

Title IX Athletics

Q & A

Q *Is the three-part test the same thing as the three-pronged test? And if so, could you explain all of that in language that makes sense? We keep hearing that there are three ways to comply with Title IX, but when asking anyone to explain it, the answers sound like double-speak or government regulation nonsense. Also, is that it, just three tests, or is there more to Title IX athletics than just the three tests? (NCAA and Community College Athletics Administrators)*

A The three-part test is the most important Title IX athletics requirement; it is indeed the same thing as the three-pronged test. However, the three-part test covers just one issue. There are twelve other issues that institutions must meet besides the three-part test.

Title IX of the Education Amendments of 1972 is the federal law prohibiting sex discrimination in education programs, which includes athletics programs. Title IX follows the same general approach as all civil rights laws by requiring equal access and treatment, in effect: 1) equal access to

the program; and 2) equivalent treatment of those who have gained access to the program. The three-part test addresses the all-important issue of “access” to the education program that is intercollegiate or interscholastic athletics. Obviously, the treatment issues do not come into play if someone cannot gain access to the program. So, first and foremost – get the access issue right.

Apart from the three-part test, which comes under the Title IX policy heading of the “accommodation of interests and abilities,” there are 12 treatment issues, which include scholarships, coaching, facilities, recruitment, equipment, scheduling, team travel, tutoring, medical services, housing and dining, support services, and publicity. (See the “Resources” tab of the Good Sports, Inc., website at www.TitleIXSpecialists.com.)

For the all-important issue of equal access to the education program that is intercollegiate or interscholastic athletics, the three-part test provides schools three different ways to comply. Schools only need to meet one of the three tests, and administrators may choose which test the institution meets. Furthermore, the school may change which test it meets from one year to the next, as long as it meets one of the tests. A quick summary for the three tests:

Title IX Athletics Q & A

Test One – proportionality; provide intercollegiate or interscholastic participation opportunities for women and men at rates that are proportionate to their respective rates of enrollment; or

Test Two – continued program expansion for the underrepresented sex; show that opportunities have been added for the underrepresented sex (nearly always girls and women) as their interests and abilities have developed and evolved; or

Test Three – full accommodation of the underrepresented sex; fully accommodate the underrepresented sex by offering every team for which there is sufficient interest and ability for a viable team, and sufficient competition in the geographic areas where the institution normally competes.

The three-part test begins with the premise that if men and women participate in the athletics program at the same rate in which men and women are enrolled at the institution, then compliance is presumed; in effect, test one – proportionality. Much confusion has arisen because opponents and advocates of gender equity have both stated that proportionality is the only way to comply. It is not. If one gender is participating at a rate less than their rate of enrollment – i.e., underrepresented — then school officials have two methods (tests two and three) to show that their actions did not cause the underrepresentation.

Test One

At the collegiate level, meeting test one means that participation opportunities are proportionate to the full-time undergraduate enrollment. At the high school / middle school level, it is simply enrollment. So, if women are 52% of the full-time undergraduate students, then 52% of the intercollegiate athletics participants should be women. The Office for Civil Rights (OCR) of the U.S. Department of Education, which has nationwide enforcement authority for Title IX, has never refined this definition of enrollment beyond full-time undergraduate students. For example, less traditional or older students, or nursing school students who may be predominantly female, are included as part of the enrollment population if they are full-time undergraduate students.

OCR developed a procedure or formula (which OCR does not refer to as a formula) for how close is close enough between rates of participation and rates of enrollment to meet the “substantial proportionality” language of the Title IX policy. The formula was outlined in OCR’s 1996 Policy Clarification for the three-part test. Without belaboring a lengthy explanation here, the formula tolerates about a 0.5 to 2.0 percentage points difference between enrollment and participation rates for the very largest of collegiate and high school athletics programs, to as much as an 18.0 percentage points difference at the smallest of programs, which are likely to be community college or middle school programs where only one team each is offered to women and men or boys and girls.

Title IX Athletics Q & A

For example, if women are 52.0% of the full-time undergraduate enrollment at a university with a very large program accommodating 800 or more student-athletes, then OCR's formula may tolerate only a 1.5 percentage points difference or less; this means that to meet test one, women's participation in intercollegiate athletics should be between 50.5% and 53.5% to comply with OCR's formula and meet test one – proportionality. A mere 1.5 percentage points difference for very large programs with two dozen or more teams is unlikely to accommodate the natural fluctuations that may occur from one year to the next in any team's participation. The result — athletics administrators must manipulate participation via “roster management” to meet OCR's standard for test one.

In particular, OCR's formula has a very narrow tolerance for the largest of high school programs, some of which may offer 45 or more teams with over 1,000 interscholastic athletics participants. Title IX considers not just varsity teams, but also junior varsity, freshmen, “B” teams, etc., as interscholastic participants. Furthermore, at the high school level, athletes are more likely to participate on more than one team, and those athletes are counted each time they participate on a team. In such cases, OCR's formula may tolerate only a 1.0 percentage point difference between enrollment and participation rates, and in some cases, even less than 1.0 percentage points.

The most challenging part of the analysis under test one is at the collegiate level, and it is in determining who to count as participants. Counting participants at the secondary education level is infinitely less complicated.

Test Two

Test two applies only if students of one sex are underrepresented. Again, it is nearly always girls and women who are underrepresented in the athletics program; thus, the institution can meet test two by showing that it has added opportunities for women as their interests and abilities have developed. This usually means adding a women's team or teams. In some cases, program expansion can also mean adding opportunities on existing teams, but only if those are real opportunities where athletes are getting coaching and practice and not just names on a squad list. While many institutions met test two in the late 1970s and early 1980s, it is unusual for schools to meet test two in the 21st century. Studies have shown that only about six percent of the collegiate programs may be meeting test two.

Unfortunately, OCR has not developed any standards for how many opportunities must be added or in what time frames before a school can be judged to be meeting test two. The most useful guidance issued by OCR is contained in their 1996 Policy Clarification for the three-part test, in which they provide some examples of institutions meeting test two. In an attempt to provide some idea to school officials, we at Good Sports, Inc., have advised that institutions that have increased participation for girls and women by 25% in the last five years are more likely to be judged as meeting test two. This is not, nor should it be interpreted, as a formal compliance standard. Rather, it is a scenario that in our experience is more likely to fit those programs likely to be meeting test two – program expansion.

Title IX Athletics Q & A

Test Three

Studies have shown that test three is the compliance method chosen most often at the collegiate level. To meet test three, an institution must offer every team for the under-represented sex (again, nearly always girls and women) for which there is sufficient interest and ability to form a team, and sufficient competition for that team in the institution's normal competitive region. These factors of sufficient interest, ability, and competition must exist before a school is required to add a team under test three. Often, it is lack of sufficient competition in the institution's normal competitive region that relieves an institution of an obligation to add a team under test three.

At the collegiate level, determining that there is enough interest for a team means evaluating several indicators of interest, such as interest levels in on-campus club and intramural programs, and even participation in elective physical education activity courses, particularly for advanced skill levels. Participation in high school programs in areas where coaches recruit and in states from where the majority of students matriculate to the institution is also reviewed, along with participation in community or Amateur Athletic Union programs. Lastly, any survey of student interests may be considered as well. If evaluation of all of these programs and survey results suggests sufficient interest and ability for a team, then the final factor is determining sufficient competition in the institution's normal competitive region. Again, lack of available competition in the institution's normal competitive region is often why institutions are able to meet test three, even though women are underrepresented in the program. Unfortunately, identifying the institution's normal competitive region involves judgment; OCR has provided only general guidance that this region is the geographic area in which the institution's athletes primarily compete. This geographic region includes institutions against which the school may not now compete. To provide at least some guidance, we at Good Sports, Inc., suggest, in general, that institutions compute the one-way miles to each regular season away event for all teams. At that point, the mileage radius in which about 85% or more of the trips occur can be a reasonable indicator of the school's normal competitive region. This 85% approach is a gauge, which we suggest from decades of experience in reviewing athletics programs. There can be exceptions to this approach, and 85% should not be regarded as a formal requirement or policy.

The three-part test was adopted as policy in OCR's 1979 Intercollegiate Athletics Policy Interpretation and comes under the Title IX regulatory language of the "accommodation of interests and abilities." Failure to comply with the three-part test continues to be a common violation of the federal civil rights law that is Title IX. (The Title IX regulation at 34 C.F.R. § 106.41(c)(1); and OCR's 1979 Intercollegiate Athletics Policy Interpretation at (C), pages 71417-71418.)

