

THREE-PART TEST — TEST THREE OCR 2005 AND 2010 POLICIES

SUMMARY/BACKGROUND

Key Points:

- Effective dates: March 17, 2005, and April 20, 2010
- April 20, 2010, policy clarification withdraws the March 17, 2005, policy clarification; the 2005 policy permitted use of a survey in isolation to demonstrate compliance with test three (full accommodation); the 2010 policy rescinds the 2005 policy and reaffirms that multiple factors are reviewed to determine compliance under test three, per the guidance in OCR's 1996 policy clarification for the three-part test.

On March 17, 2005, the Office for Civil Rights (OCR) of the U.S. Department of Education issued an "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test — Part Three." The Additional Clarification was accompanied by a "User's Guide to Developing Student Interest Surveys Under Title IX" and a related technical report entitled "Title IX Data Collection: Technical Manual for Developing the User's Guide." OCR's 2005 Clarification confirms the results of the GAO studies and OCR's own study conducted as background for the Clarification: two-thirds of postsecondary institutions choose test three as their compliance method (full accommodation, in effect, offering every team for the underrepresented sex — nearly always women — for which there is interest, ability, and competition in the institution's normal competitive region). This statement, included for the first time in a publicly disseminated OCR policy document, officially discredits claims that Title IX and/or OCR requires compliance with test one (proportionality). These inaccurate claims were the basis for the May 1995 House Subcommittee hearing and plaintiff's arguments in several court cases concerning the three-part test.

The 2005 Additional Clarification created a Model Survey to assess students' athletic interest and abilities. The Model Survey could be administered by e-mail and permitted lack of response to be interpreted as lack of interest in athletics. In effect, an institution could claim that students' lack of response to an e-mail survey was evidence that sufficient interest did not exist for girls' and women's teams not currently offered. This, in turn, created a presumption of compliance with test three. The 2005 policy was inconsistent with OCR's 1996 Policy Clarification for the three-part test and appeared to be inconsistent with appellate court rulings for the three-part test. The First Circuit Court of Appeals, quoting the district court in a lawsuit filed against Brown University, "[A] survey of interests would follow a determination that an institution does not satisfy prong three, it would not be utilized to make that determination in the first instance." The Ninth Circuit court stated: "Adopting [an] interest-based test for Title IX compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment." (part of ruling in lawsuit filed against Cal State Bakersfield). Members of Congress demanded rescission of the Clarification within weeks of its issuance.

On April 20, 2010, OCR issued "Intercollegiate Athletics Policy Clarification: The Three-Part Test — Part Three" withdrawing the 2005 Additional Clarification and all related documents. The 2010 Policy Clarification confirms that OCR does not consider survey results alone, or non-response to surveys, as evidence of lack of interest or ability under test three. The 2010 Policy Clarification reiterates the 1996 policy for test three. OCR provides a non-exhaustive list for evaluating the interests of the underrepresented sex: requests that an intercollegiate sport be added; participation in club and intramural sports; interviews with students and staff; survey results; and participation in high school

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programs, amateur athletic associations, and community sports leagues. In identifying surveys as one of several components for evaluating interests and abilities, OCR states it will review the following in determining the weight accorded to the survey results: content; target population; response rates and treatment of non-responses; confidentiality protections; and frequency in conducting surveys. The 2010 policy also confirms that, although the 1979 Intercollegiate Athletics Policy Interpretation and subsequent policies (including the 2010 policy) are designed for intercollegiate athletics, the general principles will often apply to interscholastic, club, and intramural programs.