

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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VERONICA OLLIER, *et al.*,

Plaintiffs-Appellees

v.

SWEETWATER UNION HIGH SCHOOL DISTRICT, *et al.*,

Defendants-Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF  
PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE IN PART

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**INTEREST OF THE UNITED STATES**

The United States has a direct and substantial interest in the subject matter of this appeal, which involves an interpretation of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.*, and its implementing regulations. Pursuant to 34 C.F.R. 106.41(a) *et seq.*, the Office for Civil Rights (OCR) of the United States Department of Education ensures that recipients of federal funds do not discriminate on the basis of sex in any interscholastic, intercollegiate, club, or intramural athletic program. By Executive Order, the

United States Department of Justice also coordinates the implementation and enforcement by executive agencies of the nondiscrimination provisions of Title IX. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980). Consistent with that responsibility, the Department has participated in numerous Title IX athletics cases, both as amicus curiae and as plaintiff-intervenor. See, e.g., *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012); *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006), cert. denied, 549 U.S. 1322 (2007); *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997); *Cook v. Florida High Sch. Athletic Ass'n*, No. 3:09cv547 (M.D. Fla. 2009); *Pedersen v. South Dakota High Sch. Activities Ass'n*, No. 00-4113 (D.S.D. 2000).

### **STATEMENT OF THE ISSUE**

The United States will address the following issue: Whether the district court erred in its application of the Department of Education's Three-Part Test for determining whether a recipient of federal financial assistance has provided nondiscriminatory athletic participation opportunities to students of both sexes, as required by Title IX of the Education Amendments of 1972.

### **STATEMENT OF THE CASE**

On April 19, 2007, a number of female softball players at Castle Park High School (CPHS) in the Sweetwater Union High School District (District) sued the

District and District officials, alleging unlawful discrimination under Title IX.<sup>1</sup> See *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1267 (S.D. Cal. 2009) (*Ollier I*); *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1097-1099 (S.D. Cal. 2012) (*Ollier II*). In their complaint, the students alleged that the district discriminated against female students with respect to “practice and competitive facilities; locker rooms; training facilities; equipment and supplies; travel and transportation, coaches and coaching facilities; scheduling of games and practice times; publicity; and funding”; and that CPHS had “failed to provide female students with equal athletic participation opportunities, despite their demonstrated athletic interest and abilities to participate in athletics.” *Ollier I*, 604 F. Supp. 2d at 1267-1268 (citations omitted).

On March 30, 2009, the district court granted plaintiffs’ motion for partial summary judgment, finding that defendants were not in compliance with Title IX based on unequal participation opportunities in CPHS’s athletic program. See *Ollier I*, 604 F. Supp. 2d at 1275. The court examined CPHS’s program under the Three-Part Test set forth in the Department of Education’s 1979 Title IX Policy

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<sup>1</sup> On August 25, 2008, the district court certified as a class all present and future CPHS female students and potential students who participate, seek to participate, or are or were deterred from participating in student athletic activities at CPHS. *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1267 (S.D. Cal. 2009).



Interpretation, 44 Fed. Reg. 71,414 (Dec. 11, 1979) (1979 Policy Interpretation), which asks, specifically: (1) whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; (2) where the members of one sex have been and are underrepresented among 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 athletes and the institution cannot show a continuing practice of program expansion, whether the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. See *Ollier I*, 604 F. Supp. 2d at 1269-1270.

Examining the first prong, substantial proportionality, the district court compared the percentage of female students enrolled at CPHS to the percentage of females participating in sports at the school. *Ollier I*, 604 F. Supp. 2d at 1270. The court found that for the relevant class years – 2005-2006, 2006-2007, and 2007-2008 – the differences in these percentages were 6.7%, 10.3% and 6.7%. *Id.* at 1271. For the 2007-2008 school year, for example, the court found that “the 6.7% difference reflects 47 girls who would have played sports if athletic participation was proportional to female enrollment.” *Id.* at 1272. The court found that “[f]orty-seven females could sustain at least one viable competitive team and

likely several competitive teams.” *Ibid.* The court thus held that the District had failed to meet prong one.

Turning to prong two, program expansion, the court found that “the percentage of girls participating in athletics at CPHS ranges from a 2004-05 low of 33.4% to a 2003-04 high of 40.8% with the 2007-08 school year having a 38.7% female participat[ion] rate.”<sup>2</sup> *Ollier I*, 604 F. Supp. 2d at 1272-1273 (see also *id.* at 1271 (Table 2) (setting forth the percentage of girls versus boys participating in athletics at CPHS)). The court thus found that there was “no steady increase in female participation,” and that defendants were “not entitled to show compliance with Title IX based on a history and continuing practice of program expansion.” *Id.* at 1273.

Finally, regarding prong three, full and effective accommodation of the unmet interests and abilities of the underrepresented sex, the court found that defendants had failed to counter proof offered by the plaintiffs regarding unmet interest in girls’ field hockey. *Ollier I*, 604 F. Supp. 2d at 1275. Specifically, the court found that “[a] review of the history of female participation shows that a significant number of girls at CPHS have an ability to competitively participate in

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<sup>2</sup> The table containing these statistics indicates that the highest female participation rate of 40.8% actually occurred in the 2002-2003 school year, rather than 2003-2004 as indicated by the district court. See *Ollier I*, 604 F. Supp. 2d at 1271 (Table 2). The female participation rate in 2003-2004 was 33.5%. *Ibid.* This error does not, however, affect the validity of the district court’s analysis.

this sport,” but that the sport was eliminated twice in the relevant period. *Id.* at 1274. The court held that defendants had not provided any evidence that “interest in field hockey waned in 2005-06 or 2007-08, but rather explained that a coach was not available for a team.” *Ibid.* The court held that this was not an indicator of lack of interest. *Ibid.* The court further held that plaintiffs had shown unmet interest in both tennis and water polo, sports that had been eliminated at various times in the relevant period. The court noted that defendants did not provide any evidence to counter this showing, but rather argued that there was a “lack of coaching personnel.” *Id.* at 1275. Noting, again, that under this prong of the Three-Part Test the issue was unmet interests and abilities on the part of female students, not whether coaches were available, the district court held that defendants had also failed prong three. *Ibid.*

After trial, on February 9, 2012, the district court issued an opinion regarding plaintiffs’ remaining Title IX claims. *Ollier II*, 858 F. Supp. 2d at 1097. The court held that defendants had violated Title IX with respect to recruiting benefits; locker rooms, practice and competition facilities; equipment, uniforms, and storage; scheduling benefits; equal access to coaching; medical and training services, publicity and promotional support; and fundraising. The court also held that plaintiffs had shown impermissible retaliation in CPHS’s firing of its girls’ softball coach. *Id.* at 1098-1115. The court ordered defendants to comply with

Title IX in all aspects of CPHS's athletic programs and activities and to correct the violations identified by the court, and directed the parties to jointly prepare a proposed compliance plan. *Id.* at 1116. This appeal followed.

### **SUMMARY OF ARGUMENT**

On this record, the district court properly applied the Department of Education's 1979 Policy Interpretation and reasonably concluded that defendants had failed to provide nondiscriminatory athletic participation opportunities to its female students under Title IX. Three factors – (1) the lack of substantial proportionality between girls' enrollment and their participation in CPHS' athletic program, (2) the flat participation rates over time, and (3) the proof of unmet interest on the part of the underrepresented sex at CPHS – all demonstrate that defendants cannot meet the Three-Part Test contained in the Department of Education's longstanding guidance. Despite defendants' claims that Title IX should be applied differently to high school programs than to college programs (Appellants' Br. 20), the Department of Education's guidance, which is due deference, *Mansourian v. Regents of the University of California*, 602 F.3d 957, 965 n.9 (9th Cir. 2010), permits no such distinction. See 34 C.F.R. 106.11 (stating that the regulations apply "to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance").

The district court's decision holding that defendants had failed to provide nondiscriminatory participation opportunities should thus be affirmed.

## **ARGUMENT**

### **I**

#### **THE DEPARTMENT OF EDUCATION'S TITLE IX GUIDANCE IS DUE SUBSTANTIAL DEFERENCE, AND PROVIDES THE APPROPRIATE FRAMEWORK FOR EXAMINING THE ISSUES IN THIS CASE**

Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. 1681(a). On July 21, 1975, the Secretary of the Department of Health, Education, and Welfare (HEW) issued regulations under Title IX that prohibit discrimination in athletic programs offered by a recipient of federal funds. 34 C.F.R. 106.41(a); see also 45 C.F.R. 86.41(c).<sup>3</sup> The regulations require recipients to provide equal athletic opportunity for members of both sexes, and specify that among the factors to be considered in determining whether equal opportunities are available are “[w]hether the selection of sports and levels of

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<sup>3</sup> By operation of law, all of HEW's determinations, rules, and regulations continued in effect after Congress created the Department of Education in 1980. See 20 U.S.C. 3505(a); see also the Department of Education Organization Act, Pub. L. No. 96-88, § 201, 93 Stat. 671 (1979) (20 U.S.C. 3411); Exec. Order No. 12,212, 45 Fed. Reg. 29,557 (May 2, 1980).

competition effectively accommodate the interests and abilities of members of both sexes.” 34 C.F.R. 106.41(c)(1).

In 1979, the Secretary of HEW published a policy interpretation “clarif[ying] the meaning of ‘equal opportunity’ in intercollegiate athletics.” 1979 Policy Interpretation, 44 Fed. Reg. 71,414 (Dec. 11, 1979). The 1979 Policy Interpretation sets forth the Three-Part Test, used for assessing Title IX compliance with regard to athletic participation opportunities. The Three-Part Test asks: (1) whether participation opportunities for males and female students are provided in numbers substantially proportionate to their respective enrollments; (2) where members of one sex have been and are underrepresented among athletes, whether the institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of that sex; or (3) where the members of one sex are underrepresented among athletes and the institution cannot show a continuing practice of program expansion, whether the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. See 44 Fed. Reg. at 71,418; see also *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1269-1270 (S.D. Cal. 2009).

In response to questions regarding the Three-Part Test, the Department of Education issued a number of “Dear Colleague” letters to augment the 1979 Policy

Interpretation. The first of those letters, issued in January 1996, is particularly relevant here. See Jan. 16, 1996, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (1996 Clarification) (Addendum 1-17).

This Court has held that both the 1979 Policy Interpretation and the 1996 Clarification are due deference in reviewing Title IX matters. See *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 965 n.9 (9th Cir. 2010) (“We and other circuits have held that both the Policy Interpretation and the Clarification are entitled to deference under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984), and *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 150 (1991).”). Those policy documents are thus appropriately applied to this case.

## II

### **THE DISTRICT COURT DID NOT ERR IN ANALYZING CPHS’S ATHLETIC PROGRAM UNDER THE DEPARTMENT OF EDUCATION’S THREE-PART TEST AND HOLDING THAT DEFENDANTS HAD FAILED TO MEET THE THREE-PART TEST**

The district court properly analyzed CPHS’s athletic program under the Three-Part Test set forth in the 1979 Policy Interpretation in concluding that defendants had failed to provide nondiscriminatory athletic participation opportunities to female students at CPHS. The district court’s grant of summary judgment to plaintiffs on this issue should therefore be affirmed.

A. *The District Court Did Not Err In Holding That The Participation Of Girls In CPHS's Athletic Program Was Not Substantially Proportionate To Their Enrollment At The School Under The First Prong Of The Three-Part Test*

The 1996 Clarification provides that, “[u]nder part one of the three-part test \* \* \*, where an institution provides \* \* \* athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time \* \* \* enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.”

Addendum 7. Making this examination, the district court found that for the 2005 through 2007 school years, the differences between the percentages of females enrolled at CPHS versus the percentages of females participating in athletics were 6.7%, 10.3%, and 6.7%.<sup>4</sup> See *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1270 (S.D. Cal. 2009). For the 2007-2008 school year in particular, the court found that “the 6.7% difference reflects 47 girls who would have played sports if athletic participation was proportional to female enrollment,” a number which the court found “could sustain at least one viable team.” *Id.* at 1272.

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<sup>4</sup> For example, in the 2007-2008 school year, girls comprised 45.4% of CPHS’s enrollment, but only 38.7% of the athletic participants – a 6.7% difference. *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1272 (S.D. Cal. 2009).



Defendants argue that the district court erred in (1) examining the difference between the percentage of female enrollment and the percentage of female athletes, rather than comparing each sex's participation in athletics; (2) relying on absolute numbers rather than percentages; and (3) making the "unfounded assumption" that any group of 47 enrollees would have the interest and skill to sustain a viable competitive team. Appellants' Br. 18-21. The District also suggests that it should be evaluated differently because it is a high school, rather than a "university with resources." Appellants' Br. 20. Each of the District's arguments is unavailing.

First, the plain text of the 1996 Clarification provides that OCR examines whether an institution has provided "athletic participation opportunities for male and female students in numbers *substantially proportionate to their respective full-time \* \* \* enrollments.*" Addendum 7 (emphasis added); see also *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 94 (2d Cir. 2012) ("Once the numbers of real athletic participation opportunities afforded men and women have been determined \* \* \*, the next step of Title IX effective-accommodation analysis considers whether the numbers are substantially proportionate to each sex's enrollment."). In this case, making that comparison for the 2007-2008 school year results in a 6.7% disparity, amounting to a shortfall of 47 female athletes. See *Ollier I*, 604 F. Supp. 2d at 1271 (Table 3).

Defendants argue, however, that the district court should have instead compared the percentage of male enrollment participating in athletics and the percentage of female enrollment participating in athletics, which yields a percentage disparity of 4.84% for the 2007-2008 school year. See Appellants' Br. 19. Given the clear instructions in the 1996 Clarification, defendants are flatly incorrect in using this alternative calculation; but, ultimately, their error is irrelevant, because the 4.84% disparity calculated by this method still amounts to a shortfall of 47 female athletes needed to achieve exact proportionality.<sup>5</sup>

Second, as courts have repeatedly recognized, the 1996 Clarification states that the determination of whether athletic opportunities are substantially proportionate to enrollment rates is one that is to be made on a "case-by-case basis, rather than through use of a statistical test." Addendum 9; see also *Brust v. Regents of the Univ. of Cal.*, No. 2:07-cv-1488, 2007 U.S. Dist. LEXIS 91303, at \*9 (E.D. Cal. Dec. 12, 1997) ("Courts have followed the Office for Civil Rights instructions to its Title IX investigators that [t]here is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a

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<sup>5</sup> Multiplying the 4.84% disparity between the percentage of female enrollment participating in athletics and the percentage of male enrollment participating in athletics in 2007-2008 by the total number of girls enrolled that year (975) results in a shortfall of 47 female athletes. See *Ollier I*, 604 F. Supp. 2d at 1270 (Table 1).

violation.”) (citation omitted); *Biediger*, 691 F.3d at 94 (“OCR has not construed substantial proportionality to require exact proportionality. Rather, substantial proportionality is determined on a case-by-case basis in light of ‘the institution’s specific circumstances and the size of its athletic program.’ As a baseline, OCR will consider substantial proportionality achieved if the number of additional participants \* \* \* required for exact proportionality ‘would not be sufficient to sustain a viable team.’”) (citation omitted); *Equity in Athletics, Inc. v. Department of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011) (“[T]he DOE has expressly noted that determinations of what constitutes ‘substantially proportionate’ under the first prong of the Three-Part Test should be made on a case-by-case basis,” and the Department relies on such an individual analysis “rather than \* \* \* a statistical test.”) (citation omitted), cert. denied, 132 S. Ct. 1004 (2012); *Beasley v. Alabama State Univ.*, 3 F. Supp. 2d 1325, 1335 (M.D. Ala. 1998) (noting that OCR’s 1990 Title IX Investigators Manual states that “[t]here is no set ratio that constitutes ‘substantially proportionate’ or that, when not met, results in a disparity or a violation,” and that “it is appropriate to accord deference to the OCR’s interpretation of its own regulations”).

Because the 1996 Clarification calls for an individualized analysis, OCR “has not specified a magic number at which substantial proportionality is achieved.” See *Equity in Athletics*, 639 F.3d at 110. Defendants are thus incorrect

to suggest that “proportionality relies on percentages.” See Appellants’ Br. 20. Instead of looking solely at such absolutes, as part of its case-by-case determination, OCR will examine whether it would be unreasonable to expect an institution to achieve exact proportionality because, for example, (1) there are “natural fluctuations in enrollment and participation rates”; or (2) “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.” Addendum 9. Stated differently, the second part of this analysis asks whether the number of female athletes necessary to close the disparity would 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.” Addendum 9-10. OCR considers, however, not only whether there is sufficient interest and ability, but also “the average size of teams offered for the underrepresented sex, a number which would vary by institution.” Addendum 9-10.

In this case, the school years in question showed a 6.7%, 10.3%, and 6.7% disparity. *Ollier I*, 604 F. Supp. 2d at 1271. This amounted to 48, 92, and 47 additional girls who would have played sports if participation were proportional to enrollment and no fewer boys participated. *Ibid*. The question then is whether those participation gaps would amount to viable teams. Addendum 9-10. In

making this analysis, OCR examines an “institution’s specific circumstances,” and the “size of its athletic program.” Addendum 9.

The district court did not err in holding that, in this case, defendants did not meet prong one of the Three-Part Test. Athletic participation records from CPHS show that the average team size for female students at the school is well under 47 athletes. See 11 E.R. 2066-2074; cf. Addendum 10 (noting, by way of example, that a disparity of 62 women is “a significant number,” and that it would be “likely that a viable sport could be added”); *Biediger*, 691 F.3d at 107-108 (finding a Title IX violation based upon a 3.62% disparity where the evidence showed that such a disparity would amount to an additional 38 participants). It thus stands to reason that such a gap would have allowed CPHS to create an additional team. As explained below, the evidence also establishes that such a team would be viable given the demonstrated interest and ability of female students in field hockey, tennis, and water polo, which at times were eliminated or discontinued due to a lack of coaches. See pp. 24-25, *infra*.

Defendants nevertheless suggest that they should not be held liable under prong one of the Three-Part Test because Title IX should apply differently to high schools than it does to colleges. See Appellants’ Br. 20. They claim that, unlike a university, “it is not simple” for CPHS to hire staff, obtain equipment, and find

appropriate practice space, game space, and locker room space for athletes.

Appellants' Br. 20. These assertions, however, do not preclude Title IX liability.

As an initial matter, because defendants did not dispute the applicability of Title IX to high schools in the district court, any such argument should now be deemed waived. See *Ollier I*, 604 F. Supp. 2d at 1269 n.4 (“Defendants do not dispute that Title IX is applicable here.”); cf. *Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004) (“In general, we do not consider an issue raised for the first time on appeal.”).

In any event, the resource constraints defendants complain of have apparently been no obstacle to their providing adequate participation opportunities for male athletes. Indeed, the participation rate of males in athletics has exceeded their enrollment at the school in every year discussed by the district court – often by over 10% – with participation rates for females lagging uniformly behind. *Ollier I*, 604 F. Supp. 2d at 1270-1271. This is precisely the type of disparity that Title IX was intended to eliminate. 34 C.F.R. 106.41(c) (“A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”); cf. *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 973 (9th Cir. 2010) (“Title IX does not require that a school pour ever-increasing sums into its athletic establishment. \* \* \* They may not, however, maintain varsity teams for male

students while denying female students comparable opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics.”) (citations and internal quotation marks omitted); *Horner v. Kentucky High Sch. Athletic Ass’n*, 43 F.3d 265, 275 (6th Cir. 1994) (“[A] recipient may not simply plead limited resources to excuse the fact that there are fewer opportunities for girls than for boys.”).

Moreover, OCR has made clear that its regulations apply “to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.” 34 C.F.R. 106.11. This language allows no exception for high schools or any other funding recipient. And, indeed, in March 2008, OCR issued a letter denying a request to “clarify that the Three-Part Test does not apply to high school athletics.” See March 27, 2008, Letter from Margaret Spellings, Secretary of Education, to Steven Geoffrey Gieseler, Pacific Legal Foundation (Addendum 18). In that letter, OCR noted that the 1979 Policy Interpretation states that “its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation,” and that “federal courts have referenced [that] statement \* \* \* to apply the principles of the Policy Interpretation to claims against high schools for failing to provide equal athletic opportunities.” Addendum 19 (quoting 44 Fed. Reg. at 71,413); see also

*McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 290-291 (2d Cir. 2004); *Horner*, 43 F.3d at 273; *Williams v. School Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993), cert. denied, 510 U.S. 1043 (1994); Addendum 6 n.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.”).

The importance of applying these principles in the high school context cannot be overstated: if girls are not afforded equal opportunity in high school athletics, they will not have the chance to develop the skills necessary to compete at the college level. Accordingly, the district court correctly held that defendants failed to establish compliance with the first prong of the Three-Part Test.

*B. The District Court Correctly Held That Defendants Have Not Shown A History And Continuing Practice Of Program Expansion Under The Second Prong Of The Three-Part Test*

Prong two of the Three-Part Test asks whether 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.” Addendum 10. As part of its examination of a history of program expansion, OCR will review, among other factors, an institution’s record of adding or upgrading teams; of increasing the number of participants of the



underrepresented sex in the athletics program; or of affirmative responses to requests by students or others for the addition or elevation of sports. Addendum 11. In its examination of whether an institution has a continuing practice of such expansion, OCR will review, among other factors, 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)," or its "current implementation of a plan or program expansion that is responsive to developing interests and abilities." Addendum 11. OCR also finds "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." Addendum 11-12.

Where an institution has eliminated teams for the underrepresented sex, OCR evaluates the circumstances surrounding such actions to determine whether it can meet prong two of the Three-Part Test. Addendum 12. "[A]n 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." Addendum 12.

The record here does not reflect either a history or a continuing practice of program expansion. First, the record does not show that defendants have increased

the number of female participation opportunities over time. See *Mansourian*, 602 F.3d at 969 (“The Option Two analysis focuses primarily, but not exclusively, on increasing the number of women’s athletic opportunities.”). The number of girls participating in athletics at CPHS has fluctuated within a relatively narrow band, from a high of 174 participation opportunities in 2006-2007, to a low of 144 opportunities in 1999-2000 and 2003-2004. The number of female participants in 2007-2008 was just 149. *Ollier I*, 604 F. Supp. 2d at 1271 (Table 2).

Next, while the record shows that CPHS increased the number of girls’ teams from 18 in the 1998-1999 school year to 23 teams by 2002-2003 (see Appellants’ Br. 23 (citing 9 ER 1744-1748)), there was no further expansion of the women’s athletic program after that point: since 2003, the number of girls’ teams has remained at 23, except for a decrease to 22 in the 2006-2007 school year.<sup>6</sup> See Appellants’ Br. 23; cf. *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (“The facts as found by the district court (and largely undisputed by defendant) can logically support no other conclusion than that, since adding women’s golf in 1977, CSU has not maintained a practice of program expansion in

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<sup>6</sup> Furthermore, the record shows that in the 2006-2007 school year there were no female participants on the co-educational football, wrestling, and roller hockey teams; and that in the 2007-2008 school year there were no female participants on the co-educational football team. See 11 ER 2087-2089 (Defendants’ Response to Plaintiff Naudia Rangel’s Special Interrogatories (Set One)).

women's athletics.”), cert. denied, 510 U.S. 1004 (1993). Nor, by defendants' own admission, have they conducted any survey that, in their view, would indicate students' current interests in additional interscholastic teams. See *Ollier I*, 604 F. Supp. 2d at 1273-1274 & 1274 n.9; cf. Addendum 11 (“OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex”).

Moreover, as the district court held, the data shows that girls' proportional participation is not steadily increasing over time. Looking at the school years in question here, it ranges from 33.4% in 2004-2005, to a high of 40.0% in 2005-2006, back down to 36.4% in 2006-2007, and then to 38.7% in 2007-2008. *Ollier I*, 604 F. Supp. 2d at 1271 (Table 2); cf. *Cohen v. Brown Univ.*, 101 F.3d 155, 776 (1st Cir. 1996) (“If a school \* \* \* eschews the first two benchmarks of the accommodation test, electing to stray from substantial proportionality and failing to march uninterruptedly in the direction of equal athletic opportunity, it must comply with the third benchmark.”), cert. denied, 520 U.S. 1186 (1997).

Defendants nevertheless attempt to meet prong two by showing that, even analyzing proportional opportunities, the “trend line indicating progress over time” is .0025, showing a positive change. Appellants' Br. 24-25. OCR does not employ such a statistical analysis in determining whether an institution has demonstrated a history and continuing practice of program expansion for the underrepresented sex.

Even if this Court examines the question “what percentage of the high school’s female enrollment [participated] in sports,” as defendants contend is the proper examination (see Appellants’ Br. 25), no continuing expansion is clear: from a high of 18.03% female participation in 2003, percentages dip to 12.87% in 2004, increase to 15.25% in 2005, drop to 13.37% in 2005, increase to 15.94% in 2007, and drop to 15.28% in 2008. The district court thus correctly held that defendants failed to establish compliance with the second prong of the Three-Part Test.

*C. The District Court Did Not Err In Holding That Defendants Had Not Shown A Full and Effective Accommodation of Female Athletes Under The Third Prong Of The Three-Part Test*

Finally, under prong three of the Three-Part Test, OCR determines whether an institution is “fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex.” Addendum 14. 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.” Addendum 14. Where an institution has recently eliminated a viable team, “OCR will find that there is sufficient interest, ability, and available competition to sustain a[] \* \* \* team in that sport unless an institution can provide strong evidence that interest, ability, or available

competition no longer exists.” Addendum 14; see also April 20, 2010, “Dear Colleague” Letter from Russlynn Ali, then-Assistant Secretary for Civil Rights of the Department of Education (“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.”) (Addendum 26).

In this case, the district court found that girls’ field hockey had twice been eliminated during the relevant time period. *Ollier I*, 604 F. Supp. 2d at 1274. The court held that defendants had “provide[d] no evidence that interest in field hockey waned” in these years, but rather asserted that “a coach was not available for a team.” *Ibid.* As the district court properly held, however, the question whether defendants could obtain a coach is not an indicator of lack of student interest.<sup>7</sup>

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<sup>7</sup> The District also argues on appeal that field hockey should not be considered in the analysis of prong three because “there was no [California Interscholastic Federation (CIF)] division and no competition could be secured.” Appellants’ Br. 30. The district court correctly rejected this contention, however, on the ground that there is “no evidence \* \* \* that CIF approval is a necessary prerequisite for a school to determine \* \* \* athletic interest and abilities.” *Ollier I*, 604 F. Supp. 2d at 1273 n.8; see also 34 C.F.R. 106.6(c) (“Effect of rules or regulations of private organizations. The obligation to comply with [Title IX] is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student  
(continued...)”)

*Ibid.* The district court further found that plaintiffs had presented evidence, which defendants did not counter, that CPHS has not offered girls' tennis since 2004 or 2005, and did not offer girls' water polo at various times, due to a lack of coaching personnel. *Id.* at 1275.

Because OCR will assume that there was sufficient interest in these sports absent any evidence to the contrary (see Addendum 14), and because no contrary evidence was offered here, the district court correctly held that defendants failed to demonstrate compliance with the third prong of the Three-Part Test. See *Ollier I*, 604 F. Supp. 2d at 1274-1275; cf. *Cohen*, 101 F.3d at 180 (citing 1996 Clarification for the principle that “[i]f 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”).

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(...continued)

ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.”); *Horner*, 43 F.3d at 273-274 (“[W]hile reliance on the interest of \* \* \* member schools in adding a sanctioned sport may appear to be gender-neutral, it is a method which has great potential for perpetuating gender-based discrimination. Under [this] reasoning, a school system’s compliance with Title IX can be measured by the personal views of the administrators of individual schools, irrespective of whether these views achieve Title IX’s equal opportunity requirement.”).

## CONCLUSION

For these reasons, this Court should affirm the district court's grant of summary judgment to plaintiffs on their claim that defendants violated Title IX by failing to provide nondiscriminatory athletic participation opportunities to female students at CPHS.<sup>8</sup>

Respectfully submitted,

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<sup>8</sup> The United States takes no position with respect to any of the other issues presented in this appeal.

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 29. The brief was prepared using Microsoft Office Word 2007 and contains 5,942 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

s/ Holly A. Thomas  
HOLLY A. THOMAS  
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Date: May 22, 2013



## **CERTIFICATE OF SERVICE**

I hereby certify that on May 22, 2013, I electronically filed the foregoing Brief for United States as Amicus Curiae In Support Of Plaintiffs-Appellees And Urging Affirmance In Part with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I certify that all participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on May 22, 2013, I served a copy of the foregoing document on the following counsel of record by First Class Mail:

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# ADDENDUM

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

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

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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

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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,

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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,



Norma V. Cantú  
Assistant Secretary  
for Civil Rights

Enclosure



JAN 16 1976

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)).<sup>1</sup>

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.

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<sup>1</sup> 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.

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:

- 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; and
- 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.

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.<sup>2</sup>

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

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<sup>2</sup> 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.

interests include interests that already exist at the institution.<sup>3</sup> 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

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<sup>3</sup> 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.

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 overrepresented 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 women in response to 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. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

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 a recipient 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.<sup>4</sup>

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?**

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<sup>4</sup> 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.

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 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).<sup>5</sup> 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

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<sup>5</sup> 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.

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.



THE SECRETARY OF EDUCATION  
WASHINGTON, DC 20202

March 27, 2008

Steven Geoffrey Gieseler  
Pacific Legal Foundation  
1002 SE Monterey Commons Boulevard  
Suite 102  
Stuart, FL 34996

Dear Mr. Gieseler:

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.

44 Fed. Reg. 71413, 71413 (December 11, 1979).

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); *Neal 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 II*”); *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 I*”); *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(c) 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.

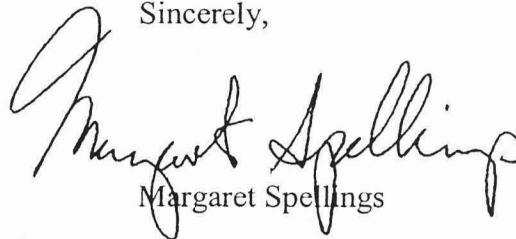
The Department respectfully denies your request for guidance that would state that schools using the third prong of the Three-Part Test must survey both genders. In the Dear Colleague letter accompanying the Department's 1996 "Clarification of Intercollegiate Athletics Policy Guidance" (1996 Clarification), 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,

A handwritten signature in black ink, appearing to read "Margaret Spellings". The signature is fluid and cursive, with a large initial "M" and "S".

Margaret Spellings





UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

APR 20 2010

Dear Colleague:

Title IX of the Education Amendments of 1972<sup>1</sup> (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.<sup>2</sup> The regulation contains specific provisions governing athletic programs<sup>3</sup> and the awarding of athletic scholarships.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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<sup>1</sup> 20 U.S.C. § 1681 *et seq.*

<sup>2</sup> 34 C.F.R. Part 106.

<sup>3</sup> 34 C.F.R. § 106.41.

<sup>4</sup> 34 C.F.R. § 106.37(c).

<sup>5</sup> 34 C.F.R. § 106.41(c).

<sup>6</sup> 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. This Dear Colleague



The “Intercollegiate Athletics Policy Interpretation”<sup>7</sup> (1979 Policy Interpretation), published on December 11, 1979, provides additional guidance on the Title IX intercollegiate athletic regulatory requirements.<sup>8</sup> 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.<sup>9</sup> 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).<sup>10</sup>

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.

<sup>7</sup> 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.

<sup>8</sup> 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).

<sup>9</sup> 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.

<sup>10</sup> 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.<sup>11</sup>

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

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<sup>11</sup> 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.<sup>12</sup> 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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<sup>12</sup> 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.<sup>13</sup>

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

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<sup>13</sup> 44 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;<sup>14</sup>
- 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.<sup>15</sup>

In accordance with the 1996 Clarification, OCR also will consider the likely interest<sup>16</sup> 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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<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> 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;<sup>17</sup> 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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<sup>17</sup> 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.<sup>18</sup> 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.

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<sup>18</sup> 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<sup>19</sup> 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,<sup>20</sup> and contains an open-ended inquiry for other sports to allow students to write in any sports that are not

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<sup>19</sup> Experience in sports generally is one indicator of ability.

<sup>20</sup> 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.<sup>21</sup> 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:

<b>Sport</b>	<b>Interest in Future Participation:</b> At what level do you wish to participate in this sport at [Institution]?	<b>Current Participation:</b> At what level are you participating in this sport?	<b>Prior Experience:</b> At what level did you participate in this sport or any other relevant sport in high school, college, or in another capacity?	
Basketball	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____	College <input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	High School <input type="checkbox"/> Varsity <input type="checkbox"/> Junior Varsity <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____
Lacrosse	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____	College <input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	High School <input type="checkbox"/> Varsity <input type="checkbox"/> Junior Varsity <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____
Other sport identified by student <sup>22</sup>	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	<input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____	College <input type="checkbox"/> Intercollegiate <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational	High School <input type="checkbox"/> Varsity <input type="checkbox"/> Junior Varsity <input type="checkbox"/> Club <input type="checkbox"/> Intramural <input type="checkbox"/> Recreational <input type="checkbox"/> Other _____

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

<sup>21</sup> 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.

<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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<sup>25</sup> in athletic participation should be asked to confirm their lack of interest before they exit the system. If response rates using the methods described

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<sup>23</sup> For example, institutions may distribute surveys to all admitted students of the underrepresented sex with acceptance letters.

<sup>24</sup> 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.

<sup>25</sup> 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:

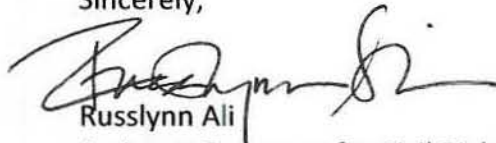
- competitive opportunities offered by other schools against which the institution competes; and
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.<sup>26</sup>

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://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>.

Sincerely,



Russlynn Ali  
Assistant Secretary for Civil Rights

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<sup>26</sup> 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.