

# Leveling the Playing Field

Achieving Gender Equity  
in Compliance With Title IX  
in College and University Athletic Programs

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## **What is Title IX?**

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, (“Title IX”) is a federal civil rights statute which prohibits sex discrimination in educational programs receiving federal financial assistance. Because most educational institutions benefit from federal funding, they must comply with the requirements of Title IX and the educational institution’s athletic program must separately satisfy the Title IX requirements. An educational institution’s athletic program must be gender equitable by providing the same or substantially the same overall opportunities, benefits and services to male student-athletes and female student-athletes.

The Office for Civil Rights of the U.S. Department of Education (the “OCR”) is responsible for enforcing Title IX. The regulation implementing Title IX, 34 C.F.R. Part 106, became effective on July 21, 1975 and on December 11, 1979, the OCR issued an Intercollegiate Athletics Policy Interpretation (the “Policy Interpretation”). The primary purpose of the Policy Interpretation was to provide guidance on the regulatory requirements of Title IX with respect to athletic programs. In essence, the Policy Interpretation focused on three major areas for determining compliance of an educational institution’s athletic program with Title IX. The three areas are as follows:

1. Accommodation of Interests and Abilities;
2. Athletic Financial Assistance; and
3. Other Program Areas, including:
  - a. Equipment and Supplies,
  - b. Scheduling of Games and Practice Time,
  - c. Travel and Per Diem Allowances,
  - d. Tutoring,
  - e. Coaching,
  - f. Locker Rooms, Practice and Competitive Facilities,
  - g. Medical and Training Facilities and Services,
  - h. Housing and Dining Facilities and Services,
  - i. Publicity,
  - j. Support Services, and
  - k. Recruitment of Student-Athletes.

On January 16, 1996, the OCR issued the “*Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*” (the “Policy Clarification”) which serves as a clarification of certain portions of the Policy Interpretation.<sup>1</sup> This recent release of the OCR

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<sup>1</sup> The Policy Clarification is reprinted in full and attached hereto as Appendix B.

provides substantial guidance on the manner in which the OCR evaluates participation opportunities for individuals of both sexes at an educational institution as a part of the determination of whether equal accommodation of interests and abilities exists in an educational institution's athletic program. In general, courts have followed the method of analysis for Title IX issues set forth in the Policy Interpretation and the Policy Clarification.

Although the OCR has authority to enforce Title IX, an implied private right of action exists to bring claims under Title IX with respect to athletic programs. Over the past few years, a significant number of female student-athletes have initiated suits against their respective educational institutions claiming unequal treatment in the conduct of athletic programs in violation of Title IX. Many of these female student-athletes have been successful in their claims, either through court decisions or out-of-court settlements. This increase in litigation has focused much more attention on Title IX issues and the full scope of the Title IX requirements for athletic programs is just beginning to be understood by many educational institutions. For a more general discussion of the leading case involving a private right of action, Cohen v. Brown University<sup>2</sup>, and other recent decisions involving actions brought by students and coaches, see Appendix A.

Until 1992, courts generally granted private parties bringing lawsuits under Title IX equitable relief in the form of injunctions. However, in Franklin v. Gwinnett County Public Schools,<sup>3</sup> the United States Supreme Court held that a private party could collect monetary damages in cases of intentional violations of Title IX, which includes the possibility of the recovery of the plaintiff's attorneys fees.

An injunction issued by a court can have a tremendous effect on an educational institution. For example, a court may, without considering the costs of doing so, require an educational institution to increase the opportunities, benefits and services to female student-athletes, including the reinstatement or addition of specific female athletic teams. The well known decision in Cohen v. Brown University case is a good example of such a remedy. In that case, a class action suit was filed when two women's varsity teams were dropped from varsity to club status. Brown University argued that its decision to cut the sports was justified for a host of reasons, including a lack of funds. Brown University also noted that it had also dropped two men's team as part of the decision to drop the women's teams. The United States District Court of Appeals for the First Circuit ruled that Brown University's actions were inconsistent with the requirements of Title IX and became the first appellate court to interpret the substantive requirements of effectively accommodating the interests and abilities of members of both sexes under Title IX.

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<sup>2</sup> 101 F.3d 155 (1<sup>st</sup> Cir. 1996).

<sup>3</sup> 503 U.S. 60, 112 S.Ct. 1028 (1992).

## **General Conclusions Applicable to Title IX Compliance**

The gender equity determination is not a mechanical analysis of specific factors. Rather, it is a careful analysis of many complex legal and factual issues, guided by the single overriding question of whether or not the men's and women's athletic programs of the educational institution are substantially equivalent in terms of opportunities, benefits and services. Consequently, it is difficult to distill many general themes or conclusions of universal application from the reported cases. It does appear justified, however, to draw the following conclusions:

1. **Analyze the Overall Program.** Determining gender equity means comparing the overall opportunities, benefits and services provided to women and the overall opportunities, benefits and services provided to men.
4. **Not Absolute Equality for Teams.** So long as overall gender equity exists, individual men's and women's teams in the same sport are permitted to have different benefits and services.
3. **Decisions of the Coaches and Athletic Personnel.** Coaches and athletic personnel are permitted to make decisions which yield different benefits or services for their teams so long as the choices of coaches or athletic personnel in the female programs are not more limited than the choices of coaches or athletic personnel in the male programs, or vice versa.
5. **Analyze the Issue in More Than One Way.** Although the appropriate analysis for determining compliance is often determining whether an equal percentage of female and male athletes are provided equal opportunities, benefits and services, some situations may require analysis in terms of teams or otherwise. This is particularly the case when male or female teams of dissimilar sports do not receive the same benefits or services due to the nature of the sport or the decisions of the coaches.
6. **Determine How the Money is Spent.** It is important to focus on how the money is spent as opposed to the costs of the benefits or services or the source of the funds. The dollars awarded to male and female athletes for scholarships, and the amounts spent on recruitment and coaches' salaries and otherwise should be proportionate to their respective participation rates.

## Accommodations of Interests and Abilities

An educational institution's athletic program must provide equal accommodation of the interests and abilities of both sexes. Analysis of this area involves (i) an examination of participation opportunities by means of a three part test, and (ii) an examination of competition opportunities by way of a two part test. Although most compliance issues arise in the area of participation opportunities, both tests must be satisfied to demonstrate compliance with Title IX. The respective tests are as follows:

### **I. Participation Opportunities**

An educational institution must comply with **one** of the requirements of this three-part test which is used to assess whether an educational institution is providing nondiscriminatory participation opportunities for individuals of both sexes. An educational institution must:

- a. Provide participation opportunities for women and men that are substantially proportionate to their respective rates of enrollment as full-time undergraduate students; **OR**
- b. Demonstrate a history and continuing practice of program expansion for the underrepresented sex; **OR**
- c. Fully and effectively accommodate the interests and abilities of the underrepresented sex.

### **II. Levels of Competition**

An educational institution must comply with **one** of the requirements of this two-part test used to assess whether an educational institution is providing nondiscriminatory competition opportunities for individuals of both sexes. An educational institution must:

- a. Provide proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; **OR**
- b. Demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex.

## **Athletics Financial Assistance**

An educational institution is required to award scholarship dollars on a basis proportionate to the ratio of male and female participants in the athletic program. In other words, if 45% of an educational institution's athletes are female, then 45% of the overall scholarship dollars provided to student-athletes should be awarded to female athletes.

Each educational institution should carefully consider and answer the following questions:

7. Who is a participant? Participants include the following: (a) an individual who receives support normally provided to student-athletes; (b) an individual who participates in practice and other regular team activities on a regular basis during the season; (c) an individual who is on the team list and on the team as of the first day of practice; and (d) an individual who continues to receive an athletic scholarship even though he or she is injured.
8. **What money is included?** All athletic scholarship dollars awarded to student-athletes for the regular academic year and for summer sessions are included in the calculations.
9. Does the total scholarship dollars awarded to male student-athletes and the total scholarship dollars awarded to female athletes vary more than 3%? A difference of more than 3% may risk a violation. The OCR and the courts are less tolerant of deviations in educational institutions with larger numbers of student-athletes and with larger total scholarship awards.

**Suggestion: Target strict proportionality in scholarship dollars so that individual student-athlete decisions are unlikely to cause a major compliance problem.**

## Other Program Areas

The third major area of focus in determining gender equity involves “other programs.” Under the Policy Interpretation, the OCR looks primarily at the following eleven issues:

### 1. **Equipment and Supplies:**

- l. **Quality** - the same or similar percentages of male and female athletes should be provided equipment of the same quality.
- m. **Suitability** - equipment items must meet specifications for the sport.
- n. **Amount** - the same numbers of equipment items should be provided to men’s and women’s teams, such as uniforms, shoes, etc...
- o. **Availability** - equipment should be equally accessible to men’s and women’s teams.
- p. **Maintenance** - key issues are equality of equipment storage, team managers for handling equipment, laundry and equipment repair.
- q. **Replacement** - establish the same replacement schedule for women’s and men’s teams in the same sport.

### 10. Scheduling of Games and Practice Time:

- r. **Number of Competitive Events** - count the number of contests as well as the number of days of competition.
- s. **Event Times** - events should be scheduled at times that are equally convenient or inconvenient for men’s and women’s teams.
- t. **Practice Opportunities** - practice opportunities should be equally adequate for conditioning and skill development.
- u. **Practice Schedules** - consider whether specific teams must arrange their practice times around other teams using the same facility or whether some teams consistently practice at less convenient times of the day.
- v. **Preseason Competition** - schedule the same number of preseason games.
- w. **Post-Season Competition** - analyze the opportunity for post-season games.

- x. **Length of Season-** length should be the same number of weeks for same sport and as appropriate to the nature of the sport for dissimilar sports.

**3. Travel and Per Diem Allowances:**

- y. **Modes of Transportation** - key issues include distance, travel squad size, and others traveling with the team.
- z. **Housing Furnished During Travel** - overall housing accommodations should be comparable between men's and women's teams.
- aa. **Length of Stay Before and After Competitive Events** - compare team arrival and departure times for competitive events.
- bb. **Per Diem Allowances** - each athlete should receive the same amount.
- cc. **Dining Arrangements** - quality of the food and establishment should be similar.

**4. Opportunity to Receive Academic Tutoring, Assignment, and Compensation of Tutors:**

- dd. **Tutor Availability** - the hours that tutors are available should be equally convenient for male and female athletes.
- ee. **Rates of Pay** - Rates of pay to the tutors for males and female athletes should be the same.
- ff. **Employment Conditions** - look at the number of students tutored per session.

**5. Opportunity to Receive Coaching, Coach Quality, and Compensation of Coaches:**

- gg. **Availability** - analyze the number of coaches assigned to each team, length of contract and employment conditions.
- hh. **Quality** - qualifications and experience should be the same or similar for coaches in the women's and men's programs.
- ii. **Compensation** - total dollars spent for salaries on men's teams and women's team coaches should be proportional to participation of men and women in the athletics program.

**6. Locker Rooms, Practice, and Competitive Facilities:**

- jj. **Locker Rooms** - the same number of women's and men's teams should have locker rooms of equivalent quality exclusively for their use.
- kk. Practice and Competitive Facilities - same or similar numbers of women's and men's teams should have facilities of equivalent quality exclusively for their use.

11. Medical and Training Facilities and Services:

- ll. Availability of Medical Personnel- medical personnel should be equally available to both male and female teams and athletes.
- mm. Availability and Qualifications of Trainers - trainers should be equally available and equally qualified for both male and female teams and athletes.
- nn. **Weight Rooms** - weight rooms should be equally available to both male and female teams and athletes.
- oo. **Training Rooms** - training rooms should be equal in availability, adequacy, quality of equipment and accessibility.
- pp. **Insurance** - any insurance premiums/costs to student-athletes should be equal and should not specifically exclude gynecological care.

12. Housing and Dining Facilities and Services:

- qq. **Availability of Housing** - any housing privileges should be equally available to male and female student-athletes.
- rr. **Dining Arrangements** - any superior quality or quantity of food should be available equally to male and female student-athletes, including pre-game and post-game meals.
- ss. Housing and Dining During School Breaks - any housing or dining arrangements provided during school breaks should be equally available to male and female student-athletes.

13. Publicity:

- tt. **Sports Information Personnel** - the quality and availability of sports information personnel should be the same for male and female teams.

- uu. **Publications** - the quality and quantity of media guides, game programs, schedule cards and posters and press releases should be equal for male and female teams.
  - vv. Other Publicity and Promotional Resources - make an equal effort in publicizing, marketing or promoting male and female teams.
14. Support Services:
- ww. Administrative Support - provide equal administrative staff to male and female teams.
  - xx. **Secretarial Support** - provide equal secretarial support for coaches of male and female teams.
  - yy. Office Space and Equipment - provide equal office conditions for coaches of male and female teams.
  - zz. **Other Support Staff** - provide equal services for male and female teams with respect to other support staff.
15. Recruitment of Student-Athletes:
- aaa. **Opportunity to Recruit** - allow the same recruiting opportunities for coaches of male and female teams.
  - bbb. Financial and Other Resources - be sure that the amount spent for male and female student-athletes is proportionate to their respective rates of participation. Remember to consider the amounts spent on coaches' travel, recruitment videos and brochures, courtesy cars, subsidized visits, mail and telephone, and recruitment services.
  - ccc. Treatment of Prospective Student-Athletes - be sure that prospective male and female student-athletes receive equal numbers of subsidized and/or unsubsidized visits. Also, be sure that prospective male and female student-athletes receive equal benefits relating to travel, housing, meals, entertainment and other expenses.

## **Suggested Course of Action**

16. Conduct a detailed evaluation of your athletic program before a complaint is filed and/or an investigation is launched by the OCR.
17. Develop a written plan.
18. Implement your plan.
19. Continue to evaluate your plan and performance on a regular and ongoing basis.

**Remember it is the educational institution's responsibility to comply with Title IX not the athletic department or coaches!**

## List of Appendices

- Appendix A - Recent Developments in Title IX Litigation
- Appendix B - Reprint of the text of the 1996 Policy Clarification issued by the OCR
- Appendix C - Reprint of the letters and the Agreement to Resolve Complaint in connection with an OCR complaint filed against University of Minnesota - Duluth.
- Appendix D - Reprint of the Fall 1997 edition of the MCC newsletter, featuring an article written by Ice Miller's SEG entitled "Title IX - Be Proactive not Reactive" (see pages 1 and 2 of the newsletter)
- Appendix E - Ice Miller's SEG Attorney Biographies

# Recent Developments in Title IX Litigation

## Introduction

During the past four years it has been primarily through court decisions that the requirements of Title IX have been interpreted and applied to various educational institutions. Several cases, notably Cohen v. Brown University<sup>1</sup>, have provided tremendous insight into how Title IX compliance will be determined. The cases below have been selected to demonstrate the basic requirements of Title IX and explore related issues that may arise during litigation of a Title IX matter.

Generally, there is no express statutory provision empowering a private party to bring suit to enforce Title IX. However, in Cannon v. University of Chicago<sup>2</sup>, the Court held that Title IX is enforceable through an implied private right of action. Therefore, a private person may bring an action against a federally-funded institution in an attempt to force the institution to comply with Title IX provisions.

Later, in Franklin v. Gwinnett County Public Schools<sup>3</sup>, the United States Supreme Court ruled that, at least with reference to intentional violations of Title IX, a private party could collect monetary damages. The Court's rationale was based on the reading of two amendments made to Title IX which led the justices to conclude that Congress did not intend to limit the remedies available in a suit brought under the statute. Therefore, a damages remedy and potentially plaintiff's attorney's fees may be granted by the court in lieu of an injunction or as part of a compliance order.

## The Landmark Decision: Cohen v. Brown University

In 1992, Cohen v. Brown University<sup>4</sup> was decided by the U.S. Court of Appeals for the First Circuit. Brown University was a landmark case because it was the first appellate court decision to interpret the substantive requirements of effectively accommodating the interests and abilities of members of both sexes under Title IX legislation. The First Circuit held that Brown's action in downgrading two of its women's teams from varsity status was inconsistent with its obligation to accommodate fully the interests and abilities of its female student-athletes.

The facts of Brown University are important. In the spring of 1991, Brown announced that it was in a financial bind, and that as a belt-tightening measure, it planned to drop four sports from its intercollegiate varsity athletic roster: women's volleyball and gymnastics, men's golf and water polo. Brown University estimated that eliminating these four teams would save

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<sup>1</sup> 101 F.3d 155 (1st Cir. 1996).

<sup>2</sup> 441 U.S. 677 (1979).

<sup>3</sup> 503 U.S. 60 (1992).

<sup>4</sup> 991 F. 2d 888 (1<sup>st</sup> Cir. 1993).

\$77,813 per annum.

Before the cuts, Brown's athletic program offered an aggregate of 328 varsity slots for female athletes and 566 varsity slots for male athletes. Thus, women had 36.7% of the athletic opportunities and men had 63.3%. At that time, Brown's student body was comprised of approximately 52% men and 48% women.

Following Brown University's announcement of the cutbacks, disappointed members of the women's volleyball and gymnastics teams brought suit. Prior to trial the district court granted plaintiff's motion for a preliminary injunction, ordering that the women's gymnastics and volleyball teams be reinstated to university-funded varsity status, and prohibited Brown University from eliminating or reducing the status or funding of any existing women's intercollegiate varsity team until the case was resolved on the merits. The district court determined after a lengthy bench trial that Brown University's intercollegiate athletic program violated Title IX and its supporting regulations. The district court judge entered an order requiring Brown University to submit a compliance plan within 60 days.

In the first appeal, the Court of Appeals of the First Circuit affirmed the district court and held that an institution's failure to effectively accommodate both genders under C.F.R. Part 106.41(c)(1) is sufficient to establish a violation of Title IX. The First Circuit relied upon the 1979 Policy Interpretation of the Office of Civil Rights, which maps out a requisite three-part test under which a university must meet at least one of the benchmarks to demonstrate the accommodation:

- (1) **Substantial Proportionality-** Where intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) **History and Continuing Practice of Program Expansion-** Where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to developing the interest and abilities of the members of that sex; or
- (3) **Full and Effective Accommodation-** Where the members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

The district court applied the above test to Brown University and held that, "because Brown University maintained a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, it cannot gain the protection of prong one. Nor did Brown University satisfy prong two. The district court found that Brown University failed to demonstrate that it has "maintained a continuing practice of intercollegiate program expansion for women, the under represented sex." The court noted further that, merely reducing program offerings to the over represented gender does not constitute program expansion for the under represented gender.

As to prong three, the district court had found that Brown University had not “fully and effectively accommodated the interest and ability of the under represented sex ‘to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.’” This benchmark sets a high standard: it demands not merely some accommodation, but full and effective accommodation. An institution can satisfy the third benchmark by ensuring participatory opportunities at the intercollegiate level when, and to the extent that there is “sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for the team.”

Another case, Pederson v. Louisiana State University<sup>5</sup>, is notable for its decision on the issue of intent. As noted earlier in this section, the Supreme Court ruled in 1992 that monetary damages are available to plaintiffs under Title IX for intentional discrimination. The Pederson court addressed the question of what conduct constitutes intentional discrimination. The court set a high standard by concluding that Louisiana State University did not intentionally discriminate even though the violations were “a result of arrogant ignorance and an outdated view of women and athletics which created the byproduct of resistance of change.” Ultimately the court denied an award of damages based on its conclusion that Title IX law and regulations had been confused and unclear. However, since the law on Title IX has developed and clarified since the issuance of the Pederson decision, the rationale articulated in Pederson finding that damages were not appropriate may no longer be a viable argument.

### **A New Trend: Gender Discrimination Suits Brought By Coaches of Women’s Sports**

The number of gender discrimination suits brought by coaches of women’s sports has grown steadily in recent years. The cases usually involve two types of claims. The first type, based on Title IX, the Federal Equal Pay Act, Title VII, and a variety of state laws, involves claims that coaches of women’s teams should be paid the same amount as coaches of men’s teams. The second type, primarily based on Title VII, involves claims that a coach was terminated in retaliation for raising concerns about an institution’s compliance with Title IX.

In Stanley v. University of Southern California<sup>6</sup>, the U.S. Court of Appeals for the Ninth Circuit rejected Marianne Stanley’s claim that the lower court had improperly denied her request to be reinstated as head women’s basketball coach until after a trial on her claim could be held. Stanley alleged that she was entitled to receive the same compensation as provided to the men’s basketball coach and the university’s failure to provide such compensation violated the Equal Pay Act, Title IX, and various state laws.

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<sup>5</sup> 912 F. Supp. 892 (M.D. La. 1996).

<sup>6</sup> 13 F.3d 1313 (9<sup>th</sup> Cir. 1994).

The Court of Appeals found a qualitative difference in responsibilities between Stanley and the head men's basketball coach that justified a different level of pay. The court focused upon revenue generation as an important factor that may be considered in justifying greater pay. The court also reviewed the men's coach's substantially different qualifications and experience and stated that an employer may consider the marketplace value of an individual person in determining compensation.

Thereafter, following extensive discovery, the lower court granted the university's motion for summary judgment on all of Stanley's claims. The court found that Stanley failed to demonstrate a violation of the Equal Pay Act by producing insufficient evidence that the two basketball coaches performed substantially the same jobs. Instead, the court found that there was a qualitative dissimilarity in the respective responsibilities of the two coaches, and that the men's coach had substantially different and superior qualifications and experience.

In Pitts v. Oklahoma State University<sup>7</sup>, the women's golf coach filed a suit against the institution alleging violations of Title VII, Title IX, and the Equal Pay Act based on the difference between her \$40,704 salary and the men's coach's \$66,000 salary. The jury held against Pitts on her Equal Pay Act claim and found that she was not entitled to the same pay as the men's coach. The higher salary was not based on discriminatory reasons, but on the accomplishments of the golf team, differing levels of fund-raising, and the marketability of the coach. In 10 years with the institution, the men's coach had won six national championships and raised more than \$8 Million while Pitts had won 11 conference championships, but not any national championships, and had raised \$15,000.

In Deli v. University of Minnesota,<sup>8</sup> the former gymnastics coach claimed that the institution had discriminated against her by paying her a lower salary than that paid to coaches of the men's football, basketball, and ice hockey teams. She alleged violation of Title VII, the Equal Pay Act, and Title IX. The U.S. District Court for the District of Minnesota found that Deli could not recover under Title IX because she had not shown that the athletes had received lesser quality coaching as a result of her lower salary. The court also held that the Equal Pay Act had not been violated. Again, the court relied upon coach's ability to generate more revenue to justify a difference in compensation. In addition, the court found that the three coaches in the men's sports supervised more employees, had larger teams, and drew larger crowds.

The issues and standards addressed in these cases will continue to evolve as more Title IX actions are litigated in the federal courts.

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<sup>7</sup> Civil No. 93-1341-A (W.D. Okla. Apr. 21, 1994).

<sup>8</sup> 863 F. Supp. 958 (D. Minn. 1994).

*The following is a reprint of the text of the Policy Clarification issued on January 16, 1996 by the Office for Civil Rights.*

## **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 athletics programs, at 34 C.F.R. § 106.41, and the awarding of athletics 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 athletics program, it must provide equal athletics opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletics interests and abilities of students of both sexes to the extent necessary to provide equal athletics opportunity.

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

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. [44 Fed. Reg. at 71418.]

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

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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 athletics programs, which also are covered by the regulation. See 44 Fed. Reg. 71413.

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 the 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 athletics benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletics 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 athletics opportunity because these opportunities provide access to all other athletics 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 athletics opportunities for male and female students in numbers substantially proportionate to their respective full-time under-graduate 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 athletics 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
- ddd. 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 athletics 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 sports 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 athletics 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 athletics opportunities provided to men and women.

OCR's analysis next determines whether athletics opportunities are substantially proportionate. The Title IX regulation allows institutions to operate separate athletics 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 athletics program and its full-time undergraduate 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 athletics 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 athletics 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 athletics 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 athletics 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 athletics 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 represent only 47 percent of its athletes. If the university provided women with 52 percent of athletics 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 athletics program consists of only 60 participants. If the university provided women with 52 percent of athletics opportunities, approximately six additional women would be able to participate. Since six 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 under-represented 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>

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<sup>2</sup> Part two focuses on whether an institution has expanded the number of intercollegiate participation

OCR will review the entire history of the athletics program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. Developing interests include interests that already exist at the institution.<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

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opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletics 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.

<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.

- ◆ An institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

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

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the 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 athletics 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 athletics 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 25 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 athletics 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 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 athletics 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 athletics 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 athletics opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

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

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

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

OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- ◆ Requests by students and admitted students that a particular sport be added;
- ◆ Requests that an existing club sport be elevated to intercollegiate team status;
- ◆ Participation in particular club or intramural sports;
- ◆ Interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- ◆ Results of questionnaires of students and admitted students regarding interests in

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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.

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 athletics 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 athletics program to assess the athletics 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 athletics interests and abilities provided they meet certain requirements. See 44 Fed. Reg. at 71417. These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

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

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

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

- ◆ The athletics experience and accomplishments - in interscholastic, club or

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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.

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 athletics 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.

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