

No. 35127-7-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN THE MATTER OF
EVERGREEN SCHOOL DISTRICT

REPLY BRIEF OF APPELLANT

Northwest Women's Law Center

Jill D. Bowman, WSBA #11754
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
(206) 624-0900

Sarah A. Dunne, WSBA #34869
705 Second Ave, Suite 300
Seattle, WA 98104
(206) 624-2184

Attorneys for Appellant

STATE OF WASHINGTON
BY *JDB*
07 FEB 16 PM 12:51

COURT OF APPEALS
DIVISION II

PM 2-15-07

TABLE OF CONTENTS

I. THIS CASE ABOUT GENDER DISCRIMINATION IS
BASED ON CLAIMS OF INEFFECTIVE
ACCOMMODATION AND UNEQUAL
TREATMENT, BUT ONLY THE
ACCOMMODATION RULING IS AT ISSUE. 1

A. The ALJ Did Not “Rewrite” Mr. Rossmiller’s
Complaint. 3

B. The Prehearing Order Does Not Support the
District’s Characterization of this Dispute as a
“Simple ‘Equal Treatment’ Case.” 4

C. The District’s Investigative Report Evidences
Acknowledgement of an Accommodation
Claim. 6

D. The ALJ Properly Admitted and Considered
Evidence Relevant to Mr. Rossmiller’s
Accommodation Claim..... 7

II. THE ALJ COMMITTED NO ERROR OF LAW IN
CONCLUDING THE DISTRICT FAILED TO
ACCOMMODATE THE INTERESTS AND
ABILITIES OF ITS FEMALE HIGH SCHOOL
ATHLETES. 8

A. A “5-12%” Disparity Does Not Satisfy the
Requirement of Substantial Proportionality. 12

B. Offering Female Athletes Opportunities to
Participate in Teams Without a “Cut” Policy
Does Not Establish Full and Effective
Accommodation. 15

C. The District Did Not Establish Compliance
With Any Part of the Three-Part Test. 17

III. THE REMEDIES ORDERED BY THE ALJ TO ADDRESS THE DISTRICT’S VIOLATION OF STATE LAW WERE NEITHER ARBITRARY NOR CAPRICIOUS, NOR BEYOND THE ALJ’S AUTHORITY.....19

IV. THE DISTRICT FAILED TO SHOW THAT RELIEF FROM THE ALJ’S ORDER IS WARRANTED UNDER RCW 34.05.570(3).....21

APPENDICES

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Boucher v. Syracuse Univ.</u> , 164 F.3d 113 (2nd Cir. 1999)	1
<u>Cohen v. Brown Univ.</u> , 101 F.3d at 173 (1st Cir. 1996)	14, 15, 17
<u>Cohen v. Brown Univ.</u> , 809 F. Supp. 978 (D.R.I. 1992), <u>aff'd</u> , 991 F.2d 888 (1st Cir. 1993).....	13
<u>Daniels v. Sch. Bd. of Brevard County</u> , 985 F. Supp. 1458 (M.D. Fla. 1997)	5
<u>Horner v. Ky. High Sch. Athletic Ass'n</u> , 43 F.3d 265 (6th Cir. 1994).....	17
<u>Landow v. Sch. Bd. of Brevard County</u> , 132 F. Supp. 2d 958 (M.D. Fla. 2000)	5
<u>McCormick v. Sch. Dist. of Mamaroneck</u> , 370 F.3d 275 (2nd Cir. 2004).....	1, 5, 9, 14, 17
<u>Roberts v. Colorado State Bd. of Agric.</u> , 998 F.2d 824 (10th Cir. 1993).....	9, 10, 12, 13
<u>Williams v. Sch. Dist. of Bethlehem</u> , 998 F.2d 168 (3d Cir. 1993).....	17, 18

STATE CASES

DaVita, Inc. v. Washington State Dep't of Health,
____ P.3d ____, 2007 WL 371680 (Wash. Ct.
App. Feb. 6, 2007).....22

King County Pub. Hosp. Dist. No. 2 v. Pub. Serv. & Pub.
Safety Employees, Local 674,
242 Wn. App. 64, 600 P.2d 589 (1979)22

STATE STATUTES AND REGULATIONS

RCW 28A.300.12022

RCW 28A.640.020 1

RCW 34.05.570(3)8, 21, 22

RCW ch. 34.1222

WAC 392-190-005 8

WAC 392-190-0306, 8

WAC 392-190-030(1).....6, 7, 8

WAC 392-190-040 18, 19

WAC 392-190-0653

WAC 392-190-0703

WAC 392-190-0754

MISCELLANEOUS

Op. Att’y Gen. No. 8 (1976)..... 1

Office for Civil Rights, U.S. Department of Education,
Clarification of Intercollegiate Athletics Policy
Guidance: The Three Part Test (January 16, 1996) 16

**I. THIS CASE ABOUT GENDER DISCRIMINATION IS
BASED ON CLAIMS OF INEFFECTIVE
ACCOMMODATION AND UNEQUAL TREATMENT, BUT
ONLY THE ACCOMMODATION RULING IS AT ISSUE.**

Whether male and female students are provided equal athletic opportunities is the fundamental inquiry in a gender discrimination case involving a school district's athletics program. See RCW 28A.640.020; Op. Att'y Gen. No. 8 (1976). Violation of antidiscrimination laws can be established with proof of discrimination against female athletes in the district's allocation of participation opportunities, which discrimination is evidenced by the underrepresentation of female students in the athletics program (an "accommodation" claim), or failure to provide equal benefits and opportunities to the district's male and female athletes (an "equal treatment" claim), or both. See, e.g., McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 291 (2nd Cir. 2004); Boucher v. Syracuse Univ., 164 F.3d 113, 115 (2nd Cir. 1999).

In this case, despite Mr. Rossmiller's explicit complaint that girls are "under-represented in athletics at every high school in the Evergreen School District," AR II:00412, and despite the District's

admission that “[t]here cannot be an ‘underrepresentation’ issue in a single sport,” Brief of Respondent (“Resp.Br.”) at 20, the Evergreen School District persists in arguing that the only matter at issue is whether the District met its obligation to treat its high school male and female tennis players equally with respect to the provision of facilities (tennis courts), coaching, and supplies (uniforms). Resp.Br. at 4, 20. Pointing to the Prehearing Order issued by the Administrative Law Judge (“ALJ”), the District argues that the ALJ “rewrote” Mr. Rossmiller’s complaint, and that the case was thereby “narrowed” and “turn[ed] . . . into” one that involved only the question of whether the District treated its high school boys’ and girls’ tennis teams equally. Resp.Br. at 4, 19. In so arguing, the District (a) ignores the ALJ’s prehearing denial of the District’s motion to dismiss Mr. Rossmiller’s “under-representation” complaint, (b) ignores the framing of the first issue referred back to the District for investigation, (c) ignores the investigative report prepared by the District in response to that referral, which reflects the District’s implicit acknowledgement of the presence of an accommodation claim, and (d) ignores that throughout the

administrative hearing the ALJ rejected the District's efforts to limit the scope of the parties' dispute. This Court should reject the District's attempts to recharacterize and circumscribe the matters at issue.

A. The ALJ Did Not "Rewrite" Mr. Rossmiller's Complaint.

After the Evergreen School District refused to investigate his allegations of unlawful discrimination against female athletes in the District's high schools, Mark Rossmiller turned to the State of Washington for assistance. AR II:00332-33. The Office of the Superintendent of Public Instruction ("OSPI") assigned the matter to the Office of Administrative Hearings and a hearing on Mr. Rossmiller's complaint was scheduled. AR II:00326-31.

At a prehearing conference, the District moved for dismissal of the proceeding, arguing that Mr. Rossmiller's complaint did not meet the specificity requirements of WAC 392-190-165.

AR V:00906. The ALJ denied the District's motion. AR V:00906-07.

The ALJ then sent the matter back to the District for completion of the process mandated in WAC 392-190-065, -070,

and -075. AR V:00906-08. In connection with that process, the ALJ listed in the Prehearing Order three “issues for investigation.” AR V:00907. Nowhere in that Prehearing Order did the ALJ indicate that by providing a description of three pending issues, the ALJ intended to “rewrite” Mr. Rossmiller’s complaint. Nor does the District cite any authority for the proposition that the ALJ would have had any authority or discretion to “rewrite” the complaint had he tried to do so. Moreover, the Prehearing Order contains no language purporting to eliminate or alter Mr. Rossmiller’s basic complaint that girls are “under-represented in athletics at every high school in the Evergreen School District” and his request for modifications to the girls’ tennis program to remedy that underrepresentation.

B. The Prehearing Order Does Not Support the District’s Characterization of this Dispute as a “Simple ‘Equal Treatment’ Case.”

The first “issue for investigation” by the District is described in the Prehearing Order as follows:

There are not enough tennis courts to meet the level of interest. The lack of facilities has a disparate impact on girls because the level of interest is higher for girls

than for boys. A minimum of six courts at each high school with court maintenance equipment is needed to meet the demand.

AR V:00907.

By itself, this description of an “issue for investigation” should have put the District on notice that an accommodation claim was raised. As the District admits, the same courts are used by the boys’ and girls’ tennis teams. Resp.Br. at 27; AR VI:00988. There is no allegation in Mr. Rossmiller’s complaint or in the Prehearing Order that the District’s female tennis players are required to use fewer courts than are the male players, or courts inferior to those used by the male players, as would be the case if this action involved solely an “equal treatment” claim.¹ Rather, the

¹ Contrast the statement of the first “issue for investigation” with the second, where it is alleged that “[t]he coach/student ratio is higher for girls in the tennis program than for boys in the program, or for students in other sports....” AR V:00907. See McCormick, 370 F.3d at 292 (equal treatment claim entails comparison of components of athletic program); Landow v. Sch. Bd. of Brevard County, 132 F. Supp. 2d 958, 961-67 (M.D. Fla. 2000) (comparing fields and equipment provided for high school boys’ baseball team to fields and equipment provided for girls’ softball team); Daniels v.

allegation is that the District is not effectively meeting girls' *interest.*

The ALJ's framing of the issue implicates the first factor in WAC 392-190-030. This section of Washington's administrative code lists a set of factors that "shall" be considered in determining whether equal opportunities in athletics are available to both girls and boys. The first listed factor inquires whether a school district's "selection of sports and levels of competition effectively accommodates the *interests* and abilities of members of both sexes." WAC 392-190-030(1) (emphasis added).

C. The District's Investigative Report Evidences Acknowledgement of an Accommodation Claim.

In its report on the "Investigation of Gender Discrimination Complaint filed by Mark Rossmiller," the District implicitly acknowledges that an accommodation claim is part of the parties'

Sch. Bd. of Brevard County, 985 F. Supp. 1458 (M.D. Fla. 1997) (same).

dispute. In response to the Prehearing Order's first "issue for investigation," the District explains:

The level of interest measured by the number of students who actively try out for a team is not the figure used to determine whether a school [district] is accommodating the interests and abilities of both sexes in compliance with Title IX or state law. What must be addressed is *whether or not equal opportunity is provided for members of both sexes to participate and whether the selection of sports and levels of competition effectively accommodates the [interests and] abilities of both sexes.*

AR V:00910 (emphasis added). In substance, the District cited the requirements of WAC 392-190-030(1). This Court therefore should reject the District's argument that the ALJ engaged in unlawful procedure by admitting the District's investigative report and underlying documents (all of which the District submitted as exhibits during the administrative hearings, see AR V:00909-47), and considering the data contained in those documents to address Mr. Rossmiller's accommodation claim.

D. The ALJ Properly Admitted and Considered Evidence Relevant to Mr. Rossmiller's Accommodation Claim.

At the outset of the administrative hearing and throughout the course of that hearing, the ALJ rejected the District's improper

attempts to limit the scope of the inquiry. AR VI:00974; AR VIII:01297-1300. While declining to open the door to a wide range of potential remedies if the claim of gender discrimination were proved, the ALJ acknowledged that WAC 392-190-030 would guide his analysis and ruled that he would admit evidence to determine whether girls were under-represented in the District's high school athletics program. Id. Because the case presented an accommodation claim as well as an unequal treatment claim, there was no erroneous interpretation or application of the law, or unlawful procedure, in admitting evidence to assess the District's compliance with WAC 392-190-030(1). See RCW 34.05.570(3); WAC 392-190-005; see also AR VI:01034 (testimony of program coordinator for equity coordination at OSPI that state law is interpreted consistently with federal law related to Title IX).

**II. THE ALJ COMMITTED NO ERROR OF LAW IN
CONCLUDING THE DISTRICT FAILED TO
ACCOMMODATE THE INTERESTS AND ABILITIES OF
ITS FEMALE HIGH SCHOOL ATHLETES.**

Compliance with the effective accommodation requirement of WAC 392-190-030(1) is assessed by application of a three-part test.

AR VI:01021-26; see also McCormick, 370 F.3d at 299-301

(discussing three-part test under federal law). The first part asks whether participation opportunities in athletics for male and female students are provided in numbers substantially proportionate to the enrollment of male and female students in the schools.

AR VI:01021-22; McCormick, 370 F.3d at 300; see AR I:00013.

The second and third parts reflect alternative ways for an institution to show that it has met the interests and abilities of all of its students. See Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 829 (10th Cir. 1993). Under the second part, when members of one sex have been and are underrepresented in a school district's athletic program, the question is "whether the [district] can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex." McCormick, 370 F.3d at 300 (quoting Title IX of the Education Amendments of 1972, A Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) ("Policy Interpretation") (a copy of the Policy Interpretation is attached to this brief as Appendix A)).

Alternatively, under the third part, the district can attempt to “demonstrate[] that the interests and abilities of the members of that sex have been fully and effectively accommodated by the [district’s] program.” Id.; see AR VI:1022. The third part “sets a high standard: it demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test.” Roberts, 998 F.2d at 831-32 (quoting Cohen v. Brown Univ., 991 F.2d 888, 898 (1st Cir. 1993)).

In this case, the evidence submitted by the District showed that for the 2003/04 school year, 49 percent of the students enrolled at Heritage High School (HHS) and Mountain View High School (MVHS) were female, while 48 percent of the students enrolled at Evergreen High School (EHS) were female. For the same time period, the percentage of female students participating in athletics ranged from a low of 37 percent (at EHS) to a high of 44 percent (at

MVHS). AR I:00006 (Finding of Fact 22).² For the 2002/03 school year, the disparity between female enrollment and female athletes ranged from six percent to ten percent (6%-10%). ARI:00005-06.

In light of this disparity, it is not surprising that the District's Title IX officer admitted that "based upon percentage of enrollment and percentage of participation . . . girls are under-represented" in the District's high school athletic program. AR VIII:01369. The District argues, however, that a "mere 5-12% difference between overall female enrollment and participation should be considered 'substantial' compliance," Resp.Br. at 49-50, and that because the "focus" of the first part of the three-part test is on participation "opportunities," not actual participation, Resp.Br. at 37, the District satisfied this part by offering its female high school athletes the

² The District was on notice of the existence of an accommodation claim, and, in any event, the ALJ's undisputed finding of the percentages of female enrollment and female participation in athletics rested on the raw numbers supplied by the District. AR I:00005-06 (Finding of Fact 22); AR V:00917-22, 00926-32, 00935-37. This Court therefore should reject the argument that the District was unfairly prejudiced by the admission and consideration of evidence relevant to the accommodation claim. Resp.Br. at 21.

opportunity to participate in no-cut sports such as track. Resp.Br. at 41-42. Neither of these arguments has merit.

A. A “5-12%” Disparity Does Not Satisfy the Requirement of Substantial Proportionality.

The District admits girls are underrepresented in actual participation slots. AR VIII:01369; Resp.Br. at 42. Nevertheless, it argues that a “mere 5-12% disparity” should be viewed, as a matter of law, as meeting the requirement for substantial proportionality. Resp.Br. at 49-50. It makes this argument despite expert testimony indicating that a ten percent (10%) differential does not satisfy Washington law. AR VI:01022. The District also fails to cite any legal authority supporting this argument. Finally, and perhaps most telling, the District ignores federal case law expressly rejecting the argument that a 10.5 percent disparity meets the requirement of substantial proportionality as a matter of law. See Roberts, 998 F.2d at 829-30 (noting that the Office for Civil Rights, Department of Education, Title IX Athletics Investigator’s Manual 24 (1990)³

³ Available at http://www.ncaa.org/gender_equity/resource_materials/AuditMaterial/Investigator’s_Manual.pdf.

“suggests that substantial proportionality entails a fairly close relationship between athletic participation and . . . enrollment”); see also Cohen v. Brown Univ., 809 F. Supp. 978, 991 (D.R.I. 1992) (11.6% disparity not substantially proportionate), aff’d, 991 F.2d 888 (1st Cir. 1993).

Alternatively, the District argues this Court should reverse the ALJ’s conclusion of discrimination because “the difference between boys and girls in state-wide participation” is in the “12-14% range.” Resp.Br. at 49. Essentially, the District argues it should not be held accountable for its violation of state antidiscrimination laws because other school districts also are discriminating against female athletes. An institution cannot avoid liability, however, by pointing to the discriminatory behavior of others. See, e.g., Roberts, 998 F.2d at 830 (observing that “[t]he fact that many or even most other educational institutions have a greater imbalance” did not relieve the University from the court’s holding “that a 10.5% disparity between female athletic participation and female . . . enrollment is not substantially proportionate”).

Moreover, to the extent the District is suggesting the disparity should be excused based on the premise that girls are less interested in participating in sports than are boys, Resp.Br. at 49 (“it is an uncontrollable factor that more boys than girls participate in sports state-wide”), such an argument has been firmly rejected by the courts. See, e.g., McCormick, 370 F.3d at 295-96. Indeed, “[i]n response to Brown University’s argument that it need not provide equal opportunities for athletic participation to women because women were less interested in sports, the First Circuit said:

To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women’s interests and abilities. Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience.... [T]o allow a numbers-based lack of interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX.

Id. (quoting Cohen v. Brown Univ., 101 F.3d 155, 178-80 (1st Cir. 1996)). The same reasoning applies here.

B. Offering Female Athletes Opportunities to Participate in Teams Without a “Cut” Policy Does Not Establish Full and Effective Accommodation.

The District asserts that it fully and effectively accommodates the interests of its female student athletes because the “focus” of the requirement for substantial proportionality is on participation “opportunities,” not actual participation, and the District offers high school girls the opportunity to participate in “no-cut” sports, such as track. Resp.Br. at 36-41. The District’s assertion is incorrect.

First, it has long been established that when assessing compliance with the first part of the three-part test, “participation opportunities offered by an institution are properly measured by counting the number of actual participants on [the institution’s] teams.” Cohen v. Brown Univ., 101 F.3d at 173. Second, the “no-cut” argument has been rejected by the Office for Civil Rights of the U.S. Department of Education (“OCR”):

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.

Office for Civil Rights, U.S. Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test (January 16, 1996) (“1996 Clarification”), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>. (A copy of the 1996 Clarification is attached to this brief as Appendix B.)

The reason for rejecting the no-cut argument is obvious: any institution would be able to avoid having to provide actual athletic participation slots to female students simply by offering a no-cut team for any unpopular sport and asserting it had fully and effectively accommodated the interests and abilities of its female athletes because the team could accommodate an unlimited number of participants. In short, merely by providing illusory opportunities, a district could claim it met the interests of its female athletes. This Court should reject the District’s argument, especially in light of the District’s failure to introduce evidence indicating that the no-cut teams offered by the District meet the interests and abilities of the female students.

The District tries to circumvent the OCR's rejection of the no-cut argument by arguing that the federal guidance supplied by the Policy Interpretation and the 1996 Clarification applies to intercollegiate athletics, but not to interscholastic athletics. Resp.Br. at 42. Relying on the statement in the 1979 Policy Interpretation that the "general principles will often apply . . . to interscholastic athletic programs," several courts have already rejected this argument. See McCormick, 370 F.3d at 291-92; Cohen, 101 F.3d at 173 n.12; Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 273-74 (6th Cir. 1994); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 171-72, 175-76 (3d 1993). This Court should do the same.

C. The District Did Not Establish Compliance With Any Part of the Three-Part Test.

The District provided no evidence of a history and continuing practice of program expansion which was demonstrably responsive to the developing interests and abilities of the District's female high school students. To the contrary, the same ten sports were offered to the District's female high school students for the three school years

addressed in the hearing. AR V:00917-22, 00926-32, 00935-37.

Moreover, there was no evidence of increased numbers of teams or levels of capabilities provided within any of the sports. Id.

Accordingly, the District failed to satisfy the second part of the three-part test.

The District also failed to satisfy the third part. The District admitted it had not met its obligation to conduct regular surveys to determine student interest. AR 1:00008 (Finding of Fact 38, undisputed); AR III:00458, 00659-73; AR VII:01050-01; AR VIII:01239; WAC 392-190-040. The District also admitted that not all girls who turned out for the District's high school tennis program were allowed to participate, and that the District did not even keep records of how many girls were cut from the tennis teams.

AR V:00910-11; AR VIII:01366-67; AR 1:00008 (Finding of Fact 39, undisputed). Together, these facts establish the District's failure to prove that the interests and abilities of the District's female high school athletes were fully and effectively accommodated.

In sum, the ALJ committed no error of law in concluding that the District failed to effectively accommodate the interests and

abilities of its female high school athletes. The District therefore violated Washington's laws against gender discrimination and it was appropriate for the ALJ to order relief.

III. THE REMEDIES ORDERED BY THE ALJ TO ADDRESS THE DISTRICT'S VIOLATION OF STATE LAW WERE NEITHER ARBITRARY NOR CAPRICIOUS, NOR BEYOND THE ALJ'S AUTHORITY.

To remedy the District's failure to provide equal opportunities for male and female high school athletes, the ALJ ordered the District to institute an affirmative action plan. AR I:00016. The plan was to include (a) a revision of the policies and procedures for responding to complaints of non-compliance with the requirements of Chapter 392-190 WAC; (b) conducting and filing the interest surveys required under WAC 392-190-040; and (c) development of an operations and capital spending improvement plan to increase the number of tennis courts and coaches. AR I:00016-17. The ALJ also ordered the District be placed on probation with the OSPI until the District showed compliance. Id.

Contrary to the claims of the District, the ALJ did not require, and Mr. Rossmiller did not argue, that if 250 girls turned

out for tennis, the District would be obligated to provide a tennis program for all of those girls. Resp.Br. at 44. As the expert testimony at trial established, in this situation, when the District has a demonstrated female interest in additional tennis participation slots because the tennis team has had to cut girls, the District has “the opportunity to add a sport or you have the opportunity to expand current sports” by adding another competition level. AR VI:01042. Here, the record showed that the District has more girls interested in tennis than can be accommodated by the current Varsity and Junior Varsity teams. AR V:00910-11; AR VIII:01244. Given the underrepresentation of female students in the District’s athletic programs and the documented interest in girls’ tennis, the District could establish another level of competition, or what is commonly referred to in interscholastic athletics as a “C” team.⁴

⁴ Although outside the record, the District admits that starting with the 2005/06 school year (i.e., after this case was decided by the ALJ), the District added a C team to its girls’ tennis program. Resp.Br. at 32. Amazingly, it still argues that “the creation of ‘C’ teams” in girls’ tennis would not increase the opportunity for girls to participate in competitive play. Resp.Br. at 29.

Similarly, increasing the number of available tennis courts expands the opportunity for additional practice time and competitive play. The District's argument that adding tennis courts "would not necessarily increase girls' participation in the sport," Resp.Br. at 30, ignores the undisputed fact that the District had to cut players from the girls' tennis teams. Under these circumstances, expansion of the available facilities and an increase in the number of coaches certainly is in line with a reasonable expectation of increased participation. Accordingly, the ALJ's order contemplating such changes, along with a directive for the District to explore expansion of competitive outlets for girls' tennis, AR I:00018, cannot reasonably be viewed as arbitrary or capricious. Finally, it certainly cannot be beyond the scope of the ALJ's authority to refer the matter back to the OSPI to monitor the District's efforts to bring itself into statutory compliance.

IV. THE DISTRICT FAILED TO SHOW THAT RELIEF FROM THE ALJ'S ORDER IS WARRANTED UNDER RCW 34.05.570(3).

The District properly acknowledges that RCW 34.05.570(3) specifies the grounds on which this Court may grant relief from the

ALJ's order. Resp.Br. at 14-15. Moreover, the District does not dispute that this Court applies the statute's review standards directly to the administrative record and is not bound by the findings or conclusions of the superior court. See, e.g., DaVita, Inc. v. Washington State Dep't of Health, ____ P.3d ____, 2007 WL 371680, at *3 (Wash. Ct. App. Feb. 6, 2007); King County Pub. Hosp. Dist. No. 2 v. Pub. Serv. & Pub. Safety Employees, Local 674, 242 Wn. App. 64, 68, 600 P.2d 589 (1979).

The District errs, however, in suggesting that the underlying decision of the School Board is relevant to this appeal. Resp.Br. at 15-16. The "agency action" at issue here is not the School Board's decision, but the order issued by ALJ Kingsley. See DaVita, 2007 WL 371680, at **3-5; RCW 28A.300.120; RCW ch. 34.12. The proper subject of this Court's review therefore is not whether Mr. Rossmiller somehow proved the "invalidity" of the School Board's action, but rather, whether the District has shown that relief from the ALJ's order is warranted on any of the grounds listed in RCW 34.05.570(3). The District failed to make any such showing.

Accordingly, this Court should reverse the superior court's decision and reinstate the order entered by ALJ Kingsley.

DATED: February 15th, 2007.

NORTHWEST WOMEN'S LAW
CENTER

By 
Jill D. Bowman, WSBA # 11754
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, Washington 98101
(206) 624-0900

By 
Sarah A. Dunne, WSBA #34869 
705 Second Ave, Suite 300
Seattle, WA 98104
(206) 624-2184

Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that on the date indicated below, the foregoing **Reply Brief of Appellant** was caused to be served via First-Class U.S. Mail on the individuals and/or offices at the addresses listed below:

Lawrence B. Ransom
Karr Tuttle Campbell
1201 Third Avenue, #2900
Seattle, WA 98101

David Stolier
Senior Assistant Attorney General
1125 Washington St., S.E.
P.O. Box 40100
Olympia, WA 98504-0100

BY _____
STATE OF _____
DEPUTY _____
DATED 15 FEB 2007
COURT CLERK _____

The undersigned caused the original document to be filed with the appellate court clerk, by mailing the same via First-Class U.S. Mail to the following:

Washington State Court of Appeals
Division II
950 Broadway, Suite 300
M/S TB-06
Tacoma, WA 98402-4454
Attention: Court Clerk

DATED: February 15th, 2007 at Seattle, Washington.



Debbie Dern

APPENDIX A

In accordance with 39 CFR 601.105 notice of these changes is hereby published in the Federal Register as an amendment to that section and the text of the changes is filed with the Director, Office of the Federal Register. Subscribers to the basic Manual will receive these amendments from the Government Printing Office. (For other availability of the Postal Contracting Manual, see 39 CFR 601.104.)

Description of these amendments to the Postal Contracting Manual follows:

1. The following new, revised, or replacement forms for cleaning services contracts have been included in section 16 and shall be used immediately:

(a) Form 7331, May 1979, Solicitation, Offer, and Award—Cleaning Services.

(b) Form 7335, August 1979, Cleaning Service Requirements.

(c) Form 7358, May 1979, Representations and Certifications—Cleaning Services Contracts.

(d) Form 7380, May 1979, Biweekly Report of Contractor Performance—Cleaning Services Contracts.

(e) Form 7420, May 1979, General Provisions—Cleaning Services Contracts.

Note.—Previous editions of Form 7331 are obsolete and shall be destroyed.

2. Section 22, Part 7, has been revised to establish uniform policy for entering into and administering cleaning services contracts.

In consideration of the foregoing, 39 CFR 601 is amended by adding the following to §601.105:

§ 601.105 Amendments to the Postal Contracting Manual.

Transmittal letter	Dated	FEDERAL REGISTER publication
29.....	Sept. 28, 1979.....	44 FR

(5 U.S.C. 552(a), 39 U.S.C. 401, 404, 410, 411, 2008)

Note.—Incorporation by reference provisions approved by the Director of the Federal Register on December 3, 1971, and extended at 42 FR 29488, June 9, 1977, 43 FR 22717, May 20, 1978, and at 44 FR 31976, June 4, 1979 [corrected at 44 FR 32369, June 6, 1979].

Fred Eggleston,
Assistant General Counsel Legislative Division

(FR Doc. 79-37842 Filed 12-10-79; 8:45 am)

BILLING CODE 7710-12-M

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 88

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

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

ACTION: Policy Interpretation.

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

EFFECTIVE DATE: December 11, 1979

FOR FURTHER INFORMATION CONTACT: Colleen O'Connor, 330 Independence Avenue, Washington, D.C. (202) 245-6871

SUPPLEMENTARY INFORMATION:

I. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation, in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 844 of the Education Amendments of 1974 further provides:

The Secretary of (of HEW) shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

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

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

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

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

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation.¹

¹The regulation specifically refers to club sports separately from intercollegiate athletics.

Accordingly, under this Policy Interpretation, club Footnotes continued on next page

Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 66.2 of the Title IX regulation.

IV. Summary of Final Policy Interpretation

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

- **Compliance in Financial Assistance (Scholarships) Based on Athletic Ability:** Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.

- **Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services):** Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.

- **Compliance in Meeting the Interests and Abilities of Male and Female Students:** Pursuant to the regulation, the governing principle in this area is that the athletic interests

and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- "Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and

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

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

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or

- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

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

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

women to participate and compete at all levels.

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

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

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

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

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

VI. Historic Patterns of Intercollegiate Athletics Program Development and Operations

In its proposed Policy Interpretation of December 11, 1978, the Department

Footnotes continued from last page. Teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition.

published a summary of historic patterns affecting the relative status of men's and women's athletic programs. The Department has modified that summary to reflect additional information obtained during the comment and consultation process. The summary is set forth at Appendix A to this document.

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 86.37(c) and 86.41(c).

A. Athletic Financial Assistance (Scholarships)

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

[Institutions] must provide reasonable opportunities for such award [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in . . . inter-collegiate athletics.³

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

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

b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require

spreading scholarships over as much as a full generation (four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

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

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

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

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

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; 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.

B. Equivalence in Other Athletic Benefits and Opportunities

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

- (1)⁴
- (2) Provision and maintenance of equipment and supplies;

(3) Scheduling of games and practice times;

(4) Travel and per diem expenses;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training services and facilities;

(9) Provision of housing and dining services and facilities; and

(10) Publicity

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

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.⁵

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

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

a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits' Amendment"⁶ to Title IX, which instructed HEW to make "reasonable [regulatory] provisions considering the nature of particular sports" in intercollegiate athletics.

Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation,

³ See also § 86.41(a) and (b) of the regulation.

⁴ Section 844 of the Education Amendments of 1974, Pub. L. 93-380, Title VIII, (August 21, 1974) 88 Stat. 612.

⁵ 86.41(c) (1) on the accommodation of student interests and abilities, is covered in detail in the following Section C of this policy interpretation.

⁶ See also § 86.37(a) of the regulation.

nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable.

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

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

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

3. *Application of the Policy—General Athletic Program Components*—a. *Equipment and Supplies* (§ 86.41(c)(2)). Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies,

instructional devices, and conditioning and weight training equipment.

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

- (1) The quality of equipment and supplies;
- (2) The amount of equipment and supplies;
- (3) The suitability of equipment and supplies;
- (4) The maintenance and replacement of the equipment and supplies; and
- (5) The availability of equipment and supplies.

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

- (1) The number of competitive events per sport;
- (2) The number and length of practice opportunities;
- (3) The time of day competitive events are scheduled;
- (4) The time of day practice opportunities are scheduled; and
- (5) The opportunities to engage in available pre-season and post-season competition.

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

- (1) Modes of transportation;
- (2) Housing furnished during travel;
- (3) Length of stay before and after competitive events;
- (4) Per diem allowances; and
- (5) Dining arrangements.

d. *Opportunity to Receive Coaching and Academic Tutoring* (§ 86.41(c)(5)).

(1) *Coaching*—Compliance will be assessed by examining, among other factors:

- (a) Relative availability of full-time coaches;
- (b) Relative availability of part-time and assistant coaches; and
- (c) Relative availability of graduate assistants.

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

- (a) The availability of tutoring; and
- (b) Procedures and criteria for obtaining tutorial assistance.

e. *Assignment and Compensation of Coaches and Tutors* (§ 86.41(c)(6)).* In

*The Department's jurisdiction over the employment practices of recipients under Subpart E, §§ 86.51–86.61 of the Title IX regulation has been successfully challenged in several court cases. Accordingly, the Department has suspended enforcement of Subpart E, Section 86.41(c)(6) of the regulation, however, authorizes the Department to

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

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

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

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

- (a) Training, experience, and other professional qualifications;
- (b) Professional standing.

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

- (a) Tutor qualifications;
- (b) Training, experience, and other qualifications.

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

- (a) Rate of compensation (per sport, per season);
- (b) Duration of contracts;
- (c) Conditions relating to contract renewal;
- (d) Experience;
- (e) Nature of coaching duties performed;
- (f) Working conditions; and
- (g) Other terms and conditions of employment.

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

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

consider the compensation of coaches of men and women in the determination of the equality of athletic opportunity provided to male and female athletes. It is on this section of the regulation that this Policy Interpretation is based.

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

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

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

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

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

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

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

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

- (1) Availability and quality of sports information personnel;
- (2) Access to other publicity resources for men's and women's programs; and
- (3) Quantity and quality of publications and other promotional devices featuring men's and women's programs.

4. Application of the Policy—Other Factors (§ 86.41(c)). **a. Recruitment of Student Athletes.** The athletic

recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes. Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.

Such examinations will review the following factors:

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

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

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

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

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

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

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

- a. Whether the policies of an institution are discriminatory in language or effect; or
- b. Whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female

students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action * * * and may choose to undertake such efforts as affirmative action * * *

Accordingly, institutions subject to § 86.23 are required in all cases to maintain equivalently effective recruitment programs for both sexes and, under § 86.41(c), to provide equivalent benefits, opportunities, and treatment to student athletes of both sexes.

athletes in the institution's program as a whole; or

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

C. Effective Accommodation of Student Interests and Abilities.

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

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

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

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. The Policy. The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

- a. The determination of athletic interests and abilities of students;
- b. The selection of sports offered; and
- c. The levels of competition available including the opportunity for team competition.

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

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

- a. The processes take into account the nationally increasing levels of women's interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and

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

4. Application of the Policy—Selection of Sports.

In the selection of sports, the regulation does not require institutions

* Public undergraduate institutions are also subject to the general anti-discrimination provision at § 86.23 of the regulation, which reads in part:

"A recipient * * * shall not discriminate on the basis of sex in the recruitment and admission of

to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

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

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

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

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

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

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

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

5. *Application of the Policy—Levels of Competition.*

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

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

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest

and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

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

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

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

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

6. *Overall Determination of Compliance.*

The Department will base its compliance determination under § 88.41(c) of the regulation upon a determination of the following:

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

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

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

VIII. The Enforcement Process

The process of Title IX enforcement is set forth in § 88.71 of the Title IX regulation, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights

Act of 1964.⁸ The enforcement process prescribed by the regulation is supplemented by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.⁹

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

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

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

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.

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

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate.

⁸ Those procedures may be found at 45 CFR 80.6-80.11 and 45 CFR Part 8.

⁹ *WEAL v. Harris*, Civil Action No. 74-1720 [D. D.C., December 29, 1977].

If the plan is not adequate to correct the violations (or to correct them within a reasonable period of time) the recipient will be found in noncompliance and voluntary negotiations will begin. However, if the institutional plan is acceptable, the Department will inform the institution that although the institution has violations, it is found to be in compliance because it is implementing a corrective plan. The Department, in this instance also, would monitor the progress of the institutional plan. If the institution subsequently does not completely implement its plan, it will be found in noncompliance.

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

IX. Authority

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374, 20 U.S.C. 1681, 1682; sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612; and 45 CFR Part 86)

Dated: December 3, 1978.

Roma Stewart,

Director, Office for Civil Rights, Department of Health, Education, and Welfare.

Dated: December 4, 1979.

Patricia Roberts Harris,

Secretary, Department of Health, Education, and Welfare.

Appendix A—Historic Patterns of Intercollegiate Athletics Program Development

1. Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. During the 1977-78 academic year women students accounted for 48 percent of the national undergraduate enrollment (5,498,000 of 11,287,000 students).¹ Yet, only 30 percent of the intercollegiate athletes are women.²

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

providing twice the number of sports for men as they are for women.³

2. Participation by women in sports is growing rapidly. During the period from 1971-1978, for example, the number of female participants in organized high school sports increased from 294,000 to 2,083,000—an increase of over 600 percent.⁴ In contrast, between Fall 1971 and Fall 1977, the enrollment of females in high school decreased from approximately 7,600,000 to approximately 7,150,000 a decrease of over 5 percent.⁵

The growth in athletic participation by high school women has been reflected on the campuses of the nation's colleges and universities. During the period from 1971 to 1978 the enrollment of women in the nation's institutions of higher education rose 52 percent, from 3,400,000 to 5,201,000.⁶ During this same period, the number of women participating in intramural sports increased 108 percent from 276,167 to 576,167. In club sports, the number of women participants increased from 16,388 to 25,541 or 55 percent. In intercollegiate sports, women's participation increased 102 percent from 31,852 to 64,375.⁷ These developments reflect the growing interest of women in competitive athletics, as well as the efforts of colleges and universities to accommodate those interests.

3. The overall growth of women's intercollegiate programs has not been at the expense of men's programs. During the past decade of rapid growth in women's programs, the number of intercollegiate sports available for men has remained stable, and the number of male athletes has increased slightly. Funding for men's programs has increased from \$1.2 to \$2.2 million between 1970-1977 alone.⁸

4. On most campuses, the primary problem confronting women athletes is

¹ U.S. Commission on Civil Rights, Comments to DHEW on proposed Policy Interpretation: Analysis of data supplied by the National Association of Directors of Collegiate Athletics.

² Figures obtained from National Federation of High School Associations (NFHSA) data.

³ *Digest of Education Statistics 1977-78*, National Center for Education Statistics (1978), Table 40, at 44. Data, by sex, are unavailable for the period from 1971 to 1977; consequently, these figures represent 50 percent of total enrollment for that period. This is the best comparison that could be made based on available data.

⁴ *Ibid.*, p. 112.

⁵ These figures, which are not precisely comparable to those cited at footnote 2, were obtained from *Sports and Recreational Programs of the Nation's Universities and Colleges*, NCAA Report No. 5, March 1978. It includes figures only from the 722 NCAA member institutions because comparable data was not available from other associations.

⁶ Compiled from *NCAA Revenues and Expenses for Intercollegiate Athletic Programs, 1978*.

the absence of a fair and adequate level of resources, services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that are members of both the National Collegiate Athletic Association (NCAA) and the Association for Intercollegiate Athletics for Women (AIAW), the average annual scholarship budget is \$39,000. Male athletes receive \$32,000 or 78 percent of this amount, and female athletes receive \$7,000 or 22 percent, although women are 30 percent of all the athletes eligible for scholarships.⁹

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

Congressional testimony on Title IX and subsequent surveys indicates that discrepancies also exist in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities.¹⁰

5. At several institutions, intercollegiate football is unique among sports. The size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports, both men's and women's. Title IX requires that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity."¹¹ However, the unique size and cost of football programs have been taken into account in developing this Policy Interpretation.

Appendix B—Comments and Responses

The Office for Civil Rights (OCR) received over 700 comments and recommendations in response to the December 11, 1978 publication of the proposed Policy Interpretation. After the formal comment period, representatives of the Department met for additional discussions with many individuals and

⁹ Figures obtained from *AIAW Structure Implementation Survey Data Summary*, October, 1978, p. 11.

¹⁰ 121 Cong. REC. 29791-95 (1975) (remarks of Senator Williams); Comments by Senator Bayh, Hearings on S. 2106 Before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 94th Congress, 1st Session 48 (1975); "Survey of Women's Athletic Directors," AIAW Workshop (January 1978).

¹¹ See April 18, 1979, Opinion of General Counsel, Department of Health, Education, and Welfare, page 1.

¹ *The Condition of Education 1978*, National Center for Education Statistics, p. 112.

² Figure obtained from Association for Intercollegiate Athletics for Women (AIAW) member survey, *AIAW Structure Implementation Survey Data Summary*, October 1978, p. 11.

groups including college and university officials, athletic associations, athletic directors, women's rights organizations and other interested parties. HEW representatives also visited eight universities in order to assess the potential of the proposed Policy Interpretation and of suggested alternative approaches for effective enforcement of Title IX.

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

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

Question No. 1: Is the description of the current status and development of intercollegiate athletics for men and women accurate? What other factors should be considered?

Comment A: Some commentors noted that the description implied the presence of intent on the part of all universities to discriminate against women. Many of these same commentors noted an absence of concern in the proposed Policy Interpretation for those universities that have in good faith attempted to meet what they felt to be a vague compliance standard in the regulation.

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

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

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

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

Comment: Some commentors stated that Part II of the proposed Policy Interpretation "Equally Accommodating the Interests and Abilities of Women" represented an extension of the July

1978, compliance deadline established in § 86.41(d) of the Title IX regulation.

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

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

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

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

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

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

Question No. 4: Is there a basis for treating part of the expenses of a particular revenue producing sport differently because the sport produces income used by the university for non-athletic operating expenses on a non-discriminatory basis? If, so, how should such funds be identified and treated?

Comment: Commentors stated that this question was largely irrelevant because there were so few universities

at which revenue from the athletic program was used in the university operating budget.

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

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

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

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

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

Question No. 6: Are the factors used to justify differences in equal average per capita expenditures for financially

measurable benefits and opportunities fair? Are there other factors that should be considered?

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

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

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

Comment: Many commentators stated that the comparability standard was fair and realistic. Some commentators were concerned, however, that the standard was vague and subjective and could lead to uneven enforcement.

Response: The concept of comparing the non-financially measurable benefits and opportunities provided to male and female athletes has been preserved and expanded in the final Policy Interpretation to include all areas of examination except scholarships and accommodation of the interests and abilities of both sexes. The standard is that equivalent benefits and opportunities must be provided. To avoid vagueness and subjectivity, further guidance is given about what elements will be considered in each program area to determine the equivalency of benefits and opportunities.

Question No. 8: Is the proposal for increasing the opportunity for women to

participate in competitive athletics appropriate and effective? Are there other procedures that should be considered? Is there a more effective way to ensure that the interest and abilities of both men and women are equally accommodated?

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

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

Additional Comments

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

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

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

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

considered acceptable, non-discriminatory reasons for differences in per capita average expenditures.

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

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

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

(3) *Comment:* Many commentators were concerned that the proposed Policy Interpretation neglected the rights of individuals.

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

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

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

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

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

Response: Commentors made this point with regard to § 98.6(c) of the Title IX regulation, which reads in part:

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

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

Several factors enter into this decision. First, the differences between rules affecting men's and women's programs are numerous and change constantly. Despite this, the Department has been unable to discover a single case in which those differences require members to act in a discriminatory manner. Second, some rule differences may permit decisions resulting in discriminatory distribution of benefits and opportunities to men's and women's programs. The fact that institutions respond to differences in rules by choosing to deny equal opportunities, however, does not mean that the rules themselves are at fault; the rules do not prohibit choices that would result in compliance with Title IX. Finally, the rules in question are all established and subject to change by the membership of the association. Since all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve

collectively any wide-spread Title IX compliance problems resulting from association rules. To the extent that this has not taken place, Federal intervention on behalf of statutory beneficiaries is both warranted and required by the law. Consequently, the Department can follow no course other than to continue to disallow any defenses against findings of noncompliance with Title IX that are based on intercollegiate athletic association rules.

(6) *Comment:* Some commentators suggested that the equal average per capita test was unfairly skewed by the high cost of some "major" men's sports, particularly football, that have no equivalently expensive counterpart among women's sports. They suggested that a certain percentage of those costs (e.g., 50% of football scholarships) should be excluded from the expenditures on male athletes prior to application of the equal average per capita test.

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

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

Response: There are two problems with this approach to assessing equal

opportunity. First, neither the statute nor the regulation calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.

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

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

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

First, the regulation states that the selection of sports is to be representative of student interests and abilities (§ 98.41(c)(1)). A requirement that sports for the members of one sex be available or developed solely on the basis of their existence or development in the program for members of the other sex could conflict with the regulation where the interests and abilities of male and female students diverge.

Second, the regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities (§ 98.41(c)). As implied above, Title IX protects the individual as a student-athlete, not as a basketball player, or swimmer.

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

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

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

The role foreseen for the Department under this concept is:

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

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

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

The Department agrees with this group of commenters that the proposed self-assessment and institutional plan is an excellent idea. Any institution that engages in the assessment/planning process, particularly with the full participation of interested parties as

envisioned in the proposal, would clearly reach or move well toward compliance. In addition, as explained in Section VIII of this Policy Interpretation, any college or university that has compliance problems but is implementing a plan that the Department determines will correct those problems within a reasonable period of time, will be found in compliance.

[FR Doc. 79-37945 Filed 12-10-79; 8:45 am]
BILLING CODE 4110-12-M

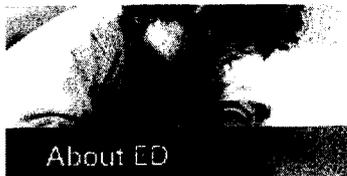
APPENDIX B



U.S. Department of Education
Promoting educational excellence for all Americans



Students Parents Teachers Administrators Performance Reports



About ED

- Overview
- Contacts
- Offices**
 - ED Structure
 - Offices
- Boards & Commissions
- Initiatives
- Publications
- ED Performance & Accountability
- Jobs

Quick Click

Select a Topic

Search ED.gov

GO

Advanced Search

About ED

- Offices
- Publications
- Budget
- Jobs
- Contacts

Press Room

- Fact Sheets
- Speeches
- Secretary Spellings

Help

- A-Z Index
- Site Map
- Technical Support
- File Viewers

Recursos en español

OFFICES

OCR

Office for Civil Rights

- | | |
|----------------------------------|--------------------------------|
| ■ Home | ■ About OCR |
| ■ Programs/Initiatives | ■ Know Your Rights |
| ■ Office Contacts | ■ Prevention |
| ■ Reports & Resources | ■ Reading Room |
| ■ News | ■ Questions and Answers |

Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test

Jan 16, 1996

Dear Colleague:

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

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

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

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

No Child Left Behind
American Competitiveness
Pandemic Flu Preparedness
Higher Education Plan
\$790 Million for College Stud

Related Topics:

- **How to File a Complaint**
- **Topics A-Z**
- **Civil Rights Data**
- **Other Civil Rights Agencies**
- **Recursos de la Oficina Para Derechos Civiles en Español**
- **Resources Available in Other Languages**

Get More!

- ED newsletters
- Teaching resources
- Answers to questions
- Online services
- Web customer survey



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

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

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

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

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways to comply. Opponents of the test assert, therefore, that the test improperly establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title IX because it measures gender discrimination by underrepresentation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

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

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic

provisions are unique in permitting institutions--notwithstanding the long history of discrimination based on sex in athletics programs--to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.)

OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

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

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.

OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex. Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.

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

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

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

Sincerely,

/signed/

Norma V. Cantú

Assistant Secretary
for Civil Rights

Enclosure

Jan 16, 1996

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

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (Title IX), which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, at 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 *Fed. Reg.* 71413 *et seq.* (1979)).¹

The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

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

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

44 *Fed. Reg.* at 71418.

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

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance

with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

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

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

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

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program. The Policy Interpretation defines participants as those athletes:

- 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.²

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

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

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

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

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

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

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the 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 to meet their developing interests and abilities.

By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. 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 at 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.⁴

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

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

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

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

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

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular 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).⁵ For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

At the same time, this flexibility must be used by institutions consistent with Title IX's requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing

nondiscriminatory participation opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.

1. The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation. See 44 Fed. Reg. 71413.
2. Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX.
3. However, under this part of the test an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex. Moreover, under part two an institution has flexibility in choosing which teams it adds for the underrepresented sex, as long as it can show overall a history and continuing practice of program expansion for members of that sex.
4. However, OCR does examine an institution's recruitment practices under another part of the Policy Interpretation. See 44 Fed. Reg. 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit potential student athletes.
5. While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.

[Top](#)

 [Printable view](#)  [Share this page](#)

Last Modified: 03/10/2005

 [FOIA](#) | [Privacy](#) | [Security](#) | [Notices](#)  [Whitehouse.gov](#)  [ExpectMore.gov](#)  [USA.gov](#)  [GovBenefits.gov](#)  [Results.gov](#)