

Intercollegiate Athletics Policy: Three-Part Test – Part Three

The following are brief questions and answers related to the Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three (Dear Colleague Letter). These questions and answers are not a formal statement of policy. Readers should consult the Dear Colleague letter for the statement of OCR policy.

1. What is the purpose of the Dear Colleague letter?

Answer: The purpose of the Dear Colleague letter is two-fold. First, it withdraws the following athletics policy documents the Department of Education (Department) issued on March 17, 2005:

- “Additional Clarification of Intercollegiate Athletics Policy: Three Part Test – Part Three” (2005 Additional Clarification);
- “User’s Guide to Student Interest Surveys under Title IX” (User’s Guide); and
- Technical report.

After careful review and consideration, the Department has determined that the 2005 policy documents are inconsistent with the Department’s long-standing Title IX athletics policy and nondiscrimination requirements and do not provide appropriate clarity regarding nondiscriminatory assessment methods, including surveys.

Second, the Dear Colleague letter provides recipients with additional clarification on compliance with part three of the three-part test (Part Three), which is one of the methods that OCR uses to assess whether institutions are providing nondiscriminatory athletic participation opportunities as required by Title IX of the Education Amendments of 1972 (Title IX).

The Dear Colleague letter sets out the multiple indicators OCR evaluates to determine whether there is unmet athletic interest and ability among students who are members of the underrepresented sex in an institution’s athletics program. The letter also provides technical assistance on effective procedures for collecting, maintaining, and evaluating information on students’ athletic interests and abilities, and the nondiscriminatory design and implementation of surveys as one assessment technique under Part Three of the three-part test.

2. What is the three-part test?

Answer: The regulation implementing Title IX requires institutions to provide equal athletic opportunities for members of both sexes and to effectively accommodate students’ athletic interests and abilities.¹ The Department’s 1979 “Intercollegiate Athletics Policy Interpretation” (1979 Policy Interpretation),² published on December 11, 1979, sets out a three-part test that OCR uses as part of determining whether an institution is meeting its Title IX obligations. An institution is in compliance with the three-part test if it meets any one of the following parts of the test:

- (1) The number of male and female athletes is substantially proportionate to their respective enrollments; or

(2) The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or

(3) The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.

The Dear Colleague letter focuses on the third compliance option (Part Three).

3. Has the Department issued additional clarification of the three-part test since 1979 and if so, is it still in effect?

Answer: In 1996, OCR issued the “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” (1996 Clarification), which provides guidance on all parts of the three-part test, including the specific factors that OCR uses to evaluate compliance under Part Three. In 2003, OCR issued a Dear Colleague letter, the “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance” (2003 Further Clarification), which reincorporated the 1996 Clarification’s broad range of factors and illustrative examples on the three-part test, including Part Three.

All Department policies on Part Three, except the 2005 Additional Clarification, User’s Guide and related technical report, remain in effect and provide the applicable standards for evaluating Part Three compliance.

4. What is required for an institution to comply with Part Three?

Answer: As stated in the 1996 Clarification and as discussed in the Dear Colleague letter, OCR considers a multitude of indicators in the context of evaluating the following three questions to determine whether an institution is in compliance with Part Three.

(1) Is there unmet interest in a particular sport?

(2) Is there sufficient ability to sustain a team in the sport?

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

If the answer to all three questions is “Yes,” OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three.

5. Why is the Department issuing clarification about surveys and their implementation if it is withdrawing the 2005 Additional Clarification and User’s Guide?

Answer: The Dear Colleague letter is part of the Department’s efforts, expressed in the 1996 Clarification, to help identify potential nondiscriminatory techniques and strategies for assessing interest. Unlike the 2005 Additional Clarification, the letter makes clear that OCR considers multiple indicators in evaluating compliance with Part Three and will not accept an institution’s reliance on a survey alone, regardless of the response rate, to determine compliance. The letter also makes clear that OCR does not consider nonresponses to surveys as evidence of lack of interest or ability in athletics.

The Dear Colleague letter provides technical assistance on the nondiscriminatory design and implementation of surveys, and clarifies that OCR has not endorsed or sanctioned any particular survey. The letter explains that OCR evaluates the overall weight it will accord the results of a survey by examining the following factors, among others:

- content of the survey;

- target population surveyed;
- response rates and treatment of nonresponses;
- confidentiality protections; and
- frequency of conducting the survey.

6. Must an institution administer a survey in order to comply with Part Three?

Answer: No. An institution is not required to administer a survey to be in compliance with Part Three, nor does OCR evaluate a survey alone in order to determine compliance with Part Three. A survey is only one indicator that may be used as part of an overall assessment of interests and abilities of the underrepresented sex. In addition to the survey, OCR will evaluate the other indicators of interest and ability discussed in the Dear Colleague letter.

7. What is deemed an acceptable response rate for a survey?

Answer: OCR determines the overall weight it will accord the results of a survey on a case-by-case basis. OCR generally accords more weight to a survey with a higher response rate than a survey with a lower response rate if the survey design and administration are consistent with the factors discussed in the Dear Colleague letter including: the survey content, target population surveyed, response rates and treatment of nonresponses, confidentiality protections, and frequency of conducting the survey.

8. Is an institution presumed in compliance with Part Three if it has administered a survey to its students that shows no unmet interests or abilities of the underrepresented sex?

Answer: No. An institution is not presumed to be in compliance with Part Three if the results of a survey it administers show no unmet interests or abilities of the underrepresented sex. As discussed in the answer to the preceding question, OCR will determine the overall weight it will accord the results of a survey based on the nondiscriminatory design of the survey and its administration, along with the multiple factors discussed in the Dear Colleague letter.

9. Can institutions use the prototype survey provided in the 2005 Additional Clarification when assessing student interests and abilities? If not, is there an example of a survey that an institution should use?

Answer: The Dear Colleague letter specifically withdraws the prototype survey instrument that was contained in the User's Guide accompanying the 2005 Additional Clarification because it was inconsistent with the nondiscriminatory assessment methods set forth in the 1979 Policy Interpretation and the 1996 Clarification. OCR has not developed, endorsed, or sanctioned any particular survey. However, for technical assistance purposes, the Dear Colleague letter provides information regarding the components of a nondiscriminatory survey and a few examples of questions an institution could ask in a survey. The examples provided are not comprehensive and should not be considered a "model" survey. In addition, OCR will provide technical assistance to help institutions that are trying to develop a survey or otherwise comply with the Title IX athletic regulatory requirements.

10. Can an institution rely solely on a survey to determine whether students have the potential ability to sustain an intercollegiate team?

Answer: No. Although an institution may choose to obtain information about students' athletic experience using a survey, the Dear Colleague letter makes clear that OCR evaluates whether students have sufficient ability to sustain an intercollegiate team using multiple indicators. OCR does not rely

solely on survey results when determining whether students have the potential ability to sustain an intercollegiate team.

11. Does the Dear Colleague letter apply to interscholastic athletics?

Answer: The Title IX regulation requires recipients (such as elementary, secondary, and postsecondary institutions) to provide equal athletic opportunities in interscholastic, intercollegiate, club, and intramural athletics. Accordingly, although designed for intercollegiate athletics, the general principles of the 1979 Policy Interpretation, and those of the Dear Colleague letter, often will apply to interscholastic, club, and intramural athletic programs.

12. Does Title IX require cutting or capping of athletics teams in order to achieve compliance with Title IX?

Answer: Nothing in Title IX requires the cutting or capping of teams in order to demonstrate Title IX compliance. In fact, as stated in the 2003 Further Clarification, the elimination of teams is a disfavored practice because it is contrary to the spirit of Title IX. When the results of an investigation show noncompliance, OCR's policy in negotiating compliance agreements is to seek remedies that do not involve the elimination of teams.

13. Who should institutions contact if they need technical assistance?

Answer: An institution should contact the OCR enforcement office serving its jurisdiction for technical assistance to comply with the Title IX athletic regulatory requirements. Contact information is accessible on the Department's website at <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm> or by contacting OCR's Customer Service Team at 1-800-421-3481.

¹ 34 C.F.R. § 106.41(c).

² 44 *Fed. Reg.* 71413, 71423 (1979).