

THE DEPARTMENT OF EDUCATION PUTS THE TEETH BACK IN TITLE IX BY REVOKING A DAMAGING 2005 ATHLETICS POLICY

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On April 20, 2010, the Department of Education issued a new policy document revoking the harmful 2005 Additional Clarification that weakened schools' obligations under Title IX to provide women and girls with equal athletic opportunities. The Department's "Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three"¹ also provides schools with guidance on how to comply with part three of Title IX's participation test, under which schools can comply if they are fully satisfying the interests of the underrepresented sex.² The 2005 policy permitted schools to claim that they were fully meeting female students' athletic interests based exclusively on the results of an email survey and to interpret any failure to respond to a survey as lack of interest in additional opportunities.

Title IX's Three-Part Participation Test

Title IX requires schools to provide nondiscriminatory sports participation opportunities in one of three ways. Specifically, a school can demonstrate compliance if:

1. The percentages of male and female athletes are about the same as the percentages of male and female students enrolled in the school; *or*
2. The school has a history and continuing practice of expanding opportunities for the gender that has been excluded from sports—usually women; *or*
3. The school is fully and effectively meeting the interests and abilities of the underrepresented gender—usually women—to participate in sports.³

The 2005 Clarification Undermined the Law and Gains for Women and Girls in Sports

The 2005 Clarification created a major compliance loophole by eliminating the requirement under part three for schools to look broadly and proactively at whether they are satisfying women's interests in sports. Instead, the 2005 policy shifted the burden to female students to prove that they are interested in additional opportunities. While many groups, including the National Collegiate Athletics Association (NCAA), publicly criticized the 2005 Clarification and urged its member schools not to use the procedures outlined in it or the accompanying "model survey,"⁴ others have encouraged colleges and high schools to use it.⁵

Before 2005, longstanding policy⁶ required schools to evaluate multiple factors in order to demonstrate full and effective accommodation of female students' interests under part three. The 2005 Clarification eliminated schools' obligations to consider any factors other than responses to surveys when assessing student interest in playing sports. And nothing in the policy took into account the serious limitations in the ability of surveys to accurately measure the interests of women and girls. For example, as courts have recognized, surveys are likely only to provide a measure of the discrimination that women and girls have faced, because interest cannot be measured apart from opportunity; as a

result, interest surveys should not be used to limit athletic opportunities. But the 2005 Clarification gave schools the green light to rely solely on surveys to justify providing women with fewer opportunities.

Given the already widespread non-compliance with Title IX in schools across the country, the 2005 Clarification only added insult to injury. Thirty-eight years after Title IX was enacted, women and girls are still treated like second-class citizens on the playing field. For example, although women in Division I colleges are 53% of the students, they receive only 44% of the sports participation opportunities, 37% of athletic operating dollars, and 32% of the money spent on recruitment.⁷ At the high school level, girls represent only 41% of varsity athletes and face discrimination in facilities, scheduling, and publicity, among other things.⁸

This lack of compliance comes at a high cost to our nation's daughters. Research has proven that increased sports opportunities benefit women and girls in a multitude of ways, from greater academic success and higher graduation rates to responsible social behavior to increased personal skills.⁹ Compared to their non-athletic peers, athletes have higher grades; are less likely to smoke or use drugs; have lower rates of sexual activity and teen pregnancy; and learn important life skills, such as how to work with a team, perform under pressure, and set goals.¹⁰

The 2010 Clarification Restores the Law and Gives Schools Further Guidance on Part Three

The 2010 Clarification reverses and replaces the 2005 document, stating that schools cannot rely solely on surveys to demonstrate that they are in compliance with part three, that a non-response may not be considered evidence of lack of interest, and that institutions bear the burden of demonstrating compliance under part three. In so doing, the Department returns to its policy of evaluating multiple indicators of interest to determine whether a school is fully and effectively accommodating its female students' interests.

Specifically, the Department makes clear that regardless of whether students respond to any interest survey administered by a school, it will look at other indicators of interest, including:

- requests by students to add a particular sport;
- participation rates in club or intramural sports;
- participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the school draws its students; and
- interviews with students, coaches, and administrators.

Some of the indicators of ability and reasonable expectation of competition that the Department will evaluate include:

- the athletic experience and accomplishments 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;
- participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport in which there is interest; and
- competitive opportunities offered by other schools against which the institution competes and those offered by other schools in the relevant geographic area against which the institution does not now compete.

The Department also lists factors to consider in determining how frequently assessments of interests and abilities must be conducted and recommends that schools develop procedures for and maintain documentation from its assessments of interests and abilities, providing examples of the type of documentation that may be needed to demonstrate compliance under part three. The Department reiterates that schools are required to have Title IX coordinators and suggests that these individuals and/or a Title IX committee conduct, evaluate and maintain records from the periodic assessments required under part three.¹¹

The 2010 Clarification restores Title IX by making clear that a school cannot rely solely on the response, or lack thereof, to an email interest survey to claim compliance under part three of the participation test. And it is no longer female students' burden to overcome stereotypes about women in sports. Instead, a school must evaluate multiple factors if it seeks to demonstrate that its athletic program is fully and effectively accommodating the interests of the underrepresented sex.

Now that the Department's policies are back in line with the law, it must vigorously enforce Title IX to level the playing field.

¹ United States Department of Education, Office for Civil Rights, *Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three* (April 20, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html> [hereinafter 2010 Clarification].

² While this new document is focused on intercollegiate athletics, its principles also apply to interscholastic athletics programs. *Id.* at n.8.

³ United States Department of Health, Education, and Welfare, Office for Civil Rights, *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (December 11, 1979).

⁴ See NCAA News Release, "In Honor of Title IX Anniversary NCAA Urges Department of Education to Rescind Additional Clarification of Federal Law," June 22, 2005 (including text of resolution unanimously endorsed by Division I, II and III governance structures), available at http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2005/Announcements/In+Honor+of+Title+IX+Anniversary+NCAA+Urges+Department+of+Education+to+Rescind+Additional+Clarification+of+Federal+Law; The NCAA News, "Title IX clarification again reveals fault line," April 11, 2005, available at http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/2005/association-wide/title+ix+clarification+again+reveals+fault+line+-+4-11-05+ncaa+news.

⁵ See John J. Almond and Daniel A. Cohen, *Navigating into the New "Safe Harbor" – Model Interest Surveys as a New Tool for Title IX Compliance Programs*, 8 Vanderbilt J. Ent. & Tech. L. 1 (2005); The NCAA News, "Advocacy Group Urges Executive Committee to Use Title IX Survey," Aug. 30, 2006, available at http://web1.ncaa.org/web_files/NCAANewsArchive/2006/Association+Updates/advocacy%2Bgroup%2Barges%2Bexecutive%2Bcommittee%2Bto%2Buse%2Btitle%2Bix%2Bsurvey%2B-%2B08-30-06%2Bupdate.html (discussing letter from College Sports Council to NCAA urging use of the survey by schools and citing Almond and Cohen article above).

⁶ United States Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

⁷ NCAA, *2003-04 Gender-Equity Report*, at 12, 25 (Sept. 2006), available at https://www.ncaapublications.com/productdownloads/2003-04_gender_equity_report4e63345f-94e2-4c23-8f7c-7c47fa1a1b0d.pdf.

⁸ See National Federation of State High School Associations (NFHS), *2008-09 High School Athletics Participation Survey* 48 (2009), available at <http://www.nfhs.org/WorkArea/DownloadAsset.aspx?id=3506>; see also National Women's Law Center, "The Battle for Gender Equity in Athletics in Elementary and Secondary Schools," (Feb. 2010), available at <http://www.nwlc.org/pdf/Battle%20final.pdf>.

⁹ Alex Poinsett, Carnegie Corporation of New York, *The Role of Sports in Youth Development* 9 (March 1996).

¹⁰ NFHS, *The Case for High School Activities* 10 (2004), available at <http://www.nfhs.org/content.aspx?id=3262>.

¹¹ 2010 Clarification at pp. 4-8.