

Title IX Athletics

Q & A

Q *We hate to say it, and we hate to ask, but the fact is, we have too many teams.*

We need to cut more than just one or two teams, and we need to cut women's teams in addition to men's teams. We don't know yet which teams we will be cutting, but we are certain that we want to stay at Division I. What is your best advice for staying in compliance with Title IX when we make these cuts?
(NCAA Senior Woman Administrator)

A Not that it is any consolation, but we hate getting this question as much as administrators hate asking it. And, we have gotten this question a lot in the last few years with the economic meltdown. As consultants, we never have and never will recommend that anyone discontinue a team. Nevertheless, we assist institutions in determining how to do just that when asked to explain all of their compliance options. We are all educators who recognize that the more opportunities for students, the better, so reducing opportunities is unpleasant all around.

In short, when an institution is cutting multiple teams for both women and men, the only way to comply for participation opportunities is test one (proportionality) of the three-part test. In achieving test one

compliance under these circumstances, we suggest getting as close to exact proportionality as possible. But, let's start at the beginning and put the three-part test in context.

BACKGROUND

Title IX of the Education Amendments of 1972 is a federal civil rights law prohibiting sex discrimination in education programs, including athletics programs, that receive federal funds (June 23, 2022, marked the 50th anniversary of Title IX). Civil rights laws have two basic requirements: equal access; and equivalent treatment of those who have gained access. The Title IX athletics policies follow this same pattern. The equal access requirement for athletics programs is addressed by an issue labeled as the "accommodation of interests and abilities." Within that issue, there is a three-part test for participation opportunities and a two-part test for levels of competition. The three-part test addresses the number of participation opportunities and the sports offered; the two-part test is designed to prohibit institutions from, for example, offering a real intercollegiate athletics program to men, and a recreational level quality intercollegiate program to women.

The three-part test is truly the access issue. Apart from the three-part test and two-part test under the "accommodation of interests and abilities," there are 12 treatment issues for those who have gained access, which are:

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athletic scholarships, equipment, scheduling, team travel, tutoring, coaching, facilities, medical services, housing and dining services, publicity, support services, and the recruitment of student-athletes. The treatment issues are irrelevant if someone cannot gain access to the program. So, first and foremost – get the access issue right. (See the “Handbooks” and the “Resources” tabs of the Good Sports, Inc., website at www.TitleIXSpecialists.com for details.)

THE THREE-PART TEST

The three-part test provides schools three different ways to comply when offering participation opportunities in athletics programs. Schools only need to meet one of the three tests, and administrators may choose which test the institution meets. Also, 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:

TEST ONE **proportionality**

provide intercollegiate or interscholastic participation opportunities proportionate to enrollment; or

TEST TWO **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**

fully accommodate the underrepresented sex by offering every team for which there is sufficient interest and ability for a viable team, and sufficient competition where the institution normally competes.

TEST ONE

If an institution chooses to comply with test one (proportionality), it must offer participation opportunities for women and men at rates proportionate to their respective rates of enrollment as full-time undergraduate students. If women are 52% of the full-time undergraduate students, then about 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, developed an analysis for determining how close is close enough between rates of participation and rates of enrollment to meet the “substantial proportionality” language of the Title IX policy. This analysis was outlined in OCR’s 1996 Policy Clarification for the three-part test. Basically, if the number of women (assuming women are underrepresented) to be added to achieve exact proportionality is less than the average number of women per team, then rates of participation are close enough to rates of enrollment to meet test one.

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For example, women are 52.0% and men are 48.0% of the full-time undergraduate enrollment. There are 200 women (50.0%) and 200 men (50.0%) of the 400 total athletes participating in the intercollegiate athletics program. Thus, there is a 2.0 percentage points difference between rates of enrollment and rates of participation (52.0% – 50.0% for women, or 50.0% – 48.0% for men). Since women participate at a rate (50.0%) less than their rate of enrollment (52.0%), OCR's analysis is applied to the women's program. Women have ten teams, thus, the average team size for women is 20 athletes (200 divided by 10). The number of women to be added to the program to achieve participation exactly proportionate to enrollment is 17. In effect, 200 women plus 17 = 217; 217 women plus 200 men = 417; 217 women of 417 total participants is 52.0%, which matches women's enrollment of 52.0%. Because women's average team size – 20 – is greater than the number of women to be added to achieve exact proportionality – 17 – women's current participation of 50.0% is considered close enough to women's enrollment of 52.0% to meet test one. In effect, the current 2.0 percentage points difference between rates of participation and rates of enrollment would be judged substantially proportionate and compliant with test one per OCR's policy.

To carry this example further, if the number of women to be added to the program to achieve exact proportionality is greater than women's average team size, then current participation would be judged as not close enough to enrollment to meet test one. Using the same enrollment and overall participation numbers, a difference of only a handful of participation opportunities can determine compliance or noncompliance with OCR's policy. For example, rates of enrollment are 52.0% women and 48.0% men. Women are 195 and men are 205 of 400 total intercollegiate athletes; women are 48.75% (195 divided by 400) and men are 51.25% (205 divided by 400) of the participants. Thus, there is a 3.25 percentage points difference between rates of enrollment and rates of participation (52.0% – 48.75% for women, or 51.25% – 48.0% for men). There are ten women's teams, so women's average team size is 20 (195 ÷ 10 = 19.5, rounded to 20). The number of women to be added to the program to achieve participation exactly proportionate to enrollment is 27. In effect, 195 women plus 27 = 222; 222 women plus 205 men = 427; 222 women of 427 total participants is 52.0%, which matches women's enrollment of 52.0%. Because women's average team size – 20 – is less than the number of women to be added to achieve exact proportionality – 27 – women's current participation of 48.75% is not close enough to women's enrollment (52.0%) to meet test one.

If the institution in these examples chooses test one (proportionality) as its compliance method, then minor differences in participation numbers will determine compliance or noncompliance. If women's and men's participation were exactly proportionate to enrollment rates of 52.0% women and 48.0% men, then women would be 208 (52.0%) and men would be 192 (48.0%) of 400 total participants.

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As shown in the examples above, compliance is still achieved if women are 200 (50.0%) and men are 200 (50.0%) of the 400 total athletes. However, if women are 195 (48.75%) and men are 205 (51.25%) of the 400 total athletes, that does not comply with test one. Thus, a difference of only five more athletes in the women's program and five fewer athletes in the men's program can determine whether an institution complies or does not comply with federal civil rights law. The difference between exact proportionality (208 women) and noncompliance (195 women) is only 13 more female participants and 13 fewer male participants, which can easily represent natural fluctuations in participation from one year to the next. Consequently, for institutions choosing to comply with test one, OCR's policy requires frequent monitoring to ensure compliance.

For the institution choosing test one, but not currently meeting the standard, compliance options include: "roster management," adding teams, discontinuing teams, or a combination of all of these actions. Roster management is a term used by athletics professionals for adding or cutting opportunities on existing teams. If women are underrepresented, walk-ons for women's teams may be retained, while walk-on athletes for men's teams are cut; this may achieve participation rates proportionate to enrollment rates without adding or cutting teams. This roster management approach is acceptable if participation numbers are not artificially inflated. For example, having 50 participants on a women's tennis team where many have limited practice opportunities and very limited coaching is likely unacceptable. Additionally, this author suggests avoiding multiple counts of individual athletes, such as for track and cross country, to a much greater extent for women's teams than for men's teams. Such practices might be viewed as conflicting with the intent of the Title IX policy. An institution that can combine the addition of a team or teams with roster management measures might be able to avoid discontinuing teams.

If an institution chooses not to comply with test one, then there are two other methods for complying with Title IX even though students of one gender are underrepresented: test two (program expansion); and test three (full accommodation) of the underrepresented sex.

TEST TWO

Test two applies only if students of one sex are underrepresented, and again, it is nearly always women who are underrepresented in the athletics program; thus, the discussion herein assumes that women are underrepresented. An institution can meet test two by showing that it has added opportunities for women as their interests and abilities have developed and evolved. This usually means adding a women's team or teams. 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

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about six percent of the collegiate programs may be meeting test two. Unfortunately, OCR has not developed any standards for the number of opportunities that 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 OCR provides 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 women's participation 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 reflects four-plus decades of experience in analyzing athletics programs for compliance with test two – program expansion.

TEST THREE

An institution that chooses to meet test three must offer every team for women (assuming women are the underrepresented sex) 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. All three factors of sufficient interest, ability, and competition must exist before a school is required to offer a team to meet test three.

At the collegiate level, determining interest means evaluating: on-campus sports offerings and participation in an institution's club, intramural, recreation, and elective physical education programs; any feeder programs such as high school and community programs; and the results of any assessments of interest. 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. OCR has provided only general guidance for identifying an institution's normal competitive region, stating 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. Thus, identifying the institution's normal competitive region involves judgment. To provide at least some guidance, we at Good Sports, Inc., suggest that institutions compute the one-way miles to each regular season away event for all teams. Then, identify the mileage radius in which about 85% or more of the trips occur. This can provide a gauge for an institution's normal competitive region. There can be exceptions to this approach, and 85% is not, nor should it be interpreted, as a formal compliance standard or policy. Again, it is a suggestion based on four-plus decades of experience regarding compliance with test three – full accommodation.

Often, it is lack of sufficient competition in the institution's normal competitive region that enables an institution to claim compliance with test three, and relieves the institution of an obligation to add a team. Studies have shown that about two-thirds of the collegiate programs are meeting or attempting to meet test three.

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DISCONTINUING TEAMS

Cutting teams should be done with great caution. For the institution that currently meets test one, cutting a team for either men or women is likely to create compliance problems, unless the institution discontinues a team for both men and women. Beyond that, some roster management may be necessary to stay within the parameters of OCR's policy.

For the institution not in compliance, but that chooses to meet test one, there are the following options: 1) add teams for the underrepresented sex (nearly always women); 2) discontinue teams for the overrepresented sex (nearly always men); 3) adjust participation on existing teams to resolve some or all of the disparity (roster management); or 4) combine some or all of these options.

Test two (program expansion) involves adding teams and/or adding opportunities on existing teams for the underrepresented sex. An institution that eliminates a team or teams for the underrepresented sex is, clearly, not expanding opportunities. Consequently, cutting a viable women's team (assuming women are underrepresented) all but eliminates any possibility of meeting test two (unless the institution is simultaneously adding other women's teams). (In those very rare circumstances when men are underrepresented in the athletics program, then cutting a men's team would not meet test two, as this would be reducing opportunities, not expanding them, for the underrepresented sex.)

Test three (full accommodation) means offering every team for the underrepresented sex for which there is sufficient interest and ability for a viable team and sufficient competition in the institution's normal competitive region. If women are underrepresented, then cutting an existing women's team nearly always means that the institution is no longer meeting test three (rare exceptions are possible if there is suddenly insufficient competition in the institution's normal competitive region, for example, as a result of the pandemic). Cutting a team for the overrepresented sex (most often men) may not create a compliance concern, unless men become underrepresented in the program to where the institution does not meet test one.

In short, women are underrepresented in the majority of athletics programs. Apart from very rare exceptions, cutting a women's team means the institution is no longer meeting test two (program expansion) or test three (full accommodation). Consequently, test one (proportionality) is the only compliance option left. Thus, an institution cutting a women's team will likely have to cut one or more men's teams to comply with test one. Once those teams are discontinued, the end result must be participation proportionate to enrollment. To eliminate compliance questions, we recommend getting as close to exact proportionality as possible after discontinuing the teams.

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NOTES

A challenging part of determining test one compliance is identifying who to count as participants. See the Title IX Intercollegiate and Interscholastic Handbooks on the Good Sports, Inc., website at www.TitleIXSpecialists.com for a list of those athletes to count and not count.

Title IX of the Education Amendments of 1972 is the statute written by the U.S. Congress. The Title IX regulation (1975), written by OCR employees, implements the statute and provides greater specificity. OCR has the authority to develop policy on the regulations it enforces, and issued an Intercollegiate Athletics Policy Interpretation (1979), and a Policy Clarification on the three-part test (1996); both remain current policy. The cites are:

The Title IX statute is at 20 U.S.C. § 1681 *et seq.* (20 United States Code section 1681) and became law June 23, 1972.

The Title IX regulation is at 34 C.F.R. (Code of Federal Regulations) Part 106. Section 106.41(c)(1) addresses the accommodation of interests and abilities. The regulation went into effect July 21, 1975.

The Intercollegiate Athletics Policy Interpretation was finalized on December 11, 1979, and is at 44 *Fed. Reg.* (Federal Register) 71413 *et seq.* The Policy Interpretation elaborates on the regulatory requirements at Section 106.41(c)(1) regarding the accommodation of interests and abilities by creating the three-part test and two-part test.

The “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” was issued by OCR on January 16, 1996, and includes OCR’s policy for how close is close enough between enrollment and participation rates to meet test one of the three-part test. OCR’s intended policy for how close is close enough, as outlined herein, has been (in the opinion of this author) misinterpreted by the Sixth Circuit Court of Appeals in the case of *Balow, et al., v. Michigan State University, et al.*, No. 21-1183, decided and filed February 1, 2022. See the article entitled: “Test One – How Could the Courts Get It So Wrong” under the “Q & A” tab on the Good Sports, Inc., website at www.TitleIXSpecialists.com.

The full text and this author’s summary of the 1972 Title IX statute, the 1975 Title IX regulation, the 1979 Policy Interpretation, and the 1996 Policy Clarification on the three-part test are at the “Resources” tab at www.TitleIXSpecialists.com.