

No. 95-2205

1/26/96

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMY COHEN, et al.,

Plaintiffs-Appellees

v.

BROWN UNIVERSITY, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., prohibits gender-based discrimination by educational institutions receiving federal financial support, including such discrimination in intercollegiate athletics. Pub. L. No. 93-380, 88 Stat. 484, 612 (1974). The United States has major responsibility for the enforcement of Title IX. Federal departments and agencies are charged with the responsibility for promulgating regulations implementing Title IX, and for ensuring that recipients of federal funds comply with the statute and the regulations. See 20 U.S.C. 1682. The issues presented in this case involve the interpretation of Title IX regulations issued by the Department of Education, 34 C.F.R. § 106.41 (1995), and a Policy Interpretation issued by its predecessor agency, the Department of Health, Education, and Welfare (HEW), 44 Fed. Reg.

71,413 (Dec. 11, 1979). This Court's decision may affect the United States' enforcement of Title IX.

STATEMENT OF THE ISSUES

The brief for the United States as amicus curiae will address the following issue:

Whether the Department of Education's regulations and Policy Interpretation applied by the district court to this case are lawful and constitutional.

STATEMENT OF THE CASE

This suit was brought by female student athletes at Brown University alleging that the University's intercollegiate varsity athletic program violated Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. (Title IX). The district court issued a preliminary injunction restoring the women's gymnastics and volleyball teams to their former, fully-funded varsity status. Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992). This Court affirmed. Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993).

Following a lengthy trial on the merits, the district court determined that the University's varsity athletic program does not comply with Title IX. Cohen v. Brown Univ., 879 F. Supp. 185 (D.R.I. 1995). The court ordered Brown to submit a comprehensive plan for complying with Title IX within 120 days, but stayed that portion of the order pending appeal. Cohen, 879 F. Supp. at

214.^{1/} On May 4, 1995, the district court modified that portion of its decision, and ordered Brown to submit a compliance plan within 60 days. On August 17, 1995, the district court rejected the University's compliance plan, and ordered specific relief in its place. The court entered a final judgment on September 1, 1995. On September 27, 1995, the district court denied the University's motion for additional findings of fact and to amend the judgment. The University noticed an appeal on October 26, 1995.

ARGUMENT

THE DEPARTMENT OF EDUCATION'S REGULATIONS
AND POLICY INTERPRETATION, WHICH THE
DISTRICT COURT CORRECTLY APPLIED TO
THIS CASE, ARE LAWFUL AND CONSTITUTIONAL

- A. The Title IX Regulations And Policy Interpretation Require Recipients Of Federal Financial Assistance To Provide Equal Athletic Opportunities To Male and Female Students.

Title IX of the Education Amendments of 1972 prohibits sex discrimination in any "educational program or activity receiving Federal financial assistance * * *." See 20 U.S.C. 1681. Section 902, 20 U.S.C. 1682, directs federal agencies responsible for providing federal financial assistance to educational institutions to create "rules, regulations, or orders of general applicability" to effectuate the "objectives of the statute." The 1974 amendments to Title IX, Pub. L. No. 93-380, 88 Stat. 484 (1974), directed the Department of Education's predecessor

^{1/} An appeal was taken from that decision, but was dismissed because of lack of jurisdiction. Cohen v. Brown Univ., No. 95-1417 (1st Cir. July 18, 1995).

agency, HEW, to issue regulations that would apply to intercollegiate athletic activities operated or funded by recipient institutions. After notice and comment, HEW issued its Title IX regulations on June 4, 1975 (40 Fed. Reg. 24,127),^{2/} and later promulgated a "Policy Interpretation" that complements the regulations. The Policy Interpretation provides a framework for resolving complaints, and gives educational institutions "additional guidance on the requirements of the law relating to intercollegiate athletic programs." See 44 Fed. Reg. 71,413 (Dec. 11, 1979) (final Policy Interpretation).^{3/} The Policy Interpretation was also issued only after providing an opportunity for public comment. See 44 Fed. Reg. 71,414 (1979); 43 Fed. Reg. 58,070 (Dec. 11, 1978) (HEW's Proposed Policy Interpretation).

As an appendix to the Policy Interpretation, HEW published a summary of its findings regarding "Historic Patterns of Intercollegiate Athletic Program Development." 44 Fed. Reg. 71,419. These findings were based on information before

^{2/} Pursuant to a then-applicable requirement, the regulations became effective on July 21, 1975, when they were not disapproved by Congress after they were submitted by the President for congressional review. The regulation established a three-year transition period, which expired on July 21, 1978. See 44 Fed. Reg. 71,413 (Dec. 11, 1979).

^{3/} When Congress dissolved HEW, it transferred its educational responsibilities to the then newly-created Department of Education. See 20 U.S.C. 3411, 3441(a). The Department of Education's current Title IX regulations remain substantially the same as those originally issued by HEW. Compare 34 C.F.R. § 106.41 (1995) (Department of Education's Title IX regulations), with 40 Fed. Reg. 24,142 to 24,143 (June 4, 1975) (HEW's Title IX regulations).

Congress, as well as the agency.^{4/} The summary found that "[t]he historic emphasis on men's intercollegiate athletic programs" had contributed to participation rates for women in intercollegiate sports that were "far below those of men," as well as to differences in "the number of sports and scope of competition offered men and women." Ibid. The summary further found that women athletes in colleges and universities were faced with "the absence of a fair and adequate level of resources, services, and benefits," including scholarships, access to coaching, funding for recruitment, quality and amount of equipment, access to facilities and practice times, publicity, medical training and facilities, and housing and dining facilities. Ibid.

The Department of Education's regulations require educational institutions that operate or sponsor interscholastic, intercollegiate, club or intramural athletics to "provide equal athletic opportunities for members of both sexes." 34 C.F.R. 106.41. In assessing whether an educational institution provides

^{4/} In making these findings, HEW relied in part upon testimony regarding discrimination against women in intercollegiate athletics presented to Congress in 1975, during its consideration of an amendment (eventually rejected) that would have exempted revenue-producing sports from Title IX. See 44 Fed. Reg. 71,419, n.10, citing 121 Cong. Rec. 29,791 to 29,795 (Sept. 23, 1975) (remarks of Sen. Williams); see also 121 Cong. Rec. 29,795 to 29,803.

"equal athletic opportunities," the Department of Education considers several factors.^{2/} The first factor is:

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

Although § 106.41(c) goes on to list nine other factors that enter into a determination of equal opportunity in athletics,^{3/} "an institution may violate Title IX simply by failing to accommodate effectively the interests and abilities of student athletes of both sexes." Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993), cert. denied, 114 S. Ct. 581 (1993).

^{2/} The regulations provide that unequal expenditures for male and female teams do not, alone, necessarily constitute noncompliance, but the Department of Education will "consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex." 34 C.F.R. § 106.41(c).

^{3/} The other nine factors concern "treatment" issues that require an assessment of the following areas (34 C.F.R. 106.41(c)): (1) the provision of equipment and supplies; (2) scheduling of games and practice time; (3) travel and per diem allowance; (4) opportunity to receive coaching and academic tutoring; (5) assignment and compensation of coaches and tutors; (6) provision of locker rooms, practice and competitive facilities; (7) provision of medical and training facilities and services; (8) provision of housing and dining facilities and services; and (9) publicity. Prior to trial, the parties settled the treatment issues as they relate to "equivalence between men's and women's teams voluntarily maintained by Brown at the university-funded levels." See Cohen, 879 F. Supp. at 192-193, 195. However, in its opinion on liability the court found that Brown's program offerings within the two-tiered structure of its varsity program violated the "treatment" aspect of the regulation because more male athletes were being supported at the university-funded varsity level than were female athletes. Id. at 213.

Paragraph 5(a) of the Policy Interpretation states that compliance with the regulation's "effective accommodation" factor. (34 C.F.R. 106.41(c)(1)) is assessed "in any one of the following ways" (emphasis added):

(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 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.

On January 16, 1996, the Department of Education issued a "Clarification Memorandum." The Clarification Memorandum does not change existing standards for compliance in this area; however, it provides further information and illustrative guidelines for assessing compliance under the Policy Interpretation's three-prong test. See Addendum, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (released January 16, 1996). The Clarification Memorandum contains numerous examples on how educational institutions can meet each of the prongs of the three-part test; it also clarifies how Title IX requires the Department to count participation opportunities.

B. The Department of Education's Three-Part Test Provides The Proper Framework For Assessing Title IX Compliance. And Was Properly Applied In This Case.

The district court correctly held that the Department of Education's Title IX regulations are entitled to deference by the federal courts. Cohen, 879 F. Supp. at 197-199. Congress expressly delegated to the Department of Education the authority to create regulations for assessing athletic programs' compliance with Title IX. See Pub. L. No. 93-380, 88 Stat. 612 (1974). In view of Congress's express delegation, the Department's regulations should be accorded "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (federal courts must accord substantial weight "to administrative regulations which Congress has declared shall have the force of law"). This Court has held that the regulations are neither arbitrary nor manifestly contrary to the statute and thus entitled to "controlling weight," and that the Policy Interpretation is entitled to "substantial deference."^{2/} See Cohen, 991 F.2d at 895-897. The district court correctly observed that this Court's legal holding on the appropriate deference due the Department of Education's

^{2/} Granting substantial deference to the Policy Interpretation is particularly appropriate because it was adopted following notice and an opportunity for public comment in compliance with the requirements for the adoption of regulations under the Administrative Procedure Act. 44 Fed. Reg. 71,413; 43 Fed. Reg. 58,070 (Dec. 11, 1978); see 5 U.S.C. 553.

regulations and Policy Interpretation is the "law of the circuit" and is controlling in this case. Cohen, 879 F. Supp. at 193, 197. Every circuit court to reach this issue has also held that such deference is appropriate. Kelley v. Board of Trustees, 35 F.3d 265, 270 (7th Cir. 1994); Roberts, 998 F.2d at 828; Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265, 274-275 (6th Cir. 1994); see also Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa. 1993), aff'd, 7 F.3d 332 (3rd Cir. 1993).^{1/}

1. The district court properly applied prong one.

The district court correctly applied prong one in determining that "participation opportunities" for male and female students at Brown are not provided in numbers "substantially proportionate" to their respective undergraduate enrollments.

a. The court defined "participant" and determined participation opportunities by counting the total number of team members on intercollegiate varsity teams at Brown.^{2/} This

^{1/} Though not challenged in this case, we think that the Department of Education's Clarification Memorandum is also entitled to considerable deference. The proposed clarification was announced to the public (60 Fed. Reg. 51,460 (Oct. 2, 1995)), and sent to over 4,500 interested parties, including most colleges and universities. The Department sought comments from individuals about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX. The Department received comments from about 300 individuals before issuing the memorandum on January 16, 1996.

^{2/} In determining "participation opportunities" under prong one, the district court considered not only opportunities offered by university-funded teams, but also those operated at the donor-funded level. The court found that although donor-funded teams operate at a disadvantage because they must raise their own

(continued...)

interpretation is consistent with Department of Education's interpretation of the Title IX statute. See 44 Fed. Reg. 71,415; Clarification Memorandum at 3 (participants are defined as actual persons who are listed as team members; the number of participants "determine[s] the number of participation opportunities provided by an institution" for purposes of the three-part test).

An alternative assessment of participation opportunity, which we do not support, would account not only for women actually participating on teams, but also any "unfilled athletic spots" on existing women's teams. This broad approach is inappropriate since it would artificially inflate the number of actual athletic participation opportunities provided at an academic institution, without accurately reflecting the extent to which the institution had accommodated the interests of its female students, and thus may be illusory. Counting actual participation opportunities, by contrast, measures real opportunities. For example, where there are female students interested in volleyball and there is no such team, the interests of these female students will not necessarily be met by 15 unfilled slots available on the women's golf team. Similarly,

^{2/}(...continued)

funding to cover expenses, the evidence showed that donor-funded teams do engage in "varsity level" competition, and thus provide equivalent participation opportunities for purposes of analyzing Title IX compliance. 879 F. Supp. at 200-201. The court excluded Brown's club teams from those numbers because there was not adequate evidence that any of Brown's club teams could be considered as regularly offering intercollegiate varsity competition. Ibid.

the court did not count "unfilled athletic slots" as participation opportunities because no student was in fact participating in that slot. Prong one of the three-part test provides schools with a "safe harbor" if students are actually participating in athletics in proportion to their enrollment by gender.

b. Furthermore, determining whether participation opportunity has been provided proportionally to men and women should not be limited to assessing only the chance for an interested person to participate in athletics. Brown, in effect, argues (Br. 23-26) that because it offers all students a "chance" to participate, women's lower participation rates therefore reflect their lesser athletic interest. Thus, Brown claims (Br. 23) that substantial proportionality should be measured against the ratio of interested male and female students, just as Title VII measures the "qualified labor pool." This approach, which was rejected by the district court, is inconsistent with Department of Education's interpretation of the statute in at least three respects.

First, Brown's argument directly contradicts the first prong, which requires that opportunities for male and female students be provided "in numbers substantially proportionate to their respective enrollments," not proportionate interest (44 Fed. Reg. 71,418 (emphasis added)).

Second, an analogy to Title VII in this narrow respect is inappropriate and undercuts the fundamental framework of Title

IX. Job opportunities, unlike competitive sports, are not segregated by sex. The sex separation of sports teams creates the risk that the smaller overall size of the program designated for women will have the effect of discouraging women from participating in sports. As the district court correctly pointed out (Cohen, 879 F. Supp. at 205 (emphasis in original)):

Title VII seeks to determine whether gender-neutral job openings have been filled without regard to gender. Title IX, on the other hand, was designed to address the reality that sports teams, unlike the vast majority of jobs, do have official gender requirements, and this statute accordingly approaches the concept of discrimination differently from Title VII.

Because of an educational institution's inherent discretion in recruiting interested athletes, team size is largely predetermined by the institution's own recruiting practices. This typically gives rise to recruiting only enough women to fill spaces in a program that underrepresents women, thus leaving the institution to defend that underrepresentation based on the level of interest of its recruits. The regulations correctly take actual demand into account in not requiring creation of whole teams for individuals, or creation of teams that won't have other teams to play against.

Third, Brown's approach confuses the showing required under prong one with that required under prong three. Prong one of the Policy Interpretation requires a relatively simple comparison of the gender ratio of participating athletes with the gender ratio of the student population. It is in prong three of the test that gender differences in athletic interests are taken into account.

Under that prong, an institution complies with Title IX even if it does not offer women athletic opportunities at a level that is substantially proportionate to their enrollment, but where the interest and abilities of women are otherwise fully and effectively accommodated by the present program. This third prong recognizes that at some institutions the interest level of female athletes will be below their student enrollment percentage, and effectively below the participation rate of men. But Title IX still requires educational institutions to fully accommodate this lower level of interest and ability, as it may be a by-product of historical discrimination.^{19/} The assessment required in demonstrating student interest is only applicable under the third prong, not under prong one.

c. The district court correctly held that the Department's interpretation of Title IX does not require quotas and that under prong one, Brown's intercollegiate athletic program was not substantially proportionate to its student enrollment. Cohen, 879 F. Supp. at 211. Title IX makes clear that educational institutions are prohibited from "granting preferential or disparate treatment" to women for the strict purpose of curing an imbalance between women's participation in athletics and their

^{19/} See 44 Fed. Reg. 71,419 (HEW concludes that as a consequence of an historical pattern of discrimination against women in intercollegiate athletics, participation rates of women are far below those of men); see also Women's Educational Equity Act of 1973, Hearing Before the Senate Committee on Labor and Human Resources, 93d Cong., 1st Sess. 82 (1973) (Sen. Schweiker raises inquiry on "social mores" that deem all sports "unladylike or tomboyish," and thus discourage female participation).

representation in the overall student body. 20 U.S.C. 1681(b). As the courts of appeals have understood, however, the "substantial proportionality" factor does not amount to a "preference," but merely serves as a "safe harbor for recipients of federal funds." Horner, 43 F.3d at 275; Kelley, 35 F.3d at 271; Roberts, 998 F.2d at 829. "[A] university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining a gender parity between its student body and its athletic lineup." Cohen, 991 F.2d at 897-898; but see Pederson v. Louisiana State Univ., No. CV94-247-A-MI, slip op. at 42-46 (M.D. La. January 12, 1996).

The Department of Education does not interpret the substantial proportionality requirement of prong one to require exact statistical balancing. See 44 Fed. Reg. 71,418; Clarification Memorandum at 4 ("Because this determination depends on the institution's specific circumstances and the size of its athletic program, the [Office for Civil Rights] makes this determination on a case-by-case basis, rather than through use of a statistical test"). Further, prong one is only one of three alternative tests. Noncompliance under this prong does not mean that an educational institution violates the statute, because effective accommodation can be shown in two other ways.

Here, the district court reasonably concluded that the 13.01% differential between female participation in varsity athletics and female representation in the overall undergraduate student body warrants a finding that Brown was not entitled to

the safe harbor under the first prong. See Roberts, 998 F.2d at 829 (court finds that 10.5% disparity in female enrollment and athletic participation is not substantially proportionate).

2. The district court properly applied prong two.

Next, the district court correctly applied the prong two analysis in determining that Brown failed to show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex. The district court found that although Brown expanded its program for women in the 1970s, with the merger of Pembroke College, since 1977 only two women's sports have been added to its intercollegiate varsity program: indoor track in 1982 and skiing in 1994. Cohen, 879 F. Supp. at 211. Moreover, Brown's decision to demote two women's teams from competitive, university-funded status, at a time when women were already underrepresented among varsity athletes, provides further support for the district court's finding of noncompliance with prong two. The district court determined that among the two demoted viable women's teams, one of those teams -- gymnastics -- would have been effectively eliminated from the women's varsity sports program altogether, since the evidence showed that that team would be unable to survive financially without university funds. Cohen, 879 F. Supp. at 212.

Further, the district court stated that "the fact that Brown has eliminated or demoted several men's teams does not amount to a continuing practice of program expansion for women." 879 F.

Supp. at 211. This holding is consistent with the Department of Education's interpretation of the statute. Where educational institutions decide to cut men's sports programs for budgetary reasons, oftentimes women's teams, as well as men's teams, are eliminated. The result is that women become more disadvantaged by the elimination of a women's team despite sufficient interest and ability to sustain a viable team. The Department of Education "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." Clarification Memorandum at 7; see also 44 Fed. Reg. 71,418.

The district court observed that although the level of athletic opportunity available to women at Brown has not historically decreased, it has "remained remarkably steady." 879 F. Supp. at 211. This continuing disparity would not bring an educational institution into compliance under the second prong, which requires a showing of continuing program expansion for members of the underrepresented sex.

3. The district court properly applied prong three.

Finally, an educational institution satisfies prong three by demonstrating that the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program.' The district court correctly ruled that Brown failed to show that women were fully and effectively accommodated by Brown's present varsity athletic

program offerings. Cohen, 879 F. Supp. at 211-213. The district court pointed to a number of instances where Brown had an opportunity to provide intercollegiate status to women's teams that clearly exhibited the interest and capability to compete at varsity level, but failed to do so. Id. at 190-191, 212-213. The court found that women's water polo was maintained at club status even though team members had the interest and ability to operate as a varsity team. Similarly, the court found that Brown's decision to demote women's gymnastics in effect resulted in the elimination of a team whose members had demonstrated interest and ability to support a varsity team through their existing intercollegiate competitive schedule.^{11/} These findings are consistent with prong three, which requires an institution to add intercollegiate teams for the underrepresented sex only where there is sufficient interest and ability to create a team and a reasonable expectation of competition for the team. 44 Fed. Reg. 71,418; Clarification Memorandum at 9 ("If an institution has recently eliminated a viable team, the Office for Civil Rights will find that there is sufficient interest, ability and available competition to sustain an intercollegiate team in that sport unless an institution can provide evidence that interest, ability, or available competition no longer exists").

Brown argues (Br. 48-49) that its current program provides intercollegiate athletic opportunities to women in excess of

^{11/} The court found that women's gymnastics would "cease to exist, within a few seasons, at an intercollegiate varsity level in the absence of university funding." Id. at 212.

their level of interest and ability relative to men. Prong three of the Policy Interpretation directs educational institutions to "fully accommodate" the interests of the underrepresented sex. As this court has explained (Cohen, 991 F.2d at 899):

"The fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender. Rather, the law requires that, in the absence of continuing program expansion * * *, schools either meet benchmark one by providing athletic opportunities in proportion to the gender composition of the student body * * *, or meet benchmark three by fully accommodating interested athletes among the underrepresented sex * * *."

Women are the underrepresented sex in this case, and their interests and abilities were not being fully and effectively accommodated by the University's present program, given the district court's findings that there were female athletes who were interested and able to engage in available intercollegiate competition. As indicated below, infra at pp. 19-21, Brown's argument that Title IX requires it to accommodate the interests of its students only in proportion to the relative interests of men and women would undermine the primary purposes of the statute.

C. The Regulations And Policy Interpretation, As Applied, Are Constitutional.

The district court's ruling does not violate the Equal Protection Clause. As an initial matter, this Court has addressed this issue in this case, and held that the Department of Education's regulations enforcing Title IX do not violate the Constitution. Cohen, 991 F.2d at 900-901; see also Kelley, 35 F.3d at 272. Moreover, while the Policy Interpretation permits

gender classifications by permitting institutions to establish separate athletic programs expressly based on the sex of the participants, clearly Brown is not challenging the constitutionality of permitting separate programs for men and women. Instead, Brown challenges the Department's three-part test. However, the Department uses the three-part test only to ensure that schools do not discriminate against one sex when schools allocate athletic participation opportunities based on sex.

Under the existing standard for reviewing gender classifications,^{12/} the legislative history of Title IX demonstrates that the statute serves the "important governmental objective[]" of ensuring nondiscrimination against women in higher education. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). The statute itself was enacted as a measure to prohibit discrimination against women in higher education, including intercollegiate athletics. Cohen, 991 F.2d at 900-901. See Women's Educational Equity Act of 1973: Hearing Before the

^{12/} Under the current state of the law, Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), is inapplicable to gender-based classifications; the intermediate scrutiny test applies to such classifications. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (the two-part test requires a showing that the classification (1) serves important governmental objectives, and (2) that the means employed are substantially related to the achievement of those objectives). In a brief filed in United States v. Commonwealth of Virginia, No. 94-1941 (S. Ct.), the United States argued that the strict scrutiny standard should be applied to gender-based classifications (U.S. Br. as Petitioner at 33-36). The Supreme Court has not yet issued its opinion in this case. As the discussion in the text illustrates, however, the regulations and Policy Interpretation are constitutional even under the strict scrutiny standard.

Senate Committee on Labor and Human Resources, 93d Cong., 1st Sess. (1973); Women's Educational Equity Act, Part 1, Hearing Before the House Committee on Education and Labor, 93d Cong., 1st Sess (1973); Sex Discrimination Regulations: Hearing Before the House Committee on Education and Labor, 94th Cong., 1st Sess. (1975); Prohibition of Sex Discrimination: Hearing Before the Senate Committee on Labor and Human Resources, 94th Cong., 1st Sess. (1975).

The Policy Interpretation is based upon Congress's findings, as well as findings made by HEW, that there exists a pattern of discrimination against women in intercollegiate athletics. 44 Fed. Reg. 71,419 (despite an increase in women's participation in sports between 1971 and 1976, women athletes confront an "absence of a fair and adequate level of resources, services and benefits"). In March 1992, the NCAA published a Gender-Equity Study^{13/} involving intercollegiate athletics, which revealed the continuing disparity between male and female athletes in rates of participation and funding levels. The study showed that the ratio of male student-athletes to female student-athletes in the NCAA Division I programs is 69% to 31% respectively, where in general the ratio of male students to female students is 49.7% to 50.3%. The average number of male student athletes per institution was 250.10, compared to 111.71 female student-athletes. The average scholarship expense, per institution, was

^{13/} The NCAA surveyed 646 educational institutions for its study. NCAA Gender-Equity Study, Summary of Results (March 1992) at 1.

\$849,130 for male student-athletes, compared to \$372,800 for women. The average recruiting expense for the men's athletic programs was \$139,152, compared to \$28,840 for women's athletic programs at Division 1 schools. NCAA Gender-Equity Study (1992) at Tables 1-2.^{14/} In view of this disparity in women's intercollegiate athletic participation, there exists a need for ensuring that opportunities are made available to women to engage in these activities on an equal basis with men.

The methods for complying with Title IX, as set forth in the three-prong test, provide colleges and universities with a variety of ways to achieve compliance, while ensuring that the means for achieving compliance are substantially related to the achievement of the statute's objectives (Hogan, 458 U.S. at 724). The Department of Education gives educational institutions significant flexibility in complying with the Policy Interpretation.

The Policy Interpretation is part of the regulatory scheme designed to ensure that, where teams are separated by sex, opportunity and treatment remain equal. The Policy Interpretation sets forth three separate ways of showing that an institution does not discriminate based on sex in athletics. Where an institution has been shown not to have substantially proportional participation by the underrepresented sex under

^{14/} See also Diane Heckman, "The Explosion of Title IX Legal Activity in Intercollegiate Athletes During 1992-93: Defining the 'Equal Opportunity' Standard," Vol. 1994 Det. C.L. Rev. 953 (Fall 1994).

prong one, for instance, it will be in noncompliance only where the existing program does not meet either prongs two or three. Moreover, as previously explained (supra at pp. 14-15), the regulations are not enforced in any way that would require statistical balancing. See Clarification Memorandum at 4. The regulations set forth standards for ensuring that students have an equal opportunity to participate in intercollegiate athletics, while also taking into account the circumstances of educational institutions. "In fact, the test is designed to avoid an absolute requirement of numerical equality" by offering three separate ways to achieve compliance. Cohen, 879 F. Supp. at 199; Cohen, 991 F.2d at 900-901; see also Hearing on Title IX of the Educational Amendments of 1972: Hearing Before the Subcommittee on Post Secondary Education, Training and Lifelong Learning of the House Committee on Economic & Educational Opportunities, 104th Cong. 1st Sess. 38 (1995) (remarks by Assistant Secretary of the Office of Civil Rights Norma V. Cantu).^{15/} While the Department of Education gives educational institutions maximum flexibility in achieving compliance, doing so requires continual review of athletic programs by the institutions themselves. As this Court has stated, "the institutions must remain vigilant,

^{15/} On May 9, 1995, Assistant Secretary Cantu testified before Congress about the importance for women to have an equal opportunity to participate in athletics. She stated: "According to the Institute for Athletics and Education, girls who participate in sports are three times more likely to graduate from high school, 80 percent less likely to have an unwanted pregnancy, and 92% less likely to use drugs". 1995 Hearing, supra, at 42.

upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex, * * * until the opportunities for, and levels of, competition are equivalent by gender." Cohen, 991 F.2d at 898 (internal quotations and footnote deleted).

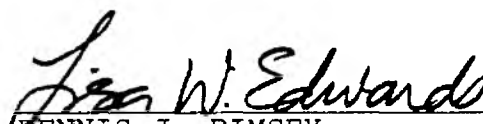
CONCLUSION

For the foregoing reasons, the Department of Education's regulations and Policy Interpretation are lawful and constitutional, and were properly applied by the district court.

Respectfully submitted,

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ADDENDUM



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

JAN 16 1996

Dear Colleague:

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

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

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

OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has

guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

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

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

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

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

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive

institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

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

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

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting institutions--notwithstanding the long history of discrimination based on sex in athletics programs--to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.)

OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide

equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

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

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

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

Finally, several parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however,

that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

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

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

Sincerely,



Norma V. Cantú
Assistant Secretary
for Civil Rights

Enclosure

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.

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.

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

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.

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

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.

example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

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

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

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

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

By 1980, Institution D established seven teams for women.

Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and 1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

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

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

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

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.

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

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.

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.

CERTIFICATE OF SERVICE

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