IV. CHALLENGES TO THE THREE-PART TEST

BREAKING DOWN BARRIERS

Educational institutions that have been sued for noncompliance with Title IX, as well as male plaintiffs who have challenged their schools' decision to eliminate their teams, have argued that the Title IX participation regulation[251] and subsequent policy documents, particularly the Policy Interpretation's three-part participation test (as written and/or as applied), constitute illegal affirmative action and/or quotas in violation of Title IX and the Equal Protection Clause. To date, every federal appellate court addressing the issue has uniformly rejected such allegations.[252] As the First Circuit has stated unequivocally:

> No aspect of the Title IX regime at issue in this case – inclusive of the statute, the relevant regulation, and the pertinent agency documents – mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.[253]

The following sections explain the arguments that rebut the principal challenges that have been raised.

A. QUOTAS ARE INAPPLICABLE IN THE CONTEXT OF ATHLETICS

Arguments that the three-part test imposes quotas or mandates discrimination against men have been held to be wholly misplaced in the sex-segregated context of athletics. This is because, in athletics, it is educational institutions themselves that in the first instance determine how many fixed participation opportunities they will provide to men and how many they will provide to women. As a result, the three-part test simply provides the means for an institution to evaluate whether it has allocated these explicitly sex-segregated opportunities consistent with Title IX's non-discrimination requirements. As the First Circuit stated, the test provides a measure of whether discrimination exists; it in no way requires quotas or affirmative action:

251 34 C.F.R. § 106.41(c)(1) (2006).

252 *See, e.g.*, *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608 (6th Cir. 2002) (holding that university's elimination of the men's wrestling, soccer, and tennis teams did not violate Title IX or the Equal Protection Clause); *Chalenor v. Univ. of N.D.*, 291 F.2d 1042 (8th Cir. 2002) (finding no violation of Title IX when university eliminated men's wrestling team); *Pederson v. La. State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000) (rejecting university's argument that Title IX's proportionality prong requires quotas); *Boulahanis v. Bd. of Regents*, 198 F.3d 633 (7th Cir. 1999) (finding no violation of Title IX or the Equal Protection Clause when university eliminated the men's soccer and wrestling programs); *Neal v. Bd. of Trs. of the Ca. State Univs.*, 198 F.3d 763 (9th Cir. 1999) (finding no violation of Title IX or Equal Protection Clause when university reduced number of spots on men's wrestling team); *Cohen v. Brown Univ.*, 101 F.3d 155, 170, 177 (1st Cir. 1996) (rejecting university's argument that Title IX's three-part test imposes quotas in violation of Title IX or Constitution).

253 *Cohen v. Brown Univ.*, 101 F.3d 155, 170 (1st Cir. 1996) (*Cohen IV*).

> [B]ecause gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways. In providing for gender-segregated teams, intercollegiate athletics programs necessarily allocate opportunities separately for male and female students, and, thus, any inquiry into a claim of gender discrimination *must* compare the athletics participation opportunities provided for men with those provided for women. . . .
>
> Rather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner.[254]

Accordingly, a "talismanic incantation of 'affirmative action' has no legal application" to cases concerning an educational institution's compliance with Title IX's participation requirements.[255]

For these reasons, courts have rejected the argument that the three-part test runs afoul of Section 1681(b) of Title IX, which prohibits requiring schools to grant preferential treatment based on a statistical imbalance between men and women.[256] As the First Circuit has stated, the "three-part test is, on its face, entirely consistent with Section 1681(b) because the test does not require preferential or disparate treatment" for either men or women.[257] The test merely implements the fundamental principle, embodied in Title IX as in other federal anti-discrimination laws, that "a significant gender-based statistical disparity may indicate the existence of discrimination."[258] In recognition of this principle, Section 1681(b) explicitly allows the "consideration . . . of statistical evidence tending to show that . . . an imbalance [between men and women] exists with respect to" participation in educational programs and activities. Nothing in the three-part test does more than what is permitted under the statute, and nothing in it creates any affirmative action plan, much less an unlawful one.

254 *Id.* at 177 (emphasis in original); *see also, e.g., Neal*, 198 F.3d at 772-73 n.8 (stating that because sports teams are gender-segregated, "determining whether discrimination exists in athletics programs *requires* gender-conscious, group-wide comparisons") (emphasis in original).

255 *Cohen IV*, 101 F.3d at 170. The *Cohen IV* court also rejected the argument that women's athletics opportunities should be allocated based on any argument that the relative levels of interest and ability of men and women differ and that the three-part test thus awards women greater numbers of participation slots than those to which they are legally entitled. According to the court, "to 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.* at 179-80; *see also* notes 146-148 and accompanying text.

256 20 U.S.C. § 1681(b) provides that:

> Nothing contained in subsection (a) of this section shall be interpreted to require any education institution to grant preferential or disparate treatment to the members of one sex on account of any imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area. Provided, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipts of the benefits of, any such program or activity by the members of one sex.

Section 1681(b) was designed to "prohibit quotas in university admissions and hiring, based upon the percentage of individuals of one gender in a geographical community," *Cohen IV*, 101 F.3d at 175 (citing the legislative history), not to govern the administration of athletics or other programs within the university. In the first instance, therefore, it is clear that the section is simply inapplicable in the context of athletics.

257 *Cohen IV*, 101 F.3d at 175 (emphasis in original).

258 *Id.* at 171; *accord Pederson*,, 213 F.3d at 878.

B. THE THREE-PART TEST PROVIDES THREE SEPARATE MEANS TO COMPLY WITH TITLE IX'S PARTICIPATION REQUIREMENTS

The federal courts to consider the question have uniformly recognized that the three-part test is flexible and provides schools with three separate and distinct options for complying with Title IX's requirement to provide equal participation opportunities to men and women. As the district court noted in *National Wrestling Coaches Association v. United States Department of Education:*

> [U]nder Title IX, as enforced by DOE, educational institutions select from a range of options when choosing how to comply with the statute and its regulations while meeting their academic and athletic goals with limited resources . . . . Flexibility, as well as First Amendment considerations embodied within the notion of academic freedom, is central to the Title IX statutory and regulatory framework.[259]

Thus, under the three-part test, while schools may, and some do, provide athletic opportunities to male and female athletes in proportion to their representation in the student body, the second and third parts of the test explicitly state that they need not do so if they have made and are making efforts to improve opportunities or are otherwise accommodating the interests of their female athletes. The fact that the first part of the three-part test relies on numerical comparisons thus does not convert that prong – or any other part of the test – into a requirement for quotas or affirmative action. Those comparisons simply represent the "starting point for analysis" of whether an educational institution has met its non-discrimination obligations.[260]

Indeed, the Department of Education itself has stressed that the three-part test provides three separate means to meet Title IX's requirements:

259 *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 263 F. Supp. 2d 82, 87 (D.D.C. 2003) (*Nat'l Wrestling Coaches Ass'n I*).

260 *Cohen IV*, 101 F.3d at 171; *see also Neal*, 198 F.3d at 771 n.7 ("[T]he OCR's three-part [participation] test gives universities two avenues other than substantial proportionality for bringing themselves into Title IX compliance . . . "); *Kelley*, 35 F.3d at 271 ("[T]he [Title IX] policy interpretation does not . . . mandate statistical balancing. Rather the policy interpretation merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance. Even if substantial proportionality has not been achieved, a school may establish it is in compliance by demonstrating either that it has a continuing practice of increasing the athletic opportunities of the underrepresented sex or that its existing programs effectively accommodate the interests of that sex."); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 275 (6th Cir. 1994) (same); *Roberts II*,, 998 F.2d at 829 (same).

> [W]ith respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. All three prongs have been used successfully by schools to comply with Title IX, and the test offers three separate ways of assessing whether schools are providing equal opportunities to their male and female students to participate in athletics. . . .
>
> [E]ach of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. The Department will continue to make clear, as it did in its 1996 Clarification, that "[i]nstitutions have flexibility in providing nondiscriminatory participation opportunities to their students . . . . "[261]

Studies confirm that the flexibility of the three-part test is not merely theoretical and that educational institutions have, in fact, used each of the prongs of the test to comply with Title IX. Between 1994 and 1998, for example, of the 74 OCR cases involving Title IX's participation requirements, only 21 schools, or less than one-third, were found in compliance under the proportionality prong. Over two-thirds of the schools were found by the OCR to be in compliance under the second or third prongs of the test.[262]

C. NONE OF THE PRONGS OF THE THREE-PART TEST REQUIRES CUTS TO MEN'S TEAMS

Attitudes toward Title IX
May 2007

Favor Title IX	Oppose Title IX
82%	15%

Source: Polling by The Mellman Group, May 2007. The Mellman Group conducted a national survey of 1000 likely voters, who were interviewed by telephone May 22-24, 2007. To ensure an unbiased sample, random-digit-dialing techniques were used and respondents screened for being likely voters. The margin of error for this survey is +/-3.1 percent at the 95 percent level of confidence. The margin of error is higher for subgroups.

261 2003 Clarification, *supra* note 35.

262 United States General Accounting Office (GAO), No. 01-128, *Gender Equity: Men's and Women's Participation in Higher Education*, December 2000, at 40.

Courts and the Department of Education have also recognized that none of the prongs of the three-part test requires cuts to men's teams. As the Ninth Circuit has stated, "Every court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into compliance by increasing athletic opportunities for the underrepresented gender . . . or by decreasing athletic opportunities for the overrepresented gender."[263]

Indeed, the Department of Education has made clear that "the elimination of teams is a disfavored practice" to comply with Title IX.[264] The Department's admonition recognizes that if they choose to comply with Prong One, educational institutions may reach proportionality by adding opportunities for women; they need not decrease opportunities for men. And the treatment of men's teams is irrelevant to Prongs Two and Three of the test, the alternatives for schools that do not comply with Prong One. Institutions cannot comply with Prong Two – the showing of a history and continuing practice of expanding opportunities for the underrepresented sex – by cutting or capping men's teams. Similarly, opportunities for men are immaterial to Prong Three, which – assuming the school has *not* offered opportunities to women that are substantially proportionate to their enrollment levels – asks whether the current athletic program nonetheless fully and effectively accommodates women's interests and abilities.

Moreover, courts have repeatedly held that neither Title IX nor the three-part test requires or encourages the cuts to men's teams that have been challenged. As the district court for the District of Columbia noted, "[F]actors external to the regulatory scheme come into play in athletic decision-making, including the desire to achieve a particular competitive level, availability of athletes with high school competition experience, and spectator interest."[265]

It is for these reasons that the United States Court of Appeals for the District of Columbia Circuit recently upheld a district court opinion rejecting the National Wrestling Coaches Association's attempt to sue the Department of Education directly to challenge the three-part test.[266] The courts held that plaintiffs in the case, a coalition of wrestlers whose teams had been eliminated by their schools, lacked standing to sue the Department because the three-part test was not the cause of their injury.[267] As the district court held, the plaintiffs offered nothing to demonstrate that their programs would be reinstated if the three-part test were struck down:

263 *Neal*, 198 F.3d at 769-70 (emphasis in original); *see also Roberts II*, 998 F.2d at 830; *Cohen II*, 991 F.2d at 898 n.15; *Horner*, 43 F.3d at 275; *Kelley*, 35 F.3d at 269; *Boulahanis*, 198 F.3d at 638-39; *Miami Univ. Wrestling Club*, 302 F.3d at 615-16; *Chalenor*, 291 F.3d at 1048-49. If, however, a university *does* choose to reduce opportunities for men as a means of complying with the law, that decision does not offend constitutional principles. *See infra* notes 270-274 and accompanying text.

264 *See* 2003 Clarification, *supra* note 35.

265 *Nat'l Wrestling Coaches Ass'n I*, 263 F.Supp. at 89; *see also Kelley*, 35 F.3d at 269 ("In making his recommendation, [the university's Athletic Director] evaluated all 19 sports offered by the University against seven criteria: (1) whether or not the Big Ten Conference and the National Collegiate Athletic Association sponsored a championship in the sport; (2) the tradition of success of the sport at the University; (3) the level of interest and participation in the sport at the high school level; (4) the adequacy of the University's facilities for the sport; (5) the level of spectator interest in the sport; (6) gender and ethnic issues; and (7) the cost of the sport."); *Boulahanis*, 198 F.3d at 637 ("for universities, decisions about cutting or adding athletic programs are based on a consideration of many factors").

266 *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004) (*Nat'l Wrestling Coaches Ass'n II*).

267 *Id.* at 942.

> Plaintiffs have not alleged, beyond conclusory assertions, that the Three Part Test represents a "substantial factor" in third party decision-making . . . . In fact, plaintiffs appear to concede the point by acknowledging that even if the Court granted the relief requested, plaintiffs and their opponents would still be arguing their respective positions to educational institutions . . . which would, in turn, continue to make discretionary determinations with respect to capping, cutting and adding teams based on a number of factors including those set forth in the 1975 Regulations, as well as factors separate and apart from Title IX and its attendant regulations.[268]

D. INSTITUTIONS' ACTIONS TO PROVIDE EQUAL OPPORTUNITY FOR THEIR MALE AND FEMALE STUDENTS MEET APPLICABLE LEGAL STANDARDS

Even where universities have chosen to reduce men's opportunities to come into compliance with Title IX, courts have uniformly made clear that those decisions do not offend either statutory or constitutional standards. In *Kelley v. Board of Trustees of the University of Illinois*, for example, the Seventh Circuit rejected the claims of male swimmers whose team had been cut by the university. The court upheld the district court's finding that since the men's share of participation opportunities was substantially greater than their share of undergraduate enrollment, the men had suffered no Title IX violation. The court went on to hold that the university had not violated the Equal Protection Clause: "While the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic opportunities, this limited consideration of sex does not violate the Constitution."[269]

[268] *See Nat'l Wrestling Coaches Ass'n I*, 263 F. Supp. 2d at 83-84. Plaintiffs' appeals in the case were fruitless. *Nat'l Wrestling Coaches Ass'n v. Dep't. of Educ.*, 366 F.3d 930 (D.C. Cir. 2004) (affirming dismissal of suit). On June 6, 2005, the United States Supreme Court denied certiorari in the case, 545 U.S. 1104 (2005), thereby leaving undisturbed the courts' conclusion that Title IX could not be blamed for the loss of men's athletic opportunities.

[269] *Kelley*, 35 F.3d at 272.

The courts have recognized that applicable constitutional standards[270] are satisfied whether educational institutions choose to comply with Title IX by reducing opportunities for men or by adding opportunities for women. In *Kelley*, the court rejected the plaintiffs' argument that a university cannot constitutionally comply with Title IX by eliminating men's athletic programs and must instead continuously expand opportunities for the underrepresented gender.[271] The court reasoned as follows:

> [Title IX's] avowed purpose is to prohibit educational institutions from discriminating on the basis of sex. And the remedial scheme established by Title IX and the applicable regulations and policy interpretation are clearly substantially related to this end. Allowing a school to consider gender when determining which athletic programs to terminate ensures that in instances where overall athletic opportunities decrease, the actual opportunities to the underrepresented gender do not. And since the remedial scheme here at issue directly protects the interests of the disproportionately burdened gender, it passes constitutional muster.[272]

[270] Gender-based classifications are subject to heightened scrutiny under the Equal Protection Clause. *United States v. Va.*, 518 U.S. 515, 532-33 (1996). Of course, the three-part test itself is gender neutral, favoring neither men nor women but protecting members of the "underrepresented sex." Policy Interpretation, *supra* note 11, 44 Fed. Reg. at 71,417-18. As the First Circuit has recognized:

> In characterizing Title IX as benefiting *only* women, Brown takes a rather isthmian view of the world at large. After all, colleges that have converted from exclusively female enrollment to coeducational enrollment face situations inverse to Brown's. In such a setting, the men's athletic program may well be underdeveloped, or underfunded, or both, while fiscal retrenchment offers no reprieve. Under these circumstances, Title IX would protect the athletic interests of men as the underrepresented sex.

Cohen II, 991 F.2d at 900 n.17 (emphasis in original). The *Cohen II* court went on to state that "even if we were to assume, for argument's sake, that the [Title IX] regulation creates a gender classification slated somewhat in favor of women, we would find that no constitutional infirmity. It is clear that Congress has broad powers under the Fifth Amendment to remedy past discrimination." *Id.* at 901.

[271] *Kelley*, 35 F.3d at 272.

[272] *Id.*

A similar argument was made in *Boulahanis v. Board of Regents,* in which the male athletes claimed that:

> [W]hen viewed in isolation, the elimination of men's wrestling and men's soccer only served to decrease opportunities for men without providing any additional opportunities for women. As such, the plaintiffs-appellants contend that increased opportunities for women cannot be the important government objective justifying the sex-based discrimination by the University.[273]

Again, the court held that the "elimination of sex-based discrimination in federally-funded educational institutions is an important government objective, and the actions of Illinois State University in eliminating the men's soccer and men's wrestling programs were substantially related to that objective."[274]

For all of the foregoing reasons, arguments that the three-part test mandates quotas or affirmative action, or otherwise violates Title IX or the Constitution, must be rejected.

273 *Boulahanis*, 198 F.3d at 639.

274 *Id.; see also Neal*, 198 F.3d at 770 (finding no violation of Title IX or Equal Protection Clause as a result of university's decision to cap men's athletic opportunities). As the courts have recognized, "a holding that universities cannot achieve substantial proportionality by cutting men's programs is tantamount to a requirement that universities achieve substantial proportionality through additional spending to add women's sports programs. This result would ignore the financial and budgetary constraints that universities face." *Boulahanis*, 198 F.3d at 638.