportunity for all its teams.
• Even if the District does not have control over certain things – what the Boosters decide to fund, what games are broadcast on local media – it has control over campus productions, such as its website, school announcements, school newspaper ads, and other District-controlled promotional devices.
Laundry List #10a: Recruitment

• (1) Whether coaches/other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;
• (2) Whether financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and
• (3) Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

Laundry List #10b: Support Services

• Administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes.
• In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:
  • (1) The amount of administrative assistance provided to men's and women's programs; and
  • (2) The amount of secretarial and clerical assistance provided to men's and women's programs.

You Decide: Title IX Violation?

1. The office space for girls’ coaches was significantly smaller than the office provided to boys’ coaches.
2. The office space for the boys’ teams coaches contained a lounge with a couch, a mini-frig, and a TV. No similar space was provided for girls’ teams coaches.
3. Football has its own secretarial assistance; all other teams share secretarial staff.
Pop Quiz!

True or false: private donations to athletic programs are exempt from Title IX equity considerations.

 Booster Club Funds

- OCR considers benefits and services provided through the use of private funds, including booster club funding, in combination with all other benefits and services.

- “Where booster clubs provide benefits or services that assist only teams of one sex, the district must ensure that teams of the other sex receive equivalent benefits and services. If booster clubs provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes.”

  Hingham Public Sch. Dist., OCR Compliance Rev. No. 01-10-5003 (2012) (emphasis added)

 Booster Club Funds, cont’d

- When any donation of money, time, goods, or services is made to District, it must ensure that the use of those donations complies with Title IX.

- District must ensure that the allocation of all financial resources, both District and donations, will not result in disparities that disadvantage students of one sex.

- District should review and/or develop a written policy regarding athletic booster clubs.
Booster Club Troubles

1. A booster club paid for pre-game meals for the football team, but did not provide any girls’ teams a dedicated pre-game meal.

2. District provided boys’ and girls’ hockey teams equal ice time, but the boys hockey booster club bought additional ice time at a community rink, and while the girls hockey team received occasional additional ice time, it was not consistent or provided as often as the boys hockey team.

3. A booster club paid “volunteer” assistant coaches for some boys teams but not for girls teams.

4. A booster club funded “scouting” budgets for a number of boys’, but not girls’, teams.

IV. Athletics: Other Title IX Issues

Transgender Students

  - Codified at Educ. Code § 221.5(f)
  - Requires pupils be permitted to participate in sex-segregated school programs, activities, and use facilities consistent with their gender identity, without respect to the gender listed in their records
    - “Gender” means sex, and includes a person's gender identity and gender expression. “Gender expression” means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. (Educ. Code § 210.7)
Transgender Students

• CIF Guidance on Gender Identity Participation:
  • All students should have the opportunity to participate in CIF activities consistent with their gender identity, irrespective of the gender listed on a student’s records.
  • The student and/or student’s school may seek review of the student’s eligibility for participation in interscholastic athletics in a gender that does not match the gender assigned to him/her at birth via the CIF’s stated procedure.
• Guidance from CDE:
  • Transgender students are entitled to and must be provided the same opportunities as all other students to participate in physical education and sports consistent with their gender identity.
  • Participation in competitive athletic activities and contact sports are to be addressed on a case-by-case basis.

Athletics: California Law

• Starting with the 2015-16 school year, all public schools and charter schools that offer competitive athletics must make certain data publicly available:
  • Total enrollment, by gender;
  • Number of pupils enrolled at the school who participate in competitive athletics, by gender; and
  • Number of boys’ and girls’ teams, classified by sport and competition level.

• If the school has a website, the data must be available on the website.

Retaliation

• Title IX protects complainants and other participants in the investigation/complaint process from retaliation.
• “Among the most important immediate responsibilities of an [institution] is to ensure that students who allege [a Title IX violation]…are not subject to retaliation.”
• If retaliation occurs, the District should take strong responsive action.
Hazing
• May implicate Title IX from an athletics perspective or a sexual harassment perspective, or both
• Pay attention to the dynamics between victim(s) and perpetrator(s)
• Be familiar with the District’s Title IX grievance investigation procedures – know when to report incident(s) to Title IX coordinator
• Hazing requires a strong, zero-tolerance response from District, Administration, and coaches
• Be aware of retaliation against victims, complainants

Pregnant Students-Athletes
• District may not discriminate against any student or exclude her from any educational program or activity on the basis of pregnancy, childbirth, false pregnancy, termination or recovery therefrom.

• May only require physician certification to participate in athletics if certification is required of all students for other physical/emotional conditions.

• District should treat pregnancy and related conditions in the same manner as any other temporary disability.

You Decide: Title IX Violation?
1. A coach excludes a female basketball player from practice and games after learning she is pregnant, out of fear for her and the baby’s health.
2. A team rule provides that if an athlete misses more than 2 consecutive practices, she may not participate in the next league game. A pregnant student misses 5 consecutive practices on medical leave from her physician. The coach excludes her from the next league game after she returns, citing the team rule.
3. The District requires a pregnant female lacrosse player to obtain a certification from her physician before she can continue practicing/playing on the team.
V. Title IX Enforcement

In 1979, the U.S. Supreme Court upheld a private right of action under Title IX.

Title IX is enforced by the U.S. Department of Education, Office for Civil Rights (OCR).

A possible penalty for violating Title IX is the loss of all federal funding.

In 1979, the U.S. Supreme Court upheld a private right of action under Title IX.

If OCR finds a recipient has violated Title IX, OCR will seek appropriate remedies.

OCR may propose a Resolution Agreement with the district that requires various corrective measures.

If a district refuses to negotiate a Resolution Agreement, OCR may initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant Federal financial assistance.

OCR may refer the case to the Department of Justice.
VI. Next Steps: Data Review & Policy Revision

Data Review

- Title IX coordinator should:
  - Review data regularly to evaluate the school's Title IX compliance
  - Identify any patterns or systemic problems under Title IX
  - Investigate possible causes of any patterns or systemic problems
  - Use the information to recommend next steps to improve Title IX compliance and ensure the school is free from sex-based discrimination

Data Review: Athletics

- OCR has provided a three part test to determine if an institution provides nondiscriminatory athletic participation opportunities:
  1. Substantially proportionate participation
  2. History and continuing practice of program expansion for underrepresented sex
  3. Interests and abilities of underrepresented sex fully accommodated
Specifically, the data review should include analysis of parts 1 and 2 of the three-part test:

1. Whether athletic participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollment.

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 members of that sex.

Part 3 of the three-part test:

- Where the members of one sex are underrepresented in athletics, and there isn’t a history and practice of program expansion, the school is fully and effectively accommodating the interests and abilities of that sex with the current program.

OCR looks to three criteria:

1. Is there unmet need in a particular sport?
2. Is there sufficient ability to sustain a team in the sport?
3. Is there a reasonable expectation of competition for the team?

Criterion 1: Unmet Interest and Ability

- Whether district eliminated a viable team for underrepresented sex
- Multiple indicators

Criterion 2: Sufficient Ability

- The athletic experience and accomplishments of the underrepresented sex
- Opinions of coaches, administrators, and other athletes
- Previous competition; participation in other sports

Criterion 3: Reasonable Expectation of Competition

- Competitive opportunities offered by other schools against which the institution competes, and new competitive opportunities in the geographic area
Policy and Program Review

- Review and assess District athletics programs, practices, and policies:
  - Does the District have written policies regarding benefits and services for its athletic programs?
    - Coaching compensation or assignment policies
    - Locker room assignments and use
  - Does the District have a written policy on Booster Clubs and other private funding sources for athletic programs?
    - Should contain provisions regulating booster club funding and other private donations flowing into the athletics programs
  - Does the District have a written policy or procedure for requesting the addition of sports or a level of competition?

Additional Resources

- U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination,
  https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
- U.S. Department of Education, Office for Civil Rights: Policy Guidance on Athletics,
  https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue04.html
- NCAA, Gender Equity and Title IX,
  http://www.ncaa.org/about/resources/inclusion/gender-equity-and-title-ix

Questions?

Information in this presentation, including but not limited to PowerPoint handouts and presenters’ comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

Monica D. Batanero, Sr. Associate General Counsel
mbatanero@sclscal.org

Kaitlyn Schwendeman, Associate General Counsel
kschwendeman@sclscal.org

School & College Legal Services of California
5350 Skylane Boulevard
Santa Rosa, CA 95403
(707) 524-2690
www.sclscal.org
ATTACHMENTS
A Policy Interpretation: Title IX and Intercollegiate Athletics

Federal Register, Vol.44, No. 239 - Tuesday, Dec. 11, 1979

Intercollegiate athletics policy interpretation; provides more specific factors to be reviewed by OCR under program factors listed at Section 106.41 Of the Title IX regulation; explains OCR's approach to determining compliance in inter-collegiate athletics; adds two program factors, recruitment and support services to be reviewed; clarifies requirement for athletic scholarships - 34 C.F.R. Section 106.37(C). The document contains dated references, and footnote 6 is out of date; however, the policy is still current.

Federal Register / Vol. 44, No. 239 / Tuesday, December 11, 1979 / Rules and Regulations

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html
Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

**AGENCY:** Office for Civil Rights, Office of the Secretary, HEW.

**ACTION:** Policy interpretation.

**SUMMARY:** The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits.

**EFFECTIVE DATE:** December 11, 1979

**FOR FURTHER INFORMATION CONTACT:** Colleen O'Connor, 330 Independence Avenue, Washington, D.C. (202) 245-6671

**SUPPLEMENTARY INFORMATION:**

1. **Legal Background**

   **A. The Statute**

   Section 901(a) of Title IX of the Education Amendments of 1972 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.
   
   Section 844 of the Education Amendments of 1974 further provides:
   
   - The Secretary of [of HEW] shall prepare and publish ! ! ! proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.
   
   Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

   **B. The Regulation**

   The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

   During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

   Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.
The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

- Compliance in Financial Assistance (Scholarships) Based on Athletic Ability: Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.
- Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem, coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.
- Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:
"Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and

Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or
- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

1. Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilitate an assessment of compliance.

2. Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of stating actual compliance factors would be more useful to all concerned.

3. The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditure patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

VI. Historic Patterns of Intercollegiate Athletics Program Development and Operations
In its proposed Policy Interpretation of December 11, 1978, the Department published a summary of historic patterns affecting the relative status of men's and women's athletic programs. The Department has modified that summary to reflect additional information obtained during the comment and consultation process. The summary is set forth at Appendix A to this document.

VII. The Policy Interpretation

This Policy Interpretation clarifies 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 of the regulation which are set forth at 45 CFR 88.37(c) and 88.4a(c).

A. Athletic Financial Assistance (Scholarships)

1. The Regulation. Section 86.37(c) of the regulation provides:

   - [Institutions] must provide reasonable opportunities for such award (of financial assistance) for member of each sex in proportion to the number of students of each sex participating in intramural and intercollegiate athletics.

2. The Policy - The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

   a. At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men's and women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

   b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require spreading scholarships over as much as a full generation (four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

3. Application of the Policy - a. This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.

   b. When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

4. Definition - For purposes of examining compliance with this Section, the participants will be defined as those athletes:

   a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

   b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season.
c. Who are listed on the eligibility or squad lists maintained for each sport, or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

B. Equivalence in Other Athletic Benefits and Opportunities

1. The Regulation C The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club or intramural athletics. "provide equal athletic opportunities for members of both sexes." In determining whether an institution is providing equal opportunity in intercollegiate athletics the regulation requires the Department to consider, among others, the following factors:

   (1)
   (2) Provision and maintenance of equipment and supplies;
   (3) Scheduling of games and practice times;
   (4) Travel and per diem expenses;
   (5) Opportunity to receive coaching and academic tutoring;
   (6) Assignment and compensation of coaches and tutors;
   (7) Provision of locker rooms, practice and competitive facilities;
   (8) Provision of medical and training services and facilities;
   (9) Provision of housing and dining services and facilities; and
   (10) Publicity

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.

2. The Policy - The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effects of any differences is negligible.

If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors. Some of the factors that may justify these differences are as follows:

a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits' Amendment" to Title IX which instructed HEW to make "reasonable (regulatory) provisions considering the nature of particular sports" in intercollegiate athletics.

Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/ upkeep requirements of those
facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable.

b. Some aspects of athletic programs may not be equivalent for men and women because of legitimately sex-neutral factors related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Such differences are justifiable to the extent that they do not reduce overall equality of opportunity.

c. The activities directly associated with the operation of a competitive event in a single-sex sport may, under some circumstances, create unique demands or imbalances in particular program components. Provided any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree, the resulting differences may be found nondiscriminatory. At many schools, for example, certain sports—noteably football and men's basketball—traditionally draw large crowds. Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind. These differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in spectator appeal and if the levels of event management support available to both programs are based on sex-neutral criteria (e.g., facilities used, projected attendance, and staffing needs).

d. Some aspects of athletic programs may not be equivalent for men and women because institutions are undertaking voluntary affirmative actions to overcome effects of historical conditions that have limited participation in athletics by the members of one sex. This is authorized at § 86.3(b) of the regulation.

3. Application of the Policy - General Athletic Program Components

a. Equipment and Supplies (§ 86.41(c)(2)). Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment.

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

1. The quality of equipment and supplies:

2. The amount of equipment and supplies;

3. The suitability of equipment and supplies:

4. The maintenance and replacement of the equipment and supplies; and

5. The availability of equipment and supplies.

b. Scheduling of Games and Practice Times (§ 86.41(c)(3)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

1. The number of competitive events per sport;

2. The number and length of practice opportunities;

3. The time of day competitive events are scheduled;

4. The time of day practice opportunities are scheduled; and

5. The opportunities to engage in available pre-season and post-season competition.

c. Travel and Per Diem Allowances (§ 86.41(c)(4)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
(1) Modes of transportation;

(2) Housing furnished during travel:

(3) Length of stay before and after competitive events:

(4) Per diem allowances: and

(5) Dining arrangements.

d. Opportunity to Receive Coaching and Academic Tutoring (§ 86.41(c)(5)). (1) Coaching compliance will be assessed by examining, among other factors:

(a) Relative availability of full-time coaches:

(b) Relative availability of part-time and assistant coaches; and

(c) Relative availability of graduate assistants.

(2) Academic tutoring-compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(a) The availability of tutoring; and

(b) Procedures and criteria for obtaining tutorial assistance.

e. Assignment and Compensation of Coaches and Tutors (§ 86.41(c)(6)). In general, a violation of Section 86.41(c)(6) will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.

Nondiscriminatory factors can affect the compensation of coaches. In determining whether differences are caused by permissible factors, the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition will be considered.

Where these or similar factors represent valid differences in skill, effort, responsibility or working conditions they may, in specific circumstances, justify differences in compensation. Similarly, there may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary.

(1) Assignment of Coaches - Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

(a) Training, experience, and other professional qualifications;

(b) Professional standing.

(2) Assignment of Tutors - Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

(a) Tutor qualifications;

(b) Training, experience, and other qualifications.

(3) Compensation of Coaches - Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

(a) Rate of compensation (per sport, per season);

(b) Duration of contracts;
(c) Conditions relating to contract renewal;
(d) Experience;
(e) Nature of coaching duties performed;
(f) Working conditions; and
(g) Other terms and conditions of employment.

(4) Compensation of Tutors - Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

(a) Hourly rate of payment by nature subjects tutored;
(b) Pupil loads per tutoring season;
(c) Tutor qualifications;
(d) Experience;
(e) Other terms and conditions of employment.

f. Provision of Locker Rooms, Practice and Competitive Facilities (86.41(c)(7)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Quality and availability of the facilities provided for practice and competitive events;
(2) Exclusivity of use of facilities provided for practice and competitive events;
(3) Availability of locker rooms;
(4) Quality of locker rooms;
(5) Maintenance of practice and competitive facilities; and
(6) Preparation of facilities for practice and competitive events.

g. Provision of Medical and Training Facilities and Services (86.41(c)(8)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Availability of medical personnel and assistance;
(2) Health, accident and injury insurance coverage;
(3) Availability and quality of weight and training facilities;
(4) Availability and quality of conditioning facilities; and
(5) Availability and qualifications of athletic trainers.

h. Provision of Housing and Dining Facilities and Services (86.41(c)(9). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Housing provided;
(2) Special services as part of housing arrangements (e.g., laundry facilities, parking space, maid service).

i. Publicity (86.41(c)(10)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(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.

4. Application of the Policy—Other Factors ('86.41(c)). a. Recruitment of Student Athletes. The athletic recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes. Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.

Such examinations will review the following factors:

(1) Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;

(2) Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and

(3) Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

b. Provision of Support Services. The administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions.

In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:

(1) The amount of administrative assistance provided to men's and women's programs;

(2) The amount of secretarial and clerical assistance provided to men's and women's programs.

5. Overall Determination of Compliance. The Department will base its compliance determination under '86.41(c) of the regulation upon an examination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole; or

C. Effective Accommodation of Student Interests and Abilities.

1. The Regulation. The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at '86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are available:

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.
2. The Policy. The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

a. The determination of athletic interests and abilities of students;

b. The selection of sports offered; and

c. The levels of competition available including the opportunity for team competition.

3. Application of the Policy C Determination of Athletic Interests and Abilities.

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.


In the selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

a. Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

b. Non-Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited;

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. Application of the Policy - Levels of Competition.

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(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 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.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. Overall Determination of Compliance.

The Department will base its compliance determination under §86.41(c) of the regulation upon a determination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or

c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

VIII. The Enforcement Process

The process of Title IX enforcement is set forth in §88.71 of the Title IX regulation, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights Act of 1964. The enforcement process prescribed by the regulation is supplemented by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.

According to the regulation, there are two ways in which enforcement is initiated:

- Compliance Reviews - Periodically the Department must select a number of recipients (in this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX (45 CFR 80.7(a))

- Complaints - The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. (45 CFR 80.7(b))

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.
The Department has 90 days to conduct an investigation and inform the recipient of its findings, and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between the Department and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance. Sometimes the violation is relatively minor and can be corrected immediately. At other times, however, the negotiations result in a plan that will correct the violations within a specified period of time. To be acceptable, a plan must describe the manner in which institutional resources will be used to correct the violation. It also must state acceptable time tables for reaching interim goals and full compliance. When agreement is reached, the Department notifies the institution that its plan is acceptable. The Department then is obligated to review periodically the implementation of the plan.

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate. If the plan is not adequate to correct the violations (or to correct them within a reasonable period of time) the recipient will be found in noncompliance and voluntary negotiations will begin. However, if the institutional plan is acceptable, the Department will inform the institution that although the institution has violations, it is found to be in compliance because it is implementing a corrective plan. The Department, in this instance also, would monitor the progress of the institutional plan. If the institution subsequently does not completely implement its plan, it will be found in noncompliance.

When a recipient is found in noncompliance and voluntary compliance attempts are unsuccessful, the formal process leading to termination of Federal assistance will be begun. These procedures, which include the opportunity for a hearing before an administrative law judge, are set forth at 45 CFR 80.8-80.11 and 45 CFR Part 81.

IX. Authority
Roma Stewart,
Director, Office for Civil Rights, Department of Health, Education, and Welfare.
Patricia Roberts Harris,
Secretary, Department of Health, Education, and Welfare.

Appendix A-Historic Patterns of Intercollegiate Athletics Program Development

1. Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. During the 1977-78 academic year women students accounted for 48 percent of the national undergraduate enrollment (5,496,000 of 11,267,000 students). Yet, only 30 percent of the intercollegiate athletes are women.

The historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women. One source indicates that, on the average, colleges and universities are providing twice the number of sports for men as they are for women.

2. Participation by women in sports is growing rapidly. During the period from 1971-1978, for example, the number of female participants in organized high school sports increased from 294,000 to 2,083,000 C an increase of over 600 percent. In contrast, between Fall 1971 and Fall 1977, the enrollment of females in high school decreased from approximately 7,600,000 to approximately 7,150,000 a decrease of over 5 percent.
The growth in athletic participation by high school women has been reflected on the campuses of the nation's colleges and universities. During the period from 1971 to 1976 the enrollment of women in the nation's institutions of higher education rose 52 percent, from 3,400,000 to 5,201,000. During this same period, the number of women participating in intramural sports increased 108 percent from 276,167 to 576,167. In club sports, the number of women participants increased from 16,386 to 25,541 or 55 percent. In intercollegiate sports, women's participation increased 102 percent from 31,852 to 64,375. These developments reflect the growing interest of women in competitive athletics, as well as the efforts of colleges and universities to accommodate those interests.

3. The overall growth of women's intercollegiate programs has not been at the expense of men's programs. During the past decade of rapid growth in women's programs, the number of intercollegiate sports available for men has remained stable, and the number of male athletes has increased slightly. Funding for men's programs has increased from $1.2 to $2.2 million between 1970-1977 alone.

4. On most campuses, the primary problem confronting women athletes is the absence of a fair and adequate level of resources, services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that are members of both the National Collegiate Athletic Association (NCAA) and the Association for Intercollegiate Athletics for Women (AIAW), the average annual scholarship budget is $39,000. Male athletes receive $32,000 or 78 percent of this amount, and female athletes receive $7,000 or 22 percent, although women are 30 percent of all the athletes eligible for scholarships.

Likewise, substantial amounts have been provided for the recruitment of male athletes, but little funding has been made available for recruitment of female athletes.

Congressional testimony on Title IX and subsequent surveys indicates that discrepancies also exist in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities.

5. At several institutions, intercollegiate football is unique among sports. The size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports, both men's and women's. Title IX requires that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity." However, the unique size and cost of football programs have been taken into account in developing this Policy Interpretation.

Appendix B-Comments and Responses

The Office for Civil Rights (OCR) received over 700 comments and recommendations in response to the December 11, 1978 publication of the proposed Policy Interpretation. After the formal comment period, representatives of the Department met for additional discussions with many individuals and groups including college and university officials, athletic associations, athletic directors, women's rights organizations and other interested parties. HEW representatives also visited eight universities in order to assess the potential of the proposed Policy Interpretation and of suggested alternative approaches for effective enforcement of Title IX.

The Department carefully considered all information before preparing the final policy. Some changes in the structure and substance of the Policy Interpretation have been made as a result of concerns that were identified in the comment and consultation process.

Persons who responded to the request for public comment were asked to comment generally and also to respond specifically to eight questions that focused on different aspects of the proposed Policy Interpretation.

Question No. 1: Is the description of the current status and development of intercollegiate athletics for men and women accurate? What other factors should be considered?
Comment A: Some commentors noted that the description implied the presence of intent on the part of all universities to discriminate against women. Many of these same commentors noted an absence of concern in the proposed Policy Interpretation for those universities that have in good faith attempted to meet what they felt to be a vague compliance standard in the regulation.

Response: The description of the current status and development of intercollegiate athletics for men and women was designed to be a factual, historical overview. There was no intent to imply the universal presence of discrimination. The Department recognizes that there are many colleges and universities that have been and are making good faith efforts, in the midst of increasing financial pressures, to provide equal athletic opportunities to their male and female athletes.

Comment B: Commentors stated that the statistics used were outdated in some areas, incomplete in some areas, and inaccurate in some areas.

Response: Comment accepted. The statistics have been updated and corrected where necessary.

Question No. 2: Is the proposed two-stage approach to compliance practical? Should it be modified? Are there other approaches to be considered?

Comment: Some commentors stated that Part II of the proposed Policy Interpretation "Equally Accommodating the Interests and Abilities of Women" represented an extension of the July 1978, compliance deadline established in '86.41(d) of the Title IX regulation.

Response: Part II of the proposed Policy Interpretation was not intended to extend the compliance deadline. The format of the two stage approach, however, seems to have encouraged that perception; therefore, the elements of both stages have been unified in this Policy Interpretation.

Question No. 3: Is the equal average per capita standard based on participation rates practical? Are there alternatives or modifications that should be considered?

Comment A: Some commentors stated it was unfair or illegal to find noncompliance solely on the basis of a financial test when more valid indicators of equality of opportunity exist.

Response: The equal average per capita standard was not a standard by which noncompliance could be found. It was offered as a standard of presumptive compliance. In order to prove noncompliance, HEW would have been required to show that the unexplained disparities in expenditures were discriminatory in effect. The standard, in part, was offered as a means of simplifying proof of compliance for universities. The widespread confusion concerning the significance of failure to satisfy the equal average per capita expenditure standard, however, is one of the reasons it was withdrawn.

Comment B: Many commentors stated that the equal average per capita standard penalizes those institutions that have increased participation opportunities for women and rewards institutions that have limited women's participation.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumptive compliance, the question of its effect is no longer relevant. However, the Department agrees that universities that had increased participation opportunities for women and wished to take advantage of the presumptive compliance standard, would have had a bigger financial burden than universities that had done little to increase participation opportunities for women.

Question No. 4: Is there a basis for treating part of the expenses of a particular revenue producing sport differently because the sport produces income used by the university for non-athletic operating expenses on a non-discriminatory basis? If, so, how should such funds be identified and treated?
Comment: Commentors stated that this question was largely irrelevant because there were so few universities at which revenue from the athletic program was used in the university operating budget.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumed compliance, a decision is no longer necessary on this issue.

Question No. 5: Is the grouping of financially measurable benefits into three categories practical? Are there alternatives that should be considered? Specifically, should recruiting expenses be considered together with all other financially measurable benefits?

Comment A: Most commentors stated that, if measured solely on a financial standard, recruiting should be grouped with the other financially measurable items. Some of these commentors held that at the current stage of development of women's intercollegiate athletics, the amount of money that would flow into the women's recruitment budget as a result of separate application of the equal average per capita standard to recruiting expenses, would make recruitment a disproportionately large percentage of the entire women's budget. Women's athletic directors, particularly, wanted the flexibility to have the money available for other uses, and they generally agreed on including recruitment expenses with the other financially measurable items.

Comment B: Some commentors stated that it was particularly inappropriate to base any measure of compliance in recruitment solely on financial expenditures. They stated that even if proportionate amounts of money were allocated to recruitment, major inequities could remain in the benefits to athletes. For instance, universities could maintain a policy of subsidizing visits to their campuses of prospective students of one sex but not the other. Commentors suggested that including an examination of differences in benefits to prospective athletes that result from recruiting methods would be appropriate.

Response: In the final Policy Interpretation, recruitment has been moved to the group of program areas to be examined under '86.41(c) to determine whether overall equal athletic opportunity exists. The Department accepts the comment that a financial measure is not sufficient to determine whether equal opportunity is being provided. Therefore, in examining athletic recruitment, the Department will primarily review the opportunity to recruit, the resources provided for recruiting, and methods of recruiting.

Question No. 6: Are the factors used to justify differences in equal average per capita expenditures for financially measurable benefits and opportunities fair? Are there other factors that should be considered?

Comment: Most commentors indicated that the factors named in the proposed Policy Interpretation (the "scope of competition" and the "nature of the sport") as justifications for differences in equal average per capita expenditures were so vague and ambiguous as to be meaningless. Some stated that it would be impossible to define the phrase "scope of competition", given the greatly differing competitive structure of men's and women's programs. Other commentors were concerned that the "scope of competition" factor that may currently be designated as "nondiscriminatory" was, in reality, the result of many years of inequitable treatment of women's athletic programs.

Response: The Department agrees that it would have been difficult to define clearly and then to quantify the "scope of competition" factor. Since equal average per capita expenditures has been dropped as a standard of presumed compliance, such financial justifications are no longer necessary. Under the equivalency standard, however, the "nature of the sport" remains an important concept. As explained within the Policy Interpretation, the unique nature of a sport may account for perceived inequities in some program areas.

Question No 7: Is the comparability standard for benefits and opportunities that are not financially measurably fair and realistic? Should other factors controlling comparability be included? Should the comparability standard be revised? Is there a different standard which should be considered?

Comment: Many commentors stated that the comparability standard was fair and realistic. Some commentors were concerned, however, that the standard was vague and subjective and could lead to uneven enforcement.
Response: The concept of comparing the non-financially measurable benefits and opportunities provided to male and female athletes has been preserved and expanded in the final Policy Interpretation to include all areas of examination except scholarships and accommodation of the interests and abilities of both sexes. The standard is that equivalent benefits and opportunities must be provided. To avoid vagueness and subjectivity, further guidance is given about what elements will be considered in each program area to determine the equivalency of benefits and opportunities.

Question No. 8: Is the proposal for increasing the opportunity for women to participate in competitive athletics appropriate and effective? Are there other procedures that should be considered? Is there a more effective way to ensure that the interest and abilities of both men and women are equally accommodated?

Comment: Several commentors indicated that the proposal to allow a university to gain the status of presumed compliance by having policies and procedures to encourage the growth of women's athletics was appropriate and effective for future students, but ignored students presently enrolled. They indicated that nowhere in the proposed Policy Interpretation was concern shown that the current selection of sports and levels of competition effectively accommodate the interests and abilities of women as well as men.

Response: Comment accepted. The requirement that universities equally accommodate the interests and abilities of their male and female athletes (Part II of the proposed Policy Interpretation) has been directly addressed and is now a part of the unified final Policy Interpretation.

Additional Comments

The following comments were not responses to questions raised in the proposed Policy Interpretation. They represent additional concerns expressed by a large number of commentors.

(1) Comment: Football and other "revenue producing" sports should be totally exempted or should receive special treatment under Title IX.

Response: The April 18, 1978, opinion of the General Counsel, HEW, concludes that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulation in the administration of any revenue producing activity". Therefore, football or other "revenue producing" sports cannot be exempted from coverage of Title IX.

In developing the proposed Policy Interpretation the Department concluded that although the fact of revenue production could not justify disparity in average per capita expenditure between men and women, there were characteristics common to most revenue producing sports that could result in legitimate nondiscriminatory differences in per capita expenditures. For instance, some "revenue producing" sports require expensive protective equipment and most require high expenditures for the management of events attended by large numbers of people. These characteristics and others described in the proposed Policy Interpretation were considered acceptable, nondiscriminatory reasons for differences in per capita average expenditures.

In the final Policy Interpretation, under the equivalent benefits and opportunities standard of compliance, some of these non-discriminatory factors are still relevant and applicable.

(2) Comment: Commentors stated that since the equal average per capita standard of presumed compliance was based on participation rates, the word should be explicitly defined.

Response: Although the final Policy Interpretation does not use the equal average per capita standard of presumed compliance, a clear understanding of the word "participant" is still necessary, particularly in the determination of compliance where scholarships are involved. The word "participant" is defined in the final Policy Interpretation.

(3) Comment: Many commentors were concerned that the proposed Policy Interpretation neglected the rights of individuals.
Response: The proposed Policy Interpretation was intended to further clarify what colleges and universities must do within their intercollegiate athletic programs to avoid discrimination against individuals on the basis of sex. The Interpretation, therefore, spoke to institutions in terms of their male and female athletes. It spoke specifically in terms of equal, average per capita expenditures and in terms of comparability of other opportunities and benefits for male and female participating athletes.

The Department believes that under this approach the rights of individuals were protected. If women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby. Under the proposed Policy Interpretation, for example, if female athletes as a whole were receiving their proportional share of athletic financial assistance, a university would have been presumed in compliance with that section of the regulation. The Department does not want and does not have the authority to force universities to offer identical programs to men and women. Therefore, to allow flexibility within women's programs and within men's programs, the proposed Policy Interpretation stated that an institution would be presumed in compliance if the average per capita expenditures on athletic scholarships for men and women, were equal. This same flexibility (in scholarships and in other areas) remains in the final Policy Interpretation.

(4) Comment: Several commentors stated that the provision of a separate dormitory to athletes of only one sex, even where no other special benefits were involved, is inherently discriminatory. They felt such separation indicated the different degrees of importance attached to athletes on the basis of sex.

Response: Comment accepted. The provision of a separate dormitory to athletes of one sex but not the other will be considered a failure to provide equivalent benefits as required by the regulation.

(5) Comment: Commentors, particularly colleges and universities, expressed concern that the differences in the rules of intercollegiate athletic associations could result in unequal distribution of benefits and opportunities to men's and women's athletic programs, thus placing the institutions in a posture of noncompliance with Title IX.

Response: Commentors made this point with regard to 86.6(c) of the Title IX regulation, which reads in part:

"The obligation to comply with (Title IX) is not obviated or alleviated by any rule or regulation of any * * * athletic or other * * * association * * **"

Since the penalties for violation of intercollegiate athletic association rules an have a severe effect on the athletic opportunities within an affected program, the Department has reexamined this regulatory requirement to determine whether it should be modified. Our conclusion is that modification would not have a beneficial effect, and that the present requirement will stand.

Several factors enter into this decision. First, the differences between rules affecting men's and women's programs are numerous and change constantly. Despite this, the Department has been unable to discover a single case in which those differences require members to act in a discriminatory manner. Second, some rule differences may permit decisions resulting in discriminatory distribution of benefits and opportunities to men's and women's programs. The fact that institutions respond to differences in rules by choosing to deny equal opportunities, however, does not mean that the rules themselves are at fault; the rules do not prohibit choices that would result in compliance with Title IX. Finally, the rules in question are all established and subject to change by the membership of the association. Since all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve collectively any wide-spread Title IX compliance problems resulting from association rules. To the extent that this has not taken place, Federal intervention on behalf of statutory beneficiaries is both warranted and required by the law. Consequently, the Department can follow no course other than to continue to disallow any defenses against findings of noncompliance with Title IX that are based on intercollegiate athletic association rules.
(6) Comment: Some commentors suggested that the equal average per capita test was unfairly skewed by the high cost of some "major" men's sports, particularly football, that have no equivalently expensive counterpart among women's sports. They suggested that a certain percentage of those costs (e.g., 50% of football scholarships) should be excluded from the expenditures on male athletes prior to application of the equal average per capita test.

Response: Since equality of average per capita expenditures has been eliminated as a standard of presumed compliance, the suggestion is no longer relevant. However, it was possible under that standard to exclude expenditures that were due to the nature of the sport, or the scope of competition and thus were not discriminatory in effect. Given the diversity of intercollegiate athletic programs, determinations as to whether disparities in expenditures were nondiscriminatory would have been made on a case-by-case basis. There was no legal support for the proposition that an arbitrary percentage of expenditures should be excluded from the calculations.

(7) Comment: Some commentors urged the Department to adopt various forms of team-based comparisons in assessing equality of opportunity between men's and women's athletic programs. They stated that well-developed men's programs are frequently characterized by a few "major" teams that have the greatest spectator appeal, earn the greatest income, cost the most to operate, and dominate the program in other ways. They suggested that women's programs should be similarly constructed and that comparability should then be required only between "men's major" and "women's major" teams, and between "men's minor" and "women's minor" teams. The men's teams most often cited as appropriate for "major" designation have been football and basketball, with women's basketball and volleyball being frequently selected as the counterparts.

Response: I here are two problems with this approach to assessing equal opportunity. First, neither the statute nor the regulation calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.

Second, no subgrouping of male or female students (such as a team) mat be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the "major/minor" classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women's volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to the members of one sex.

(8) Comment: Some commenters suggest that equality of opportunity should be measured by a "sport-specific" comparison. Under this approach, institutions offering the same sports to men and women would have an obligation to provide equal opportunity within each of those sports. For example, the men's basketball team and the women's basketball team would have to receive equal opportunities and benefits.

Response: As noted above, there is no provision for the requirement of identical programs for men and women, and no such requirement will be made by the Department. Moreover, a sport-specific comparison could actually create unequal opportunity. For example, the sports available for men at an institution might include most or all of those available for women; but the men's program might concentrate resources on sports not available to women (e.g., football, ice hockey). In addition, the sport-specific concept overlooks two key elements of the Title IX regulation.

First, the regulation states that the selection of sports is to be representative of student interests and abilities (86.41(c)(1)). A requirement that sports for the members of one sex be available or developed solely on the basis of their existence or development in the program for members of the other sex could conflict with the regulation where the interests and abilities of male and female students diverge.

Second, the regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities (86.41(c)). As implied above, Title IX protects the individual as a student-athlete, not all a basketball player, or swimmer.

https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html
(9) Comment: A coalition of many colleges and universities urged that there are no objective standards against which compliance with Title IX in intercollegiate athletics could be measured. They felt that diversity is so great among colleges and universities that no single standard or set of standards could practicably apply to all affected institutions. They concluded that it would be best for individual institutions to determine the policies and procedures by which to ensure nondiscrimination in intercollegiate athletic programs.

Specifically, this coalition suggested that each institution should create a group representative of all affected parties on campus.

This group would then assess existing athletic opportunities for men and women, and, on the basis of the assessment, develop a plan to ensure nondiscrimination. This plan would then be recommended to the Board of Trustees or other appropriate governing body.

The role foreseen for the Department under this concept is:

(a) The Department would use the plan as a framework for evaluating complaints and assessing compliance;
(b) The Department would determine whether the plan satisfies the interests of the involved parties; and
(c) The Department would determine whether the institution is adhering to the plan.

Thesecommenters felt that this approach to Title IX enforcement would ensure an environment of equal opportunity.

Response: Title IX is an antidiscrimination law. It prohibits discrimination based on sex in educational institutions that are recipients of Federal assistance. The legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions. The Department accepts that colleges and universities are sincere in their intention to ensure equal opportunity in intercollegiate athletics to their male and female students. It cannot, however, turn over its responsibility for interpreting and enforcing the law. In this case, its responsibility includes articulating the standards by which compliance with the Title IX statute will be evaluated.

The Department agrees with this group of commenters that the proposed self-assessment and institutional plan is an excellent idea. Any institution that engages in the assessment/planning process, particularly with the full participation of interested parties as envisioned in the proposal, would clearly reach or move well toward compliance. In addition, as explained in Section VIII of this Policy Interpretation, any college or university that has compliance problems but is implementing a plan that the Department determines will correct those problems within a reasonable period of time, will be found in compliance.
Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test

Jan 16, 1996

Dear Colleague:

It is my pleasure to send you the enclosed Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the Clarification).

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979--both of which followed publication for notice and the receipt, review and consideration of extensive comments--specifically address intercollegiate athletics. Since becoming Assistant Secretary, I have recognized the need to provide additional
clarification regarding what is commonly referred to as the "three-part test," a test used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics. The three-part test is described in the Department's 1979 Policy Interpretation.

Accordingly, on September 20, 1995, OCR circulated to over 4500 interested parties a draft of the proposed Clarification, soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX. As indicated when circulating the draft of the Clarification, the objective of the Clarification is to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics. Further, the Clarification is limited to an elaboration of the "three-part test." This test, which has generated the majority of the questions that have been raised about Title IX compliance, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation.

OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

The draft has been revised to incorporate suggestions that OCR received regarding how to make the document more useful and clearer. For instance, the Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term "developing interests" under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities and why Title IX does not require an institution, under part three of the test, to accommodate the interests and abilities of potential students.

OCR also received requests for clarification that relate primarily to fact- or institution-specific situations that only apply to a small number of athletes or institutions. These comments are more appropriately handled on an individual basis and, accordingly, OCR will follow-up on these comments and questions in the context of OCR's ongoing technical assistance efforts.

It is important to outline several points about the final document.

The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes. The first part of the test--substantial proportionality--focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The second part--history and continuing practice--is an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part--fully and effectively accommodating interests and abilities of the underrepresented sex--centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.
Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways to comply. Opponents of the test assert, therefore, that the test improperly establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title IX because it measures gender discrimination by underrepresentation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

First, it is clear from the Clarification that there are three different avenues of compliance. Institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated. The fact that each part of the three-part test considers participation rates does not mean, as some opponents of the test have suggested, that the three parts do not provide different ways to comply with Title IX.

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting institutions—notwithstanding the long history of discrimination based on sex in athletics programs—to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.) OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

What is clear then—because, for example, part three of the three-part test permits evidence that underrepresentation is caused not by discrimination but by lack of interest—is that underrepresentation alone is not the measure of discrimination. Substantial proportionality merely provides institutions with a safe harbor. Even if this were not the case and proportional opportunities were the only test, the “quota” criticism would be misplaced. Quotas are impermissible where opportunities are required to be created without regard to sex. However, schools are permitted to create athletic participation opportunities based on sex. Where they do so unequally, that is a legitimate measure of unequal opportunity under Title IX. OCR has chosen to make substantial proportionality only one of three alternative measures.

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.
OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex. Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.

Finally, several parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however, that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a significant challenge that many institutions face today, especially in the face of increasing budget constraints. It has been OCR’s experience, however, that institutions committed to maintaining their men’s program have been able to do so—and comply with Title IX— notwithstanding limited athletic budgets. In many cases, OCR and these institutions have worked together to find creative solutions that ensured equal opportunities in intercollegiate athletics. OCR is similarly prepared to join with other institutions in assisting them to address their own situations.

OCR is committed to continuing to work in partnership with colleges and universities to ensure that the promise of Title IX becomes a reality for all students. Thank you for your continuing interest in this subject.

Sincerely,

/signed/
Norma V. Cantú
Assistant Secretary for Civil Rights

Enclosure

Jan 16, 1996

CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX), which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, at 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 Fed. Reg. 71413 et seq. (1979)).1
The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

The 1979 Policy Interpretation provides that as part of this determination OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

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 history and continuing practice of program expansion, as described 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.

44 Fed. Reg. at 71418.

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

In addition, when an "overall determination of compliance" is made by OCR, 44 Fed. Reg. 71417, 71418, OCR examines the institution's program as a whole. Thus OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

This Clarification provides specific factors that guide an analysis of each part of the three-part test. In addition, it provides examples to demonstrate, in concrete terms, how these factors will be considered. These examples are intended to be illustrative, and the conclusions drawn in each example are based solely on the facts included in the example.

THREE-PART TEST -- Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.
OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program. The Policy Interpretation defines participants as those athletes:

1. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
2. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
3. Who are listed on the eligibility or squad lists maintained for each sport, or
4. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

44 Fed. Reg. at 71415.

OCR uses this definition of participant to determine the number of participation opportunities provided by an institution for purposes of the three-part test.

Under this definition, OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates.

In determining participation opportunities, OCR includes, among others, those athletes who do not receive scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete. OCR's investigations reveal that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team. Because these are significant benefits, and because receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

OCR's analysis next determines whether athletic opportunities are substantially proportionate. The Title IX regulation allows institutions to operate separate athletic programs for men and women. Accordingly, the regulation allows an institution to control the respective number of participation opportunities offered to men and women. Thus, it could be argued that to satisfy part one there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment.

However, because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality—for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality—the Policy Interpretation examines whether participation opportunities are "substantially" proportionate to enrollment rates. Because this determination depends on the institution's specific circumstances and the size of its athletic program, OCR makes this determination on a case-by-case basis, rather than through use of a statistical test.

As an example of a determination under part one: If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the
institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.

As another example, over the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal—i.e., 50 percent of the participants in its athletic program are female—its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy part one.

OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.

As another example, at Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

THREE-PART TEST -- Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under part two of the three-part test (part two), an institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.²

OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. Developing interests include interests that already exist at the institution.³ There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.

OCR will consider the following factors, among others, as evidence that may indicate a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.
OCR will consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the underrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion. It is only necessary to examine part two if one sex is overrepresented in the athletic program. Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion for that sex.

In addition, OCR will not find that an institution satisfies part two where it established teams for the underrepresented sex only at the initiation of its program for the underrepresented sex or where it merely promises to expand its program for the underrepresented sex at some time in the future.

The following examples are intended to illustrate the principles discussed above.

At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls' high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for the underrepresented sex to meet their developing interests and abilities.

By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.
In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and 1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

THREE-PART TEST -- Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex -- including students who are admitted to the institution though not yet enrolled. Title IX provides that an institution must provide equal athletic opportunity to its students. Accordingly, the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students.4

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

a) Is there sufficient unmet interest to support an intercollegiate team?

OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:
requests by students and admitted students that a particular sport be added;
requests that an existing club sport be elevated to intercollegiate team status;
participation in particular club or intramural sports;
interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
results of questionnaires of students and admitted students regarding interests in particular sports; and
participation in particular in interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s). For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. See 44 Fed. Reg. at 71417. These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

b) Is there sufficient ability to sustain an intercollegiate team?

Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:

- the athletic experience and accomplishments—in interscholastic, club or intramural competition—of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

c) Is there a reasonable expectation of competition for the team?

Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

- competitive opportunities offered by other schools against which the institution competes; and
• competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

Under the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.

CONCLUSION

This discussion clarifies that institutions have three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities. The three-part test gives institutions flexibility and control over their athletics programs. For instance, the test allows institutions to respond to different levels of interest by its male and female students. Moreover, nothing in the three-part test requires an institution to eliminate participation opportunities for men.

At the same time, this flexibility must be used by institutions consistent with Title IX’s requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing nondiscriminatory participation opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.

1. The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation. See 44 Fed. Reg. 71413.

2. Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX.

3. However, under this part of the test an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex. Moreover, under part two an institution has flexibility in choosing which teams it adds for the underrepresented sex, as long as it can show overall a history and continuing practice of program expansion for members of that sex.

4. However, OCR does examine an institution's recruitment practices under another part of the Policy Interpretation. See 44 Fed. Reg. 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit potential student athletes.

5. While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.
July 11, 2003

Dear Colleague:

It is my pleasure to provide you with this Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.

Since its enactment in 1972, Title IX has produced significant advancement in athletic opportunities for women and girls across the nation. Recognizing that more remains to be done, the Bush Administration is firmly committed to building on this legacy and continuing the progress that Title IX has brought toward true equality of opportunity for male and female student-athletes in America.

In response to numerous requests for additional guidance on the Department of Education's (Department) enforcement standards since its last written guidance on Title IX in 1996, the Department's Office for Civil Rights (OCR) began looking into whether additional guidance on Title IX requirements regarding intercollegiate athletics was needed. On June 27, 2002, Secretary of Education Rod Paige created the Secretary's Commission on Opportunities in Athletics to investigate this matter further, and to report back with recommendations on how to improve the application of the current standards for measuring equal opportunity to participate in athletics under Title IX. On February 26, 2003, the Commission presented Secretary Paige with its final report, "Open to All: Title IX at Thirty," and in addition, individual members expressed their views.

After eight months of discussion and an extensive and inclusive fact-finding process, the Commission found very broad support throughout the country for the goals and spirit of Title IX. With that in mind, OCR today issues this Further Clarification in order to strengthen Title IX's promise of non-discrimination in the athletic programs of our nation's schools.

Title IX establishes 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."

In its 1979 Policy Interpretation, the Department established a three-prong test for compliance with Title IX, which it later amplified and clarified in its 1996 Clarification. The test provides that an institution is in compliance if 1) the intercollegiate-level participation opportunities for male and female students at the institution are "substantially proportionate" to their respective full-time undergraduate enrollments, 2) the institution has a "history and continuing practice of program expansion" for the underrepresented sex, or 3) the institution is "fully and effectively" accommodating the interests and abilities of the underrepresented sex.

First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best
satisfy the three-prong test if it maintains a history and continuing practice of program expansion for the underrepresented sex, or if "the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program." Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.

The transmittal letter accompanying the 1996 Clarification issued by the Department described only one of these three separate prongs - substantial proportionality - as a "safe harbor" for Title IX compliance. This led many schools to believe, erroneously, that they must take measures to ensure strict proportionality between the sexes. In fact, each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. The Department will continue to make clear, as it did in its 1996 Clarification, that "[i]nstitutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas."

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law, to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.

In the 1996 Clarification, the Department provided schools with a broad range of specific factors, as well as illustrative examples, to help schools understand the flexibility of the three-prong test. OCR reincorporates those factors, as well as those illustrative examples, into this Further Clarification, and OCR will continue to assist schools on a case-by-case basis and address any questions they have about Title IX compliance. Indeed, OCR encourages schools to request individualized assistance from OCR as they consider ways to meet the requirements of Title IX. As OCR works with schools on Title IX compliance, OCR will share information on successful approaches with the broader scholastic community.

Second, OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams. Therefore, in negotiating compliance agreements, OCR's policy will be to seek remedies that do not involve the elimination of teams.
Third, OCR hereby advises schools that it will aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. At the same time, OCR will also work with schools to assist them in avoiding such sanctions by achieving Title IX compliance.

Fourth, private sponsorship of athletic teams will continue to be allowed. Of course, private sponsorship does not in any way change or diminish a school's obligations under Title IX.

Finally, OCR recognizes that schools will benefit from clear and consistent implementation of Title IX. Accordingly, OCR will ensure that its enforcement practices do not vary from region to region.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a challenge for many academic institutions. But OCR believes that the three-prong test has provided, and will continue to provide, schools with the flexibility to provide greater athletic opportunities for students of both sexes.

OCR is strongly reaffirming today its commitment to equal opportunity for girls and boys, women and men. To that end, OCR is committed to continuing to work in partnership with educational institutions to ensure that the promise of Title IX becomes a reality for all students.

Thank you for your continuing interest in this subject.

Sincerely,

Gerald Reynolds
Assistant Secretary for Civil Rights
This letter is in response to your letter dated June 19, 2007, containing the “Petition of the College Sports Council to Repeal, Amend, and Clarify Rules Applying Title IX to High School Athletics” (Petition). The Petition requests that the United States Department of Education (Department) take the following actions with regard to Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 et seq.: (1) clarify that the Three-Part Test does not apply to high school athletics; (2) repeal or amend any rule, regulation, interpretation, or clarification applying the Three-Part Test to high school athletics; and (3) clarify the Department’s guidance to high schools with regard to measuring athletic interests and abilities. I apologize for the Department’s delayed response to your letter.

After careful consideration of your arguments, the Department has decided to deny your Petition. Your Petition first asks the Department to clarify that the Three-Part Test does not apply to high school athletics. The regulations implementing Title IX (Title IX Regulations), 34 C.F.R. Part 106, effective July 21, 1975, require recipients of federal funds in part to provide equal athletic opportunity for members of both sexes to participate in interscholastic and intercollegiate athletics. In order to determine compliance in accordance with this requirement, the Department considers, among other factors, “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes” in interscholastic and intercollegiate athletics programs. 34 C.F.R. § 106.41(c)(1).

On December 11, 1979, the Department published the Intercollegiate Athletics Policy Interpretation (1979 Policy Interpretation), which provides guidance to institutions on the requirements for compliance with Title IX. Among the issues addressed in the 1979 Policy Interpretation is the requirement to effectively accommodate student athletic interests and abilities, which is measured through the Three-Part Test.
The 1979 Policy Interpretation explains the scope of its application to high school athletics as follows:

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.


Numerous federal courts have held that the 1979 Policy Interpretation and the Three-Part Test are entitled to substantial deference. See, e.g., Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046-47 (8th Cir. 2002); Neel v. Bd. of Trustees of Ca. State Universities, 198 F.3d 763, 770 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155, 173 (1st Cir. 1996) ("Cohen I"); Kelley v. Bd. of Trustees, Univ. of Ill., 35 F.3d 265, 271 (7th Cir. 1994); Cohen v. Brown Univ., 991 F.2d 888, 896-97 (1st Cir. 1993) ("Cohen II"); Roberts v. Colo. State Univ., 998 F.2d 824, 828 (10th Cir. 1993). Additionally, federal courts have referenced the above statement in the 1979 Policy Interpretation regarding its application to interscholastic athletic programs to apply the principles of the Policy Interpretation to claims against high schools for failing to provide equal athletic opportunities. See McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 290-91 (2d Cir. 2004); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 273 (6th Cir. 1994); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993). For example, the Sixth Circuit applied the Three-Part Test specifically to address a claim against a state high school athletic association for failing to effectively accommodate the athletic interests and abilities of female high school student athletes. See Horner, 43 F.3d at 274-275. In light of this existing guidance, which federal courts have applied authoritatively and unambiguously to interscholastic athletics, further clarification on this matter is not necessary.

Your Petition also requests that the Department repeal or amend any rule, regulation, interpretation, or clarification applying the Three-Part Test to high school athletics. You suggest that this action should be taken because the Three-Part Test violates the principles of equal protection and limits participation opportunities. We note that you raised similar arguments in your January 2003 “Petition to Repeal and Amend Guidance Issued under 34 C.F.R. 106.41(e) Concerning Equal Athletic Opportunity,” in which you requested that the Department repeal the Three-Part Test. The Department denied that request, and the Department denies your request in the instant Petition because the Three-Part Test neither violates equal protection nor creates a gender-conscious affirmative action or quota system. The Three-Part Test provides three separate ways to measure a school’s compliance with one aspect of the Title IX regulations. Federal courts have agreed that the Three-Part Test is not a quota, see, e.g., Cohen II, 101 F.3d at 175; Kelley, 35 F.3d at 271, and every federal court that has considered an equal protection challenge to the Three-Part Test has upheld its constitutionality, see, e.g., Neal, 198 F.3d at 772; Cohen II, 101 F.3d at 170-72; Kelley, 35 F.3d at 272; Cohen I, 991 F.2d at 900-01.
Moreover, as explained in the Department’s “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance,” issued on July 11, 2003 (2003 Further Clarification), the Three-Part Test does not limit opportunities but instead provides schools “with the flexibility to provide greater athletic opportunities for students of both sexes.”

Your Petition next requests that the Department clarify its guidance to high schools on measuring athletic interests and abilities. Specifically, your Petition requests that the Department issue guidance: (a) stating that high schools seeking to use the third prong of the Three-Part Test must survey both genders to determine relative athletic interests and abilities; (b) interpreting the Three-Part Test “not as superseding the 1975 Regulations, but as an elaboration on some of the types of ‘reasonable methods’ the regulations require schools to develop”; and (c) clarifying that the so-called “cutting-and-capping” approach is not authorized in the high school setting.

The Department respectfully denies your request for guidance that would state that schools using the third prong of the Three-Part Test must survey both genders. In the Dear Colleague letter accompanying the Department’s 1996 “Clarification of Intercollegiate Athletics Policy Guidance” (1996 Clarification), the Department responded to similar suggestions to modify the third prong of the Three-Part Test so that it would not focus on the underrepresented sex only. As explained in that document, the focus on the underrepresented sex is appropriate because “Title IX, by definition, addresses discrimination.” The First Circuit, which rejected a similar argument to modify the third prong of the Three-Part Test, further explained that “[t]he fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender.” Cohen I, 991 F.2d at 899. Finally, we believe that the denial of this request is consistent with the unanimous recommendation of the Secretary’s Commission on Opportunity in Athletics that the Department should not change current policies in a manner that would undermine Title IX enforcement regarding nondiscriminatory treatment in athletic participation. See U.S. Department of Education, Secretary’s Commission on Opportunity in Athletics, Open to All: Title IX at 30, Washington, D.C., 2003.

The Department also respectfully denies your request to issue guidance stating that the Three-Part Test does not supersede the Title IX Regulations because existing guidance already makes it clear that the Three-Part Test is consistent with the Title IX Regulations. As stated in the 1979 Policy Interpretation, its purpose is to explain the standards set out in Title IX and the Title IX Regulations and to provide a framework within which complaints alleging discrimination in athletics can be resolved. 44 Fed. Reg. at 71413. Accordingly, the Three-Part Test clarifies, not replaces, one requirement in the Title IX Regulations. Similarly, courts have characterized the 1979 Policy Interpretation as a clarification or interpretation of the Title IX Regulations, and no court has held that the 1979 Policy Interpretation is inconsistent with Title IX or its implementing regulations. See, e.g., Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930, 940 (D.C. Cir. 2004); Miami Univ. Wrestling Club, 302 F.3d at 615; Chalenor, 291 F.3d at 1045, 1047; Cohen I, 991 F.2d at 899.
Lastly, with regard to the request in your Petition for the Department to clarify that the cutting-and-capping approach is not authorized in the high school setting, the Department must also respectfully deny this request. Through the 1996 Clarification, 2003 Further Clarification, and 2005 “Additional Clarification of Intercollegiate Athletics Policy” (March 17, 2005), the Department repeatedly and clearly has stated its view that institutions are not required to cut or reduce teams to comply with Title IX or, specifically, with the Three-Part Test, that taking such action is disfavored, and that the Department will not seek remedies that involve the elimination of teams.

Therefore, we do not believe that further guidance on this matter is necessary when the Three-Part Test is applied in the context of high school athletics. The Department remains committed to working with schools on an individualized basis to ensure equal athletic opportunity for all students.

Sincerely,

Margaret Spellings

Margaret Spellings
Dear Colleague:

Title IX of the Education Amendments of 1972\(^1\) (Title IX) prohibits discrimination on the basis of sex in education programs and activities by recipients of Federal financial assistance, which include schools, colleges and universities. Since its passage, Title IX has dramatically increased academic, athletic and employment opportunities for women and girls. Title IX stands for the proposition that equality of opportunity in America is not rhetoric, but rather a guiding principle.

Although there has been indisputable progress since Title IX was enacted, notably in interscholastic and intercollegiate athletic programs, sex discrimination unfortunately continues to exist in many education programs and activities. I am committed to the vigorous enforcement of Title IX to resolve this discrimination and to provide clear policy guidance to assist a recipient institution (institution) in making the promise of Title IX a reality for all.

To that end, on behalf of the Office for Civil Rights (OCR) of the U.S. Department of Education (Department), it is my pleasure to provide you with this “Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three.” With this letter, the Department is withdrawing the “Additional Clarification of Intercollegiate Athletics Policy: Three Part Test – Part Three” (2005 Additional Clarification) and all related documents accompanying it, including the “User’s Guide to Student Interest Surveys under Title IX” (User’s Guide) and related technical report, that were issued by the Department on March 17, 2005.

OCR enforces Title IX and its implementing regulation.\(^2\) The regulation contains specific provisions governing athletic programs\(^3\) and the awarding of athletic scholarships.\(^4\) Specifically, the Title IX regulation provides that if an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes.\(^5\) In determining whether equal athletic opportunities are available, the regulation requires OCR to consider whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes.\(^6\)

\(^1\) 20 U.S.C. § 1681 et seq.
\(^2\) 34 C.F.R. Part 106.
\(^3\) 34 C.F.R. § 106.41.
\(^4\) 34 C.F.R. § 106.37(c).
\(^5\) 34 C.F.R. § 106.41(c).
\(^6\) 34 C.F.R. § 106.41(c)(1). The Title IX regulation at 34 C.F.R. § 106.41(c) provides that OCR also will consider other factors when determining whether equal athletic opportunity is available at an institution.
The “Intercollegiate Athletics Policy Interpretation”7 (1979 Policy Interpretation), published on December 11, 1979, provides additional guidance on the Title IX intercollegiate athletic regulatory requirements.8 The 1979 Policy Interpretation sets out a three-part test that OCR uses to assess whether an institution is effectively accommodating the athletic interests and abilities of its students to the extent necessary to provide equal athletic opportunity.9 On January 16, 1996, OCR issued the “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” (1996 Clarification) to provide additional clarification on all parts of the three-part test, including the specific factors that OCR uses to evaluate compliance under the third part of the three-part test (Part Three).10

In 2005, OCR issued the Additional Clarification regarding application of the indicators in the 1996 Clarification that guided OCR’s analysis of Part Three. The accompanying User’s Guide included a prototype survey instrument (model survey) that institutions could use to measure student interest in participating in intercollegiate athletics and included specific guidance on its implementation. The Additional Clarification and User’s Guide changed OCR’s approach from an analysis of multiple indicators to a reliance on a single survey instrument to demonstrate that an institution is accommodating student interests and abilities in compliance with Part Three. After careful review, OCR has determined that the 2005 Additional Clarification and the User’s Guide are inconsistent with the nondiscriminatory methods of assessment set forth in the 1979 Policy Interpretation and the 1996 Clarification and do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys, under Part Three. Accordingly, the Department is withdrawing the 2005 Additional Clarification and User’s Guide, including the model survey. All other Department policies on Part Three remain in effect and provide the applicable standards for evaluating Part Three compliance.

Given the resource limitations faced by institutions throughout the nation and the effect on institutions’ athletics programs, I recognize the importance of assisting institutions in developing their own assessment methods that retain the flexibility to meet their unique circumstances, but are consistent with the nondiscrimination requirements of the Title IX regulation. Therefore, this Dear Colleague letter reaffirms, and provides additional clarification

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letter only addresses the regulatory requirement, at 34 C.F.R. § 106.41(c)(1), to effectively accommodate interests and abilities.

7 44 Fed. Reg. 71413 (1979). The 1979 Policy Interpretation was published by the former Department of Health, Education, and Welfare, and was adopted by the Department of Education when it was established in 1980.

8 Although the 1979 Policy Interpretation is designed for intercollegiate athletics, its general principles, and those of this letter, often will apply to interscholastic, club, and intramural athletic programs. 44 Fed. Reg. at 71413. Furthermore, the Title IX regulation requires institutions to provide equal athletic opportunities in intercollegiate, interscholastic, club, and intramural athletics. 34 C.F.R. § 106.41(c).

9 As discussed in the 1979 Policy Interpretation, OCR also considers the quality of competitive opportunities offered to members of both sexes in determining whether an institution effectively accommodates the athletic interests and abilities of its students. 44 Fed. Reg. at 71418.

10 OCR’s “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance,” which was issued as a Dear Colleague letter on July 11, 2003, also reincorporated the 1996 Clarification’s broad range of specific factors and illustrative examples.
on, the multiple indicators discussed in the 1996 Clarification that guide OCR’s analysis of whether institutions are in compliance with Part Three, as well as the nondiscriminatory implementation of a survey as one assessment technique.

**The Three-Part Test**

As discussed above, OCR uses the three-part test to determine whether an institution is providing nondiscriminatory athletic participation opportunities in compliance with the Title IX regulation. The test provides the following three compliance options:

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 history and continuing practice of program expansion, as described 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.\(^\text{11}\)

The three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs consistent with Title IX’s nondiscrimination requirements. As stated in the 1996 Clarification, “[T]he three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.”

**Part Three of the Three-Part Test — Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex**

This letter focuses on Part Three — whether an institution is fully and effectively accommodating the athletic interests and abilities of the underrepresented sex. As the 1996 Clarification indicates, while disproportionately high athletic participation rates by an institution’s students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy Part Three if it can show that the underrepresented sex is not being denied opportunities, i.e., that the interests and abilities of

\(^{11}\) 44 Fed. Reg. at 71418.
the underrepresented sex are fully and effectively accommodated. This letter provides information that guides OCR in its evaluation of compliance with Part Three and the nondiscriminatory implementation of assessments of students’ athletic interests and abilities under it.

Under Part Three, the focus is on full and effective accommodation of the interests and abilities of the institution’s students who are members of the underrepresented sex — including students who are admitted to the institution though not yet enrolled. As stated in the 1996 Clarification, and as further discussed below, in determining compliance with Part Three, OCR considers all of the following three questions:

1. Is there unmet interest in a particular sport?

2. Is there sufficient ability to sustain a team in the sport?

3. Is there a reasonable expectation of competition for the team?

If the answer to all three questions is “Yes,” OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three.

A. Unmet Interest and Ability — OCR Evaluation Criteria

In determining whether an institution has unmet interest and ability to support an intercollegiate team in a particular sport, OCR evaluates a broad range of indicators, including:

- whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students;
- whether a viable team for the underrepresented sex recently was eliminated;
- multiple indicators of interest;
- multiple indicators of ability; and
- frequency of conducting assessments.

Each of these five criteria is described below. Following the discussion of these criteria, this section provides technical assistance recommendations for effective assessment procedures and the nondiscriminatory implementation of a survey as one component of assessing the interests and abilities of students of the underrepresented sex. This section concludes with a discussion of the multiple indicators OCR evaluates to determine whether there are a sufficient number of students with unmet interest and ability to sustain a new intercollegiate team.

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12 OCR examines an institution’s recruitment practices under another part of the 1979 Policy Interpretation. See 44 Fed. Reg. at 71417. Accordingly, where an institution recruits potential student athletes for its men’s teams, it must ensure that its women’s teams are provided with substantially equal opportunities to recruit potential student athletes.
1. Nondiscriminatory Methods of Assessment

Under Part Three, OCR evaluates whether an institution uses processes and methods for assessing the athletic interests and abilities of its students of the underrepresented sex that are consistent with the nondiscrimination standards set forth in the 1979 Policy Interpretation. The 1979 Policy Interpretation states that institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

   a. The processes take into account the nationally increasing levels of women's interests and abilities;

   b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

   c. The methods of determining ability take into account team performance records; and

   d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.\(^\text{13}\)

An institution should document its assessment of students' interests and abilities.

2. Assessments Not Used To Eliminate Viable Teams

As discussed in the 1996 Clarification, if an institution recently has eliminated a viable team for the underrepresented sex from the intercollegiate athletics program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport and thus there would be a presumption that the institution is not in compliance with Part Three. This presumption can be overcome if the institution can provide strong evidence that interest, ability, or competition no longer exists.

Accordingly, OCR does not consider the failure by students to express interest during a survey under Part Three as evidence sufficient to justify the elimination of a current and viable intercollegiate team for the underrepresented sex. In other words, students participating on a viable intercollegiate team have expressed interest by active participation, and OCR does not use survey results to nullify that expressed interest.

3. Multiple Indicators Evaluated to Assess Interest

OCR considers a broad range of indicators to assess whether there is unmet athletic interest among the underrepresented sex. These indicators guide OCR in determining whether the institution has measured the interests of students of the underrepresented sex using nondiscriminatory methods consistent with the 1979 Policy Interpretation. As discussed in the

\(^{13}\) Fed. Reg. at 71417.
1996 Clarification, OCR evaluates the interests of the underrepresented sex by examining the following list of non-exhaustive indicators:

- requests by students and admitted students that a particular sport be added;
- requests for the elevation of an existing club sport to intercollegiate status;
- participation in club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interests in particular sports;
- results of surveys or questionnaires of students and admitted students regarding interests in particular sports;\(^{14}\)
- participation in interscholastic sports by admitted students; and
- participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.\(^ {15}\)

In accordance with the 1996 Clarification, OCR also will consider the likely interest\(^ {16}\) of the underrepresented sex by looking at participation in intercollegiate sports in the institution’s normal competitive regions.

4. Multiple Indicators Evaluated to Assess Ability

As discussed in the 1996 Clarification, OCR considers a range of indicators to assess whether there is sufficient ability among interested students of the underrepresented sex to sustain a team in the sport. When making this determination, OCR examines indicators such as:

- the athletic experience and accomplishments — in interscholastic, club or intramural competition — of underrepresented students and admitted students interested in playing the sport;

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\(^ {14}\) OCR evaluates all of the indicators discussed here so OCR does not consider survey results alone as sufficient evidence of lack of interest under Part Three.

\(^ {15}\) As discussed in the 1996 Clarification, this indicator may be helpful to OCR in ascertaining likely interest of an institution’s students and admitted students in particular sports, especially in the absence of more direct indicia. However, in conducting its investigations, OCR determines whether an institution is meeting the actual interests and abilities of its students and admitted students.

An institution’s evaluation should take into account sports played in the high schools and communities from which it draws its students, both as an indication of possible interest at the institution, and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex. For example, if OCR’s investigation finds that a substantial number of high schools from the relevant region offer a particular sport that the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR also may interview students, admitted students, coaches, and others regarding interest in that sport.

\(^ {16}\) See Footnote 15 above.
• opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team; and
• if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Additionally, because OCR recognizes that students may have a broad range of athletic experiences and abilities, OCR also examines other indications of ability such as:

• participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered; and
• tryouts or other direct observations of participation in the particular sport in which there is interest.

As the 1996 Clarification indicated, neither a poor competitive record, nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution’s other athletes, is conclusive evidence of lack of ability. For the purposes of assessing ability, it is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

5. Frequency of Assessments

As discussed in the 1996 Clarification, OCR evaluates whether an institution assesses interest and ability periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. There are several factors OCR considers when determining the rate of frequency for conducting an assessment. These factors include, but are not limited to:

• the degree to which the previous assessment captured the interests and abilities of the institution’s students and admitted students of the underrepresented sex;
• changes in demographics or student population at the institution;\(^{17}\) and
• whether there have been complaints from the underrepresented sex with regard to a lack of athletic opportunities or requests for the addition of new teams.

Further, OCR will consider whether an institution conducts more frequent assessments if a previous assessment detected levels of student interest and ability in any sport that were close to the minimum number of players required to sustain a team.

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\(^{17}\) For example, in a typical four-year institution, the student body population will change substantially each year, by approximately 25 percent annually.
6. Effective Procedures for Evaluating Requests to Add Teams and Assessing Participation

An institution has a continuing obligation to comply with Title IX's nondiscrimination requirements; thus, OCR recommends that institutions have effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of students of the underrepresented sex, including easily understood policies and procedures for receiving and responding to requests for additional teams, and wide dissemination of such policies and procedures to existing and newly admitted students, as well as to coaches and other employees.

OCR also recommends that institutions develop procedures for, and maintain documentation from, routine monitoring of participation of the underrepresented sex in club and intramural sports as part of their assessment of student interests and abilities. OCR further recommends that institutions develop procedures for, and maintain documentation from, evaluations of the participation of the underrepresented sex in high school athletic programs, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students. This is the type of documentation that may be needed in order for an institution to demonstrate that it is assessing interests and abilities in compliance with Part Three.

The Title IX regulation requires institutions to designate at least one employee to coordinate their efforts to comply with and carry out their Title IX responsibilities. Therefore, institutions may wish to consider whether the monitoring and documentation of participation in club, intramural, and interscholastic sports and the processing of requests for the addition or elevation of athletic teams should be part of the responsibilities of their Title IX coordinators in conjunction with their athletic departments. Another option an institution may wish to consider is to create a Title IX committee to carry out these functions. If an institution chooses to form such a committee, it should include the Title IX coordinator as part of the committee and provide appropriate training on the Title IX requirements for committee members.

7. Survey May Assist in Capturing Information on Students' Interests and Abilities

As discussed in the 1996 Clarification, institutions may use a variety of techniques to identify students' interests and abilities. OCR recognizes that a properly designed and implemented survey is one tool that can assist an institution in capturing information on students' interests and abilities. OCR evaluates a survey as one component of an institution's overall assessment under Part Three and will not accept an institution's reliance on a survey alone, regardless of the response rate, to determine whether it is fully and effectively accommodating the interests and abilities of its underrepresented students. If an institution conducts a survey as part of its assessment, OCR examines the content, implementation and response rates of the survey, as well as an institution's other methods of measuring interest and ability.

18 34 C.F.R. § 106.8(a).
Under Part Three, OCR evaluates the overall weight it will accord the conclusions drawn by an institution from the results of a survey by examining the following factors, among others:

- content of the survey;
- target population surveyed;
- response rates and treatment of non-responses;
- confidentiality protections; and
- frequency of conducting the survey.

OCR also considers whether a survey is implemented in such a way as to maximize the possibility of obtaining accurate information and facilitating responses. A properly designed survey should effectively capture information on interest and ability\(^\text{19}\) across multiple sports, without complicating responses with superfluous or confusing questions.

OCR has not endorsed or sanctioned any particular survey; however, for technical assistance purposes, this letter contains information that an institution may wish to consider in developing its own survey.

a. **Content of the Survey**

i. **Purpose**

To ensure students understand the importance of responding to the survey, OCR evaluates whether a survey clearly states its purpose. For technical assistance purposes, an example of a purpose statement might be:

**Purpose**: This data collection is being conducted for evaluation, research, and planning purposes and may be used along with other information to determine whether [institution] is effectively accommodating the athletic interests and abilities of its students, including whether to add additional teams.

ii. **Collect information regarding all sports**

In addition, OCR evaluates whether the survey lists all sports for the underrepresented sex recognized by the three primary national intercollegiate athletic associations,\(^\text{20}\) and contains an open-ended inquiry for other sports to allow students to write in any sports that are not

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\(^{19}\) Experience in sports generally is one indicator of ability.

\(^{20}\) These associations are the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association. A current list of these sports for both sexes is: baseball, basketball, bowling, cross country, fencing, field hockey, football, golf, gymnastics, ice hockey, lacrosse, rifle, rowing, skiing, soccer, softball, swimming and diving, tennis, indoor track and field, outdoor track and field, volleyball, water polo, and wrestling.
listed. OCR considers whether the survey allows students to identify their interest in future or current participation in all of the sports they identify and general athletic experience. OCR also considers whether the survey allows students to provide additional information or comments about their interest, experience, and ability. For technical assistance purposes, the types of questions an institution could ask regarding interest in future participation, current participation, and prior athletic experience might be:

<table>
<thead>
<tr>
<th>Sport</th>
<th>Interest in Future Participation: At what level do you wish to participate in this sport at [Institution]?</th>
<th>Current Participation: At what level are you participating in this sport?</th>
<th>Prior Experience: At what level did you participate in this sport or any other relevant sport in high school, college, or in another capacity?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basketball</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
</tr>
<tr>
<td>Lacrosse</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
</tr>
<tr>
<td>Other sport identified by student</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other __________</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>High School □ Varsity □ Junior Varsity □ Club □ Intramural □ Recreational □ Other __________</td>
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<td>High School □ Varsity □ Junior Varsity □ Club □ Intramural □ Recreational □ Other __________</td>
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<td>High School □ Varsity □ Junior Varsity □ Club □ Intramural □ Recreational □ Other __________</td>
</tr>
</tbody>
</table>

iii. Contact Information

OCR also looks at whether an institution requests contact information, to allow the institution to follow-up with students who wish to be contacted regarding their interests and abilities.

b. Target Population Surveyed

OCR considers the target population surveyed at the institution. Under Part Three, OCR evaluates whether the survey is administered as a census to all full-time undergraduate

21 An open-ended inquiry for other sports should be prominent or otherwise readily visible and contain a line or other mechanism for students to write in the sport for which they wish to express interest and ability.

22 If the survey is provided in paper form, an institution should provide a surplus of rows to ensure that a respondent can provide information for all the sports for which there is interest.
students of the underrepresented sex and admitted students of the underrepresented sex.\textsuperscript{23} Using a census of all students can avoid several issues associated with sample surveys including, but not limited to: selection of the sampling mechanism, selection of the sample size, calculation of sampling error, and using sample estimates. If an institution intends to administer a survey to a sample population to gauge an estimate of interests and abilities, the larger the sample, the more weight OCR will accord the estimate.

c. **Responses: Rates and Treatment of Non-Responses**

OCR evaluates whether the survey is administered in a manner designed to generate high response rates and how institutions treat responses and non-responses.

OCR looks at whether institutions provide the survey in a context that encourages high response rates, and whether institutions widely publicize the survey; give students, including those participating in club or intramural sports, advance notice of the survey; and provide students adequate time to respond. Generally, OCR accords more weight to a survey with a higher response rate than a survey with a lower response rate, and institutions may want to distribute the survey through multiple mechanisms to increase the response rate.

For example, for enrolled students, an institution may want to administer the survey as part of a mandatory activity, such as during course registration. If administered as part of a mandatory activity, students also should have the option of completing the survey at a later date in order to ensure that they have adequate time to respond. Students who indicate that they wish to complete the survey at a later time should be given the opportunity to provide their contact information to enable the institution to take steps to ensure that they complete the survey. An institution should follow-up with those students who indicate that they wish to respond in the future.

An institution also may choose to send an email to the entire target population that includes a link to the survey. If an institution’s assessment process includes email, OCR considers whether the institution takes appropriate cautionary measures, such as ensuring that it has accurate email addresses and that the target population has access to email.\textsuperscript{24} OCR also expects institutions to take additional steps to follow-up with those who do not respond, including sending widely publicized reminder notices.

If institutions administer the survey through a web-based distribution system, students who indicate that they have no current interest\textsuperscript{25} in athletic participation should be asked to confirm their lack of interest before they exit the system. If response rates using the methods described

\textsuperscript{23} For example, institutions may distribute surveys to all admitted students of the underrepresented sex with acceptance letters.

\textsuperscript{24} OCR also evaluates whether the survey is administered in a manner designed to ensure the accurate identity of the respondent and to protect against multiple responses by the same individual.

\textsuperscript{25} Students may have, or may be unaware of whether they will have, a future interest in athletic participation.
above are low, an institution should consider administering the survey in another manner to obtain higher response rates.

OCR does not consider non-responses to surveys as evidence of lack of interest or ability in athletics. As discussed above, regardless of whether students respond to a survey, OCR also evaluates whether students’ interest and abilities are assessed using the multiple indicators described above.

(d. Confidentiality Protections)

OCR also looks at whether institutions notify students that all responses as well as any personally identifiable information they provide will be kept confidential, although the aggregate survey information will be shared with athletic directors, coaches, and other staff, as appropriate. When requesting any personal or personally identifiable data, protecting the respondents’ confidentiality helps to ensure that institutions obtain high-quality data and high response rates. If a student has expressed interest in being contacted when responding to the survey, an institution should continue to maintain the student’s confidentiality except to the extent needed to follow-up with the student.

e. Frequency of Conducting the Survey

As discussed above, OCR evaluates whether an institution periodically conducts an assessment of interest and abilities. In addition to the factors OCR considers when determining the rate of frequency for conducting an assessment, OCR also will consider factors such as the size of the previously assessed survey population and the rate of response to the immediately preceding survey(s) conducted by the institution, if any.

8. Multiple Indicators Evaluated to Assess Sufficient Number of Interested and Able Students to Sustain a Team

Under Part Three, institutions are not required to create an intercollegiate team or elevate a club team to intercollegiate status unless there are a sufficient number of interested and able students to sustain a team. When OCR evaluates whether there are a sufficient number of students, OCR considers such indicators as the:

- minimum number of participants needed for a particular sport;
- opinions of athletic directors and coaches concerning the abilities required to field an intercollegiate team; and
- size of a team in a particular sport at institutions in the governing athletic association or conference to which the institution belongs or in the institution’s competitive regions.

When evaluating the minimum number of athletes needed, OCR may consider factors such as the:
rate of substitutions necessitated by factors such as length of competitions, intensity of play, or injury;
- variety of skill sets required for competition; and
- minimum number of athletes needed to conduct effective practices for skill development.

B. Reasonable Expectation of Competition — OCR Evaluation Criteria

Lastly, as indicated in the 1996 Clarification, OCR evaluates whether there is a reasonable expectation of intercollegiate competition for the team in the institution’s normal competitive regions. In evaluating available competition, OCR considers available competitive opportunities in the geographic area in which the institution’s athletes primarily compete, including:

- competitive opportunities offered by other schools against which the institution competes; and
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.26

If the information or documentation compiled by the institution during the assessment process shows that there is sufficient interest and ability to support a new intercollegiate team and a reasonable expectation of intercollegiate competition in the institution’s normal competitive region for the team, the institution is under an obligation to create an intercollegiate team within a reasonable period of time in order to comply with Part Three.

Conclusion

The three-part test gives institutions flexibility and affords them control over their athletics programs. This flexibility, however, must be used consistent with Title IX’s nondiscrimination requirements. OCR will continue to work with institutions to assist them in finding ways to address their particular circumstances and comply with Title IX. For technical assistance, please contact the OCR enforcement office that serves your area, found at http://wdcroblp01.ed.gov/CFAPPS/OCR/contactus.cfm.

Sincerely,

Russlynn Ali
Assistant Secretary for Civil Rights

26 Under the 1979 Policy Interpretation, an institution also may be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex. 44 Fed. Reg. at 71418.
The following are brief questions and answers related to the Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three (Dear Colleague Letter). These questions and answers are not a formal statement of policy. Readers should consult the Dear Colleague letter for the statement of OCR policy.

1. What is the purpose of the Dear Colleague letter?

**Answer:** The purpose of the Dear Colleague letter is two-fold. First, it withdraws the following athletics policy documents the Department of Education (Department) issued on March 17, 2005:

- "Additional Clarification of Intercollegiate Athletics Policy: Three Part Test – Part Three" (2005 Additional Clarification);
- "User’s Guide to Student Interest Surveys under Title IX" (User’s Guide); and
- Technical report.
After careful review and consideration, the Department has determined that the 2005 policy documents are inconsistent with the Department’s long-standing Title IX athletics policy and nondiscrimination requirements and do not provide appropriate clarity regarding nondiscriminatory assessment methods, including surveys.

Second, the Dear Colleague letter provides recipients with additional clarification on compliance with part three of the three-part test (Part Three), which is one of the methods that OCR uses to assess whether institutions are providing nondiscriminatory athletic participation opportunities as required by Title IX of the Education Amendments of 1972 (Title IX).

The Dear Colleague letter sets out the multiple indicators OCR evaluates to determine whether there is unmet athletic interest and ability among students who are members of the underrepresented sex in an institution’s athletics program. The letter also provides technical assistance on effective procedures for collecting, maintaining, and evaluating information on students’ athletic interests and abilities, and the nondiscriminatory design and implementation of surveys as one assessment technique under Part Three of the three-part test.

2. **What is the three-part test?**

**Answer:** The regulation implementing Title IX requires institutions to provide equal athletic opportunities for members of both sexes and to effectively accommodate students’ athletic interests and abilities. The Department’s 1979 “Intercollegiate Athletics Policy Interpretation” (1979 Policy Interpretation), published on December 11, 1979, sets out a three-part test that OCR uses as part of determining whether an institution is meeting its Title IX obligations. An institution is in compliance with the three-part test if it meets any one of the following parts of the test:

(1) The number of male and female athletes is substantially proportionate to their respective enrollments; or

(2) The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or

(3) The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.

The Dear Colleague letter focuses on the third compliance option (Part Three).

3. **Has the Department issued additional clarification of the three-part test since 1979 and if so, is it still in effect?**

**Answer:** In 1996, OCR issued the “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” (1996 Clarification), which provides guidance on all parts of the three-part test, including the specific factors that OCR uses to evaluate compliance under Part Three. In 2003, OCR issued a Dear Colleague letter, the “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance” (2003 Further Clarification), which reincorporated the 1996 Clarification’s broad range of factors and illustrative examples on the three-part test, including Part Three.

All Department policies on Part Three, except the 2005 Additional Clarification, User’s Guide and related technical report, remain in effect and provide the applicable standards for evaluating Part Three compliance.

4. **What is required for an institution to comply with Part Three?**

**Answer:** As stated in the 1996 Clarification and as discussed in the Dear Colleague letter, OCR considers a multitude of indicators in the context of evaluating the following three questions to determine whether an institution is in compliance with Part Three.

(1) Is there unmet interest in a particular sport?

(2) Is there sufficient ability to sustain a team in the sport?

(3) Is there a reasonable expectation of competition for the team?
If the answer to all three questions is “Yes,” OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three.

5. Why is the Department issuing clarification about surveys and their implementation if it is withdrawing the 2005 Additional Clarification and User’s Guide?

**Answer:** The Dear Colleague letter is part of the Department’s efforts, expressed in the 1996 Clarification, to help identify potential nondiscriminatory techniques and strategies for assessing interest. Unlike the 2005 Additional Clarification, the letter makes clear that OCR considers multiple indicators in evaluating compliance with Part Three and will not accept an institution’s reliance on a survey alone, regardless of the response rate, to determine compliance. The letter also makes clear that OCR does not consider nonresponses to surveys as evidence of lack of interest or ability in athletics.

The Dear Colleague letter provides technical assistance on the nondiscriminatory design and implementation of surveys, and clarifies that OCR has not endorsed or sanctioned any particular survey. The letter explains that OCR evaluates the overall weight it will accord the results of a survey by examining the following factors, among others:

- content of the survey;
- target population surveyed;
- response rates and treatment of nonresponses;
- confidentiality protections; and
- frequency of conducting the survey.

6. Must an institution administer a survey in order to comply with Part Three?

**Answer:** No. An institution is not required to administer a survey to be in compliance with Part Three, nor does OCR evaluate a survey alone in order to determine compliance with Part Three. A survey is only one indicator that may be used as part of an overall assessment of interests and abilities of the underrepresented sex. In addition to the survey, OCR will evaluate the other indicators of interest and ability discussed in the Dear Colleague letter.

7. What is deemed an acceptable response rate for a survey?

**Answer:** OCR determines the overall weight it will accord the results of a survey on a case-by-case basis. OCR generally accords more weight to a survey with a higher response rate than a survey with a lower response rate if the survey design and administration are consistent with the factors discussed in the Dear Colleague letter including: the survey content, target population surveyed, response rates and treatment of nonresponses, confidentiality protections, and frequency of conducting the survey.

8. Is an institution presumed in compliance with Part Three if it has administered a survey to its students that shows no unmet interests or abilities of the underrepresented sex?

**Answer:** No. An institution is not presumed to be in compliance with Part Three if the results of a survey it administers show no unmet interests or abilities of the underrepresented sex. As discussed in the answer to the preceding question, OCR will determine the overall weight it will accord the results of a survey based on the nondiscriminatory design of the survey and its administration, along with the multiple factors discussed in the Dear Colleague letter.

9. Can institutions use the prototype survey provided in the 2005 Additional Clarification when assessing student interests and abilities? If not, is there an example of a survey that an institution should use?
Answer: The Dear Colleague letter specifically withdraws the prototype survey instrument that was contained in the User’s Guide accompanying the 2005 Additional Clarification because it was inconsistent with the nondiscriminatory assessment methods set forth in the 1979 Policy Interpretation and the 1996 Clarification. OCR has not developed, endorsed, or sanctioned any particular survey. However, for technical assistance purposes, the Dear Colleague letter provides information regarding the components of a nondiscriminatory survey and a few examples of questions an institution could ask in a survey. The examples provided are not comprehensive and should not be considered a “model” survey. In addition, OCR will provide technical assistance to help institutions that are trying to develop a survey or otherwise comply with the Title IX athletic regulatory requirements.

10. Can an institution rely solely on a survey to determine whether students have the potential ability to sustain an intercollegiate team?

Answer: No. Although an institution may choose to obtain information about students’ athletic experience using a survey, the Dear Colleague letter makes clear that OCR evaluates whether students have sufficient ability to sustain an intercollegiate team using multiple indicators. OCR does not rely solely on survey results when determining whether students have the potential ability to sustain an intercollegiate team.

11. Does the Dear Colleague letter apply to interscholastic athletics?

Answer: The Title IX regulation requires recipients (such as elementary, secondary, and postsecondary institutions) to provide equal athletic opportunities in interscholastic, intercollegiate, club, and intramural athletics. Accordingly, although designed for intercollegiate athletics, the general principles of the 1979 Policy Interpretation, and those of the Dear Colleague letter, often will apply to interscholastic, club, and intramural athletic programs.

12. Does Title IX require cutting or capping of athletics teams in order to achieve compliance with Title IX?

Answer: Nothing in Title IX requires the cutting or capping of teams in order to demonstrate Title IX compliance. In fact, as stated in the 2003 Further Clarification, the elimination of teams is a disfavored practice because it is contrary to the spirit of Title IX. When the results of an investigation show noncompliance, OCR’s policy in negotiating compliance agreements is to seek remedies that do not involve the elimination of teams.

13. Who should institutions contact if they need technical assistance?

Answer: An institution should contact the OCR enforcement office serving its jurisdiction for technical assistance to comply with the Title IX athletic regulatory requirements. Contact information is accessible on the Department’s website at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm (http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm) or by contacting OCR’s Customer Service Team at 1-800-421-3481.

1 34 C.F.R. § 106.41(c).

How Do I Find...

- Student loans, forgiveness (/fund/grants-college.html?src=rm)
- College accreditation (https://www.ed.gov/accreditation?src=rm)
- FERPA (http://studentprivacy.ed.gov?src=rm)
- FAFSA (https://fafsa.ed.gov/?src=edgov-rn)
- 1098, tax forms (https://www.ed.gov/1098-e?src=rm)

More > (/about/top-tasks.html?src=rm)

Information About...

- Transforming Teaching (https://www.ed.gov/teaching?src=nn)
- Early Learning (/about/initiatives/earlylearning/index.html?src=nn)

Related Topics

How to File a Complaint
(/about/offices/list/ocr/docs/howto.html?src=rt)

Topics A-Z
(/about/offices/list/ocr/topics.html?src=rt)

Civil Rights Data Collection
(CRDC)
(/about/offices/list/ocr/data.html?src=rt)

Other Civil Rights Agencies
(/about/offices/list/ocr/related.html?src=rt)

Recursos de la Oficina Para Derechos Civiles en Español
(http://www.ed.gov/about/offices/list/ocr/docs/list-sp.html)

Resources Available in Other Languages
(http://www.ed.gov/about/offices/list/ocr/docs/howto-index.html)
Student Loans
(/fund/grants-college.html?src=ft)
Repaying Loans (https://studentaid.gov/manage-loans/repayment?src=ft)
Defaulted Loans (https://studentaid.gov/manage-loans/default?src=ft)
Loan Forgiveness (https://studentaid.gov/manage-loans/forgiveness-cancellation?src=ft)
Loan Servicers (https://studentaid.gov/manage-loans/repayment/servicers?src=ft#who-is-my-loan-servicer)

Grants & Programs
(/fund/grants-apply.html?src=ft)
Apply for Pell Grants (https://www.fafsa.ed.gov/?src=ft)
Grants Forecast (/fund/grant/find/edlite-forecast.html?src=ft)
Apply for a Grant (/fund/grant/apply/grantapps/index.html?src=ft)
Eligibility for Grants (/programs/find/elig/index.html?src=ft)

Laws & Guidance
(/policy/?src=ft)
FERPA (https://studentprivacy.ed.gov/?src=ft)
Civil Rights (/about/offices/list/ocr/know.html?src=ft)
New IDEA Website (https://sites.ed.gov/idea/?src=ft)

Data & Research
(/rschstat/?src=ft)
Education Statistics (https://nces.ed.gov/?src=ft)
Postsecondary Education Data (https://nces.ed.gov/ipeds/?src=ft)
ED Data Express (https://eddataexpress.ed.gov/?src=ft)
Nation's Report Card (https://nces.ed.gov/nationsreportcard/?src=ft)

About Us
(/about/?src=ft)
Contact Us (/about/contacts/gen/?src=ft)
ED Offices (/about/offices/list/?src=ft)
Jobs (https://www.ed.gov/jobs/?src=ft)
FAQs (https://www.ed.gov/answers/?src=ft)
Recursos en español (/espanol/bienvenidos/es/index.html?src=ft)
Budget, Performance (/about/overview/focus/performance.html?src=ft)
Privacy Program (https://www.ed.gov/privacy?src=ft)
Subscribe to E-Mail Updates (https://public.govdelivery.com/accounts/USED/subscriber/new?topic_id=USED_5)

https://www2.ed.gov/about/offices/list/ocr/docs/title9-qa-20100420.html
listed.²¹ OCR considers whether the survey allows students to identify their interest in future or current participation in all of the sports they identify and general athletic experience. OCR also considers whether the survey allows students to provide additional information or comments about their interest, experience, and ability. For technical assistance purposes, the types of questions an institution could ask regarding interest in future participation, current participation, and prior athletic experience might be:

<table>
<thead>
<tr>
<th>Sport</th>
<th>Interest in Future Participation: At what level do you wish to participate in this sport at [Institution]?</th>
<th>Current Participation: At what level are you participating in this sport?</th>
<th>Prior Experience: At what level did you participate in this sport or any other relevant sport in high school, college, or in another capacity?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basketball</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other ____________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other ____________</td>
</tr>
<tr>
<td>Lacrosse</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other ____________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other ____________</td>
</tr>
<tr>
<td>Other sport identified by student²²</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational</td>
<td>□ Intercollegiate □ Club □ Intramural □ Recreational □ Other ____________</td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other ____________</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>College □ Intercollegiate □ Club □ Intramural □ Recreational □ Other ____________</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>High School □ Varsity □ Junior Varsity □ Club □ Intramural □ Recreational □ Other ____________</td>
</tr>
</tbody>
</table>

iii. Contact Information

OCR also looks at whether an institution requests contact information, to allow the institution to follow-up with students who wish to be contacted regarding their interests and abilities.

b. Target Population Surveyed

OCR considers the target population surveyed at the institution. Under Part Three, OCR evaluates whether the survey is administered as a census to all full-time undergraduate

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²¹ An open-ended inquiry for other sports should be prominent or otherwise readily visible and contain a line or other mechanism for students to write in the sport for which they wish to express interest and ability.

²² If the survey is provided in paper form, an institution should provide a surplus of rows to ensure that a respondent can provide information for all the sports for which there is interest.
Frequently Asked Questions

Consistent with our mission to provide a world-class education for all students, from early childhood to adulthood, the California Department of Education issues the following Frequently Asked Questions (FAQs) in an effort to (a) foster an educational environment that is safe and free from discrimination for all students, regardless of sex, sexual orientation, gender identity, or gender expression, and (b) assist school districts with understanding and implementing policy changes related to AB 1266 and transgender student privacy, facility use, and participation in school athletic competitions.

These FAQs are provided to promote the goals of reducing the stigmatization of and improving the educational integration of transgender and gender nonconforming students, maintaining the privacy of all students, and supporting healthy communication between educators, students, and parents to further the successful educational development and well-being of every student.

1. **What is Assembly Bill (AB) 1266?**

   AB 1266, also known as the “School Success and Opportunity Act,” was introduced by Assemblyman Tom Ammiano on February 22, 2013. It requires that pupils be permitted to participate in sex-segregated school programs, activities, and use facilities consistent with their gender identity, without respect to the gender listed in a pupil’s records. AB 1266 was approved by Governor Brown on August 12, 2013.

   According to Assemblyman Ammiano, “This bill is needed to ensure that transgender students are protected and have the same opportunities to participate and succeed as all other students.” “AB 1266 clarifies California’s student nondiscrimination laws by specifying that all students in K-12 schools must be permitted to participate in school programs, activities, and facilities in accordance with the student’s gender identity.”

   As part of the analysis of AB 1266, Assemblyman Ammiano also stated, "Athletics and physical education classes, which are often segregated by sex, provide numerous well-documented positive effects for a student's physical, social, and emotional development. Playing sports can provide student athletes with important lessons about self-discipline, teamwork, success, and failure, as well as the joy and shared excitement that being a member of a sports team can bring. When transgender students are denied the opportunity to participate in physical education classes in a manner consistent with their gender identity, they miss out on these important benefits and suffer from stigmatization and isolation. In addition, in many cases, students who are transgender are unable to get the credits they need to graduate on time when, for example, they do not have a place to get ready for gym class."

2. **When did this law go into effect?**

   AB 1266 became a provision within California Education Code, Section 221.5(f), on January 1, 2014. It is important to note that prior to the enactment of AB 1266, both state and federal law have prohibited gender-based discrimination for some time.
**Federal Protection:**

Title IX prohibits sexual harassment and discrimination based on gender or sex stereotypes in every jurisdiction. While Title IX does not specifically use the terms “transgender” or “gender identity or expression,” courts have held that harassment and other discrimination against transgender and gender nonconforming people constitutes sex discrimination. This position has also been supported by the U.S. Department of Education. These rights were clarified in the October 26, 2010, “Dear Colleague Letter” and the April 29, 2014, guidance issued by the U.S. Department of Education, Office for Civil Rights, described in the “Recent Developments and Resources” section at the end of this document.

**California Law:**

It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, equal rights and opportunities in the educational institutions of the state. (Education Code Section 200.)

No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid. (Education Code Section 220.)

3. **What specifically does AB 1266 provide?**

Pre-existing state law prohibits public schools from discriminating on the basis of several characteristics, including sex, sexual orientation, and gender identity. Pre-existing state law also requires that participation in a particular physical education activity or sport, if required of pupils of one sex, be available to pupils of each sex. AB 1266 requires a pupil be permitted to participate in sex-segregated school programs, activities, and facilities including athletic teams and competitions, consistent with his or her gender identity, regardless of the gender listed on the pupil's records.

As amended, Education Code Section 221.5(f) provides that “a pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.”

4. **How should a school district, teacher, school administrator or other employee define gender, transgender, or gender identity?**

There are a number of developing terms used to describe transgender characteristics and experiences, which may differ based on region, age, culture, or other factors. Many of these terms are not currently defined by law. However, several common definitions have been used by the courts, the U.S. Department of Education, and a number of groups with educational equity expertise, including the Gay, Lesbian, Straight, Education Network, and the California School Boards Association. Any definitions provided in these materials are provided to facilitate the process of providing safe and nondiscriminatory learning environments and are not provided for the purpose of labeling any students. •"Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's
gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. (Education Code Section 210.7.) •“Gender identity” refers to a person’s gender-related identity, appearance or behavior whether or not different from that traditionally associated with the person's physiology or assigned sex at birth. •“Gender expression” refers to external cues that one uses to represent or communicate one’s gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. •“Transgender” describes people whose gender identity is different from that traditionally associated with their assigned sex at birth. “Transgender boy” and “transgender male” refer to an individual assigned the female sex at birth who has a male gender identity. “Transgender girl” and “transgender female” refer to an individual assigned the male sex at birth who has a female gender identity. An individual can express or assert a transgender gender identity in a variety of ways, which may but do not always include specific medical treatments or procedures. Medical treatments or procedures are not considered a prerequisite for one’s recognition as transgender. •“Gender nonconformity” refers to one’s gender expression, gender characteristics, or gender identity that does not conform to gender stereotypes “typically” associated with one’s legal sex assigned at birth, such as “feminine” boys, “masculine” girls and those who are perceived as androgynous. Sexual orientation is not the same as gender identity. Not all transgender youth identify as gay, lesbian or bisexual, and not all gay, lesbian and bisexual youth display gender-nonconforming characteristics.

5. How can a teacher or school administrator determine whether a student is transgender or not?

The first and best option is always to engage in an open dialogue with the student and the student’s parent or parents if applicable (but see FAQs 6 and 7). Gender identity is a deeply rooted element of a person’s identity. Therefore, school districts should accept and respect a student’s assertion of their gender identity where the student expresses that identity at school or where there is other evidence that this is a sincerely held part of the student’s core identity. Some examples of evidence that the student’s asserted gender identity is sincerely held could include letters from family members or healthcare providers, photographs of the student at public events or family gatherings, or letters from community members such as clergy.

If a student meets one or more of those requirements, a school may not question the student’s assertion of their gender identity except in the rare circumstance when school personnel have a credible basis for believing that the student is making that assertion for some improper purpose. The fact that a student may express or present their gender identity in different ways in different contexts does not, by itself, undermine a student’s assertion of their gender identity.

A school cannot require a student to provide any particular type of diagnosis, proof of medical treatment, or meet an age requirement as a condition to receiving the protections afforded under California’s antidiscrimination statutes. Similarly, there is no threshold step for social transition that any student must meet in order to have his or her gender identity recognized and respected by a school.

6. May a student’s gender identity be shared with the student’s parents, other students, or members of the public?

A transgender or gender nonconforming student may not express their gender identity openly in all contexts, including at home. Revealing a student’s gender identity or expression to others may compromise the student’s safety. Thus, preserving a student’s privacy is of the utmost importance. The right of transgender students to keep their transgender status private is grounded in California’s antidiscrimination laws as well as federal and state laws. Disclosing that a student is transgender without the student’s permission may violate California’s antidiscrimination law by increasing the student’s vulnerability to harassment and may violate the student’s right to privacy.
A. Public Records Act requests - The Education Code requires that schools keep student records private. Private information such as transgender status or gender identity falls within this code requirement and should not be released. (Education Code Section 49060.)

B. Family Educational and Privacy Rights (FERPA) - FERPA is federal law that protects the privacy of students’ education records. FERPA provides that schools may only disclose information in school records with written permission from a student's parents or from the student after the student reaches the age of 18. (20 U.S.C. Section 1232g.) This includes any “information that . . . would allow a reasonable person in the school community . . . to identify the student with reasonable certainty.” (34 C.F.R. Section 99.3.)

C. California Constitution - Minors enjoy a right to privacy under Article I, Section I of the California Constitution that is enforceable against private parties and government officials. The right to privacy encompasses the right to non-disclosure (autonomy privacy) as well as in the collection and dissemination of personal information such as medical records and gender identity (informational privacy).

Even when information is part of a student's records and therefore covered by FERPA, the law provides several exceptions that permit appropriate communications under circumstances in which the student or others may be at risk of harm. Transgender or gender nonconforming students are often subject to stressors which can place them at risk of self-harm. FERPA expressly permits the disclosure of information from a student’s records “…to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.” (34 C.F.R. Section 99.36(a).) “If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.” (Id. Section 99.36(c).)

Moreover, although FERPA restricts disclosures of information obtained from a student's records, it was never intended to act as a complete prohibition on all communications. One threshold point that is often overlooked is that FERPA limits only the disclosure of records and information from records about a student. It does not limit disclosure or discussion of personal observations.

In other words, if a school employee develops a concern about a student based on the employee’s observations of or personal interactions with the student, the employee may disclose that concern to anyone without violating, or even implicating, FERPA. Of course, in most cases, the initial disclosure should be made to professionals trained to evaluate and handle such concerns, such as school student health or welfare personnel, who can then determine whether further and broader disclosures are appropriate.

7. **What steps should a school or school district take to protect a transgender or gender nonconforming student's right to privacy?**

To prevent accidental disclosure of a student’s transgender status, it is strongly recommended that schools keep records that reflect a transgender student’s birth name and assigned sex (e.g., copy of the birth certificate) apart from the student's school records. Schools should consider placing physical documents in a locked file cabinet in the principal's or nurse’s office. Alternatively, schools could indicate in the student's records that the necessary identity documents have been reviewed and accepted without retaining the documents themselves. Furthermore, schools should implement similar safeguards to protect against disclosure of information contained in electronic records.
Pursuant to the above protections, schools must consult with a transgender student to determine who can or will be informed of the student’s transgender status, if anyone, including the student’s family. With rare exceptions, schools are required to respect the limitations that a student places on the disclosure of their transgender status, including not sharing that information with the student’s parents. In those very rare circumstances where a school believes there is a specific and compelling “need to know,” the school should inform the student that the school intends to disclose the student’s transgender status, giving the student the opportunity to make that disclosure her or himself. Additionally, schools must take measures to ensure that any disclosure is made in a way that reduces or eliminates the risk of re-disclosure and protects the transgender student from harassment and discrimination. Those measures could include providing counseling to the student and the student’s family to facilitate the family’s acceptance and support of the student’s transgender status. Schools are not permitted to disclose private student information to other students or the parents of those students.

A transgender student’s right to privacy does not restrict a student’s right to openly discuss and express their gender identity or to decide when or with whom to share private information. A student does not waive his or her right to privacy by selectively sharing this information with others.

8. What is a school or school district's obligation when a student's stated gender identity is different than the student's gender marker in the school's or district's official records?

A school district is required to maintain a mandatory permanent student record which includes the legal name of the student and the student’s gender. If and when a school district receives documentation that such legal name or gender has been changed, the district must update the student’s official record accordingly.

If the school district has not received documentation supporting a legal name or gender change, the school should nonetheless update all unofficial school records (e.g. attendance sheets, school IDs, report cards) to reflect the student’s name and gender marker that is consistent with the student’s gender identity. This is critical in order to avoid unintentionally revealing the student’s transgender status to others in violation of the student’s privacy rights, as discussed above in section 6.

If a student so chooses, district personnel shall be required to address the student by a name and the pronouns consistent with the student’s gender identity, without the necessity of legal documentation or a change to the student’s official district record. The student’s age is not a factor. For example, children as early as age two are expressing a different gender identity. It is strongly suggested that teachers privately ask transgender or gender nonconforming students at the beginning of the school year how they want to be addressed in class, in correspondence to the home, or at conferences with the student’s parents.

In addition to preserving a transgender student’s privacy, referring to a transgender student by the student’s chosen name and pronouns fosters a safe, supportive and inclusive learning environment. To ensure that transgender students have equal access to the programs and activities provided by the school, all members of the school community must use a transgender student’s chosen name and pronouns. Schools should also implement safeguards to reduce the possibility of inadvertent slips or mistakes, particularly among temporary personnel such as substitute teachers.

If a member of the school community intentionally uses a student’s incorrect name and pronoun, or persistently refuses to respect a student’s chosen name and pronouns, that conduct should be treated as harassment. That type of harassment can create a hostile learning environment, violate the transgender student’s privacy rights, and increase that student’s risk for harassment by other members of the school.
community. Examples of this type of harassment include a teacher consistently using the student’s incorrect name when displaying the student’s work in the classroom, or a transgender student’s peers referring to the student by the student’s birth name during class, but would not include unintentional or sporadic occurrences. Depending on the circumstances, the school’s failure to address known incidents of that type of harassment may violate California’s antidiscrimination laws.

9. **How does a school or school district determine the appropriate facilities, programs, and activities for transgender students?**

A school may maintain separate restroom and locker room facilities for male and female students. However, students shall have access to the restroom and locker room that corresponds to their gender identity asserted at school. As an alternative, a “gender neutral” restroom or private changing area may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such a “gender neutral” restroom or private changing area shall be a matter of choice for a student and no student shall be compelled to use such restroom or changing area.

If there is a reason or request for increased privacy and safety, regardless of the underlying reason, any student may be provided access to a reasonable alternative locker room such as:

   a. Use of a private area in the public area of the locker room facility (i.e., a nearby restroom stall with a door, an area separated by a curtain, or a P.E. instructor’s office in the locker room).

   b. A separate changing schedule (either utilizing the locker room before or after the other students).

   c. Use of a nearby private area (i.e., a nearby restroom or a health office restroom).

It should be emphasized that any alternative arrangement should be provided in a way that keeps the student’s gender identity confidential.

Schools cannot, however, require a transgender student to use those alternatives. Requiring a transgender student to be singled out by using separate facilities is not only a denial of equal access, it also may violate the student’s right to privacy by disclosing the student’s transgender status or causing others to question why the student is being treated differently.

Some students (or parents) may feel uncomfortable with a transgender student using the same sex-segregated restroom or locker room. This discomfort is not a reason to deny access to the transgender student. School administrators and counseling staff should work with students and parents to address the discomfort and to foster understanding of gender identity, to create a school culture that respects and values all students.

10. **How should a school or district determine the appropriate placement for transgender students related to sports and physical education classes?**

Transgender students are entitled to and must be provided the same opportunities as all other students to participate in physical education and sports consistent with their gender identity. Participation in competitive athletic activities and contact sports are to be addressed on a case-by-case basis. For additional guidance, the California Interscholastic Federation issued new bylaws in 2013, which provide a detailed process for gender identity participation in interscholastic sports. (See, Recent Developments section below.)
11. **May a school district or school enforce a gender-based dress code?**

Nondiscriminatory gender segregated dress codes may be enforced by a school or school district pursuant to district policy. Students shall have the right to dress in accordance with their gender identity, within the constraints of the dress codes adopted by the school. School staff shall not enforce a school’s dress code more strictly against transgender and gender nonconforming students than other students.

12. **How should school districts and schools address harassment, bullying and abuse of transgender students?**

California law requires that schools provide all students with a safe, supportive and inclusive learning environment, free from discrimination, harassment, and bullying. Examples of harassment and abuse commonly experienced by transgender students include, but are not limited to, being teased for failing to conform to sex stereotypes, being deliberately referred to by the name and/or pronouns associated with the student's assigned sex at birth, being deliberately excluded from peer activities, and having personal items stolen or damaged. School district efforts to prevent and address harassment must include strong local policies and procedures for handling complaints of harassment, consistent and effective implementation of those policies, and encouraging members of the school community to report incidents of harassment. Beyond investigating incidents, schools should implement appropriate corrective action to end the harassment and monitor the effectiveness of those actions.

13. **Should a school district or school generally review its gender-based policies?**

As a general matter, schools should evaluate all gender-based policies, rules, and practices and maintain only those that have a clear and sound pedagogical purpose. Examples of policies and practices that should be reconsidered include: gender-based dress code for graduation or senior portraits and asking students to line up according to gender. Gender-based policies, rules, and practices can have the effect of marginalizing, stigmatizing, and excluding students, whether they are gender nonconforming or not. In some circumstances, these policies, rules, and practices may violate federal and state law. For these reasons, schools should consider alternatives to them.

Whenever students are separated by gender in school activities or are subject to an otherwise lawful gender-specific rule, policy, or practice, students must be permitted to participate in such activities or conform to such rule, policy, or practice consistent with their gender identity.

**RECENT DEVELOPMENTS AND RESOURCES**

The [California School Boards Association’s (CSBA) Final Guidance Regarding Transgender Students, Privacy, and Facilities](https://www.cde.ca.gov/re/di/eo/faq.asp) has also promulgated a model board policy and administrative regulation that can be adopted by districts:

- **Board Policy 5145.3:** [PDF; Posted 29-Jan-2016](https://www.cde.ca.gov/re/di/eo/faq.asp)
- **Administrative Regulation 5145.3:** [PDF; Posted 29-Jan-2016](https://www.cde.ca.gov/re/di/eo/faq.asp)

CSBA also issued a [policy brief](https://www.cde.ca.gov/re/di/eo/faq.asp) on the issue of how schools can support transgender and gender nonconforming students.

Office for Civil Rights Complaint and Resolution Agreement
On July 24, 2013, the U.S. Department of Education's Office for Civil Rights and the U.S. Department of Justice's Civil Rights Division entered into a Resolution Agreement with the Arcadia Unified School District to resolve a complaint alleging violations of Title IX. The case was brought on behalf of a transgender student who was denied access to the boys' restrooms and locker rooms, and required to sleep in a separate facility during an overnight field trip. The agreement requires the school district to treat the student in a manner consistent with his gender identity for all purposes. Moreover, the school district agreed to retain a consultant to revise their policies to prohibit discrimination on the basis of gender identity and implement a district-wide training program for staff and students.

The Resolution Agreement (PDF; Posted 29-Jan-2016) between the Office for Civil Rights and Arcadia Unified School District

California Interscholastic Federation

In February 2013, the California Interscholastic Federation (CIF) issued new bylaws which provide that all students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity. CIF Regulation 300 D, Gender Identify Participation, provides:

Participation in interscholastic athletics is a valuable part of the educational experience for all students. All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student’s records. The student and/or the student's school may seek review of the student’s eligibility for participation in interscholastic athletics in a gender that does not match the gender assigned to him or her at birth, should either the student or the school have questions or need guidance in making the determination, by working through the procedure set forth in the “Guidelines for Gender Identity Participation.”

NOTE: The student’s school may make the initial determination whether a student may participate in interscholastic athletics in a gender that does not match the gender assigned to him or her at birth.

The new California Interscholastic Federation bylaws

Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, April 29, 2014

In April 2014, the U.S. Department of Education, Office for Civil Rights, issued guidance making clear that federal law prohibits discrimination against students on the basis of transgender status: "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation." (PDF; Posted 29-Jan-2016)

Office for Civil Rights Dear Colleague Letter, October 26, 2010

In October 2010, the U.S. Department of Education, Office for Civil Rights, issued a Dear Colleague Letter that, among other things, clarified that although Title IX does not prohibit discrimination on the basis of sexual orientation, harassment directed at a student because that student is gay, lesbian, bisexual, or transgender may constitute sexual harassment and sex discrimination prohibited by Title IX.

The U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter, October 26, 2010 (PDF; Posted 29-Jan-2016)

Other Resources


Questions: Education Equity UCP Appeals Office | 916-319-8239

Last Reviewed: Wednesday, April 25, 2018
GUIDELINES FOR GENDER IDENTITY PARTICIPATION

GENDER IDENTITY PARTICIPATION - All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student’s records. The student and/or the student’s school may seek review of the student’s eligibility for participation in interscholastic athletics in a gender that does not match the gender assigned to him or her at birth, via the following procedure below should either the student or the school have questions or need guidance in making the determination.

Once the student has been granted eligibility to participate in interscholastic athletics consistent with his/her gender identity, the eligibility is granted for the duration of the student’s participation and does not need to be renewed every sports season or school year. All discussion and documentation will be kept confidential, and the proceedings will be sealed unless the student and family make a specific request.

1. NOTICE TO THE SCHOOL: The student and/or parents shall contact the school administrator or athletic director indicating that the student has a consistent gender identity different than the gender listed on the student’s school registration records, and that the student desires to participate in activities in a manner consistent with his/her gender identity.

2. NOTICE TO THE CIF: The school administrator shall contact the CIF office, which will assign a facilitator who will assist the school and student in preparation and completion of the CIF Gender Identity eligibility appeal process.

3. FIRST LEVEL OF APPEAL: The student will be scheduled for an appeal hearing before an eligibility committee specifically established to hear gender identity appeals. The CIF shall schedule a hearing as expeditiously as possible, but in no case later than five (5) school business days of that member school prior to the first full interscholastic contest that is the subject of the petition, or within a reasonable time thereafter in cases of emergency, including, but not limited to, any unforeseeable late student enrollment. The Gender Identity Eligibility Committee will be comprised of a minimum of three (3) of the following persons one of whom must be from the physician or mental health profession category:
   A. Physician with experience in gender identity health care and the World Professional Association for Transgender Health (WPATH) Standards of Care.
   B. Psychiatrist, psychologist or licensed mental health professional familiar with the World Professional Association for Transgender Health (WPATH) Standards of Care.
   C. School administrator from a non-appealing school
   D. CIF staff member
   E. Advocate familiar with Gender Identity and Expression issues

4. DOCUMENTATION: The appealing student should provide the Eligibility Committee with the following documentation and information:
   A. Current transcript and school registration information
   B. Documentation of student’s consistent gender identification (e.g., affirmed written statements from student and/or parent/guardian and/or health care provider)
   C. Any other pertinent documentation or information

5. SECOND LEVEL OF APPEAL: An aggrieved student wishing to appeal the Gender Identity Eligibility Committee decision shall file notice of appeal with the Executive Director of the CIF on or before the tenth (10th) school busines day following the date of receipt of the written decision of the Gender Identity Eligibility Committee denying the petition. An appeal to the CIF Executive Director shall require the Executive Director to schedule a hearing to commence on or before the tenth (10th) school business day following the date of receipt of the written notice of appeal. Written notice of the time and place of the hearing shall be delivered to the petitioned appellant in person or by certified mail, with return receipt requested, no later than five (5) school business days of that member school prior to the date of the hearing. When there is confirmation of a student’s consistent gender identity, the eligibility committee/CIF Executive Director will affirm the student’s eligibility to participate in CIF activities consistent with the student’s gender identification. The CIF will facilitate the provision of resources and training for a member school seeking assistance regarding gender identity.

For Additional information on Gender Identity, refer to APPENDIX (located on following page)
APPENDIX – GENDER IDENTITY

DEFINITIONS:
For the purposes of this policy, the following definitions apply:

1. TRANSGENDER PERSON
   A person whose gender identity does not match the sex assigned to him or her at birth. This cross gender identification is often referred to as gender dysphoria. When the gender dysphoria causes clinically significant distress or impairment, it is sometimes classified as Gender Identity Disorder. A transgender person who is born female-bodied but identifies as male is referred to as a transgender man or a female-to-male transsexual. A transgender person who is born male-bodied but identifies as female is referred to as a transgender woman or a male-to-female transsexual.

2. INTERSEX PERSON
   “Intersex” is a general term used to indicate a person born with a reproductive or sexual anatomy and/or chromosome pattern that doesn’t seem to fit the typical definitions of female or male. This may be the result of several different medical conditions involving chromosomal variations, hormonal variations, ambiguous genitalia, and/or an anatomy that includes both male and female characteristics. The medical term for this condition is a Disorder of Sexual Development of “DSD.” “Intersex” is not the same as “transgender,” although some people identify as both intersex and transgender. However, the two groups may face similar situations in needing to change gender designations for the purposes of participation in school activities.

3. GENDER IDENTITY
   A person’s deeply-felt internal sense of being male or female.

4. GENDER EXPRESSION
   A person’s external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions.

CORE VALUES:
The CIF Gender Identity policy has been developed based on the following core values:

• Acknowledging that the CIF policy will likely need to be reviewed and revised to reflect increased medical understanding and evolving societal norms
• Grounding a policy in sound medical practice
• Enacting a policy that will maximize flexibility and privacy with minimal restrictions
• Providing a space for intersex and transgender students to exist and thrive
• Reducing bullying and harassment of students
• Preserving existing practices regarding girls’ participation on boys’ teams as per current CIF policy.
• Recognizing the value of education based athletics for all students
• Emphasizing that participation in education based athletics is not just allowed, but encouraged for all students
• Adhering to California state and federal law regarding gender equity and educational opportunity
• Operating from the presumption that all students will have access to programs and eligibility policies
• Creating a level playing field for all students
• Reducing economic barriers, especially for minority populations
• Addressing the concerns of parents, teachers and coaches through an educational component
State of California

EDUCATION CODE

Section 221.9

221.9. (a) Commencing with the 2015–16 school year and every year thereafter, each public elementary and secondary school in the state, including each charter school, that offers competitive athletics shall publicly make available at the end of the school year all of the following information:

(1) The total enrollment of the school, classified by gender.
(2) The number of pupils enrolled at the school who participate in competitive athletics, classified by gender.
(3) The number of boys’ and girls’ teams, classified by sport and by competition level.

(b) The data required pursuant to subdivision (a) shall reflect the total number of players on a team roster on the official first day of competition.

(c) The school shall make the information specified in subdivision (a) publicly available as follows:

(1) If the school maintains an Internet Web site, by posting the information on the school’s Internet Web site.
(2) If the school does not maintain an Internet Web site, by submitting the information to its school district or, for a charter school, to its charter operator. The school district or charter operator shall post the information on its Internet Web site, and the information shall be disaggregated by schoolsite.

(d) The materials used by a school to compile the information specified in subdivision (a) shall be retained by the school for at least three years after the information is posted on the Internet pursuant to subdivision (c).

(e) As used in this section, “competitive athletics” means sports where the activity has coaches, a governing organization, and practices, and competes during a defined season, and has competition as its primary goal.

(Added by Stats. 2014, Ch. 258, Sec. 2. (SB 1349) Effective January 1, 2015.)
Resolution Agreement
Coalinga–Huron Joint Unified School District
OCR Case No. 09-14-1425

In order to resolve the allegations raised in the above-referenced complaint filed with the U.S. Department of Education, Office for Civil Rights under Title IX of the Education Amendments of 1972 (Title IX), and without admitting to any violation of Title IX or any other federal law, the Coalinga-Huron Joint Unified School District (District) voluntarily agrees to the terms of this Agreement. OCR concludes that compliance with the terms of this Agreement will address and resolve all allegations of the complaint. The District agrees to fully implement the terms below:

Provisions

Title IX Compliance Coordinator

1. By February 13, 2015 the District will name a District level Title IX Coordinator.

2. By March 6, 2015, the District will ensure that required information regarding the District level Title IX Coordinator are posted and made available as required by law.

3. By March 13, 2015, the District will provide OCR with documentation of the steps it has taken to meet the requirements of this Section.

4. By September 15, 2015, the District’s Title IX Coordinator, key administrators from the District and each school site, and all other District employees who the District identifies as having responsibilities involving Title IX compliance will attend a training conducted by OCR. The training will cover the District’s general responsibilities under Title IX and its application to athletics.

Locker Rooms, Practice and Competitive Facilities

1. Locker Rooms
   a. The District will maintain the wooden benches in the Coalinga High School (School) Girls’ Locker Room at the School, in a way that is equivalent to the benches provided in the Boys’ Locker Room. If the benches cannot be maintained adequately, then they will be replaced with the same type of benches provided to the boys by February 1, 2015.

2. Softball Fields
   a. The District will ensure that the School’s Varsity and JV softball teams are provided with practice and competitive facilities that are equivalent in number, quality, use, and maintenance, to the facilities provided to
the School’s Varsity and JV baseball teams. This will include, but is not
limited to, the following features for each softball facility:

i. A safe and adequate softball field for games and practice,
   including an appropriate sand and clay mixture for the infield;
ii. A fence around the entire playing field;
iii. Covered home and visitor dugouts;
iv. A new backstop;
v. Seating that provides adequate spectator capacity;
vi. Maintenance, cleaning, and security services similar to the
   baseball facilities;

b. By June 30, 2015, the District will provide OCR with its plan, including a
   proposed timeline, to provide equivalent Varsity and JV softball practice
   and competitive facilities.

c. After the District’s plan is approved by OCR, at the interval of every six
   months, the District will provide OCR with reports discussing the
   progress and completion toward the following milestones:
   i. approval of the plan by the District’s Board;
   ii. solicitation and receipt of bids of construction of the facility or
       facilities;
   iii. documentation (including photographs) that construction has
       begun on the facility or facilities;
   iv. documentation (including photographs) that the facility or
       facilities are complete and operational.

3. Girls Soccer Practice Field

a. By March 31, 2015, the District will provide OCR with a plan to better
   maintain the School’s Girls’ Soccer Practice Field, including but not
   limited to adequate watering and maintenance of the field and drawing
   of regulation lines on the field.

b. After the District’s plan is approved by OCR, the District will provide
   OCR with notice of approval of the plan by the District’s Board within 10
   days of the Board’s approval.

c. By June 30, 2015, the District will provide OCR with documentation
   (including photographs of the Girls Soccer Practice Field) of the steps it
   has taken to meet the requirements of this Section.

Funding

Sources of funding for athletic program benefits, treatments, and opportunities, such as
improvements to athletic fields, are not relevant factors so as to allow an inequity in
resources allocated to sports activity to develop. When any donation, of money, time, goods, or services is made to the District, it is the responsibility of the District to ensure the use of those donations complies with the legal requirements of Title IX. The District will ensure that the allocation of all financial resources, both District and donations, will not result in disparities that disadvantage students of one sex.

Monitoring

The District understands that by signing this Agreement, it agrees to provide data and other information in a timely manner. Further, the District understands that, during the monitoring of this Agreement, OCR may visit the District, interview District staff, and request such additional reports or data as are necessary for OCR to determine whether the District has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Title IX, which was at issue in this case.

The District understands that OCR will not close the monitoring of this Agreement until OCR determines that the District has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Title IX, which was at issue in this case.

The District understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce this Agreement, OCR shall give the District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

Coalinga-Huron Joint Unified School District

By: __________/s/_________________  Date: _______03/02/2015________

Title: ____Superintendent___________
Section 51521

51521. No person shall solicit any other person to contribute to any fund or to purchase any item of personal property, upon the representation that the money received is to be used wholly or in part for the benefit of any public school or the student body of any public school, unless such person obtains the prior written approval of either the governing board of the school district in which such solicitation is to be made or the governing board of the school district having jurisdiction over the school or student body represented to be benefited by such solicitation, or the designee of either of such boards.

The prohibitions of this section shall not apply with respect to any solicitation or contribution the total proceeds of which are delivered to a public school, nor to a solicitation of a transfer to be effected by a testamentary act.

(Enacted by Stats. 1976, Ch. 1010.)