

School Athletics Equity Act Summary Report



**New Mexico Public Education Department
December 2014**

TABLE OF CONTENTS

Background.....	2
Title IX Data Submitted.....	4
School Athletic Equity Act Data Submitted.....	9
Recommendations on How to Increase Gender Equity in Athletics.....	11
Resources	12
Appendices	13

Appendix A: PED Rule—6.13.4 NMAC: Governing Gender Equity in Participating in Interscholastic Sports

Appendix B: United States Department of Education, Office of Civil Rights, Dear Colleague Letter, April 20, 2010

BACKGROUND

The *School Athletics Equity Act* (SAEA or the Act) (CS/HB 432, or Laws 2009 Chapter 178) was passed in 2009. The Act requires each public school that has an athletic program for grades seven (7) through twelve (12) to annually submit prescribed data and a Title IX Assurance Form document to the Public Education Department (PED). In order to comply with the Act, schools that have an athletic program must collect and input data annually for submission to the PED (See also 6.13.4 NMAC (Governing Gender Equity in Participation in Interscholastic Sports). This rule can be accessed at the following link:

<http://www.nmcpr.state.nm.us/nmac/parts/title06/06.013.0004.htm>.

The SAEA data requirements include that (See Appendix A: PED Rule 6.13.4 NMAC: Governing Gender Equity in Participation in Interscholastic Sports for specific data requirements):

1. Beginning August 31, 2011, the PED collects data from schools concerning total enrollment; enrollment by gender; number of students participating in athletics; athletic participation by gender; number of boys' and girls' teams by sport and by competition level; and specific information pertaining to athletic directors, coaches, and other school personnel.
2. A Title IX Assurance Form, signed every year and submitted to the local board of education or governing body, is submitted to the PED.
3. Beginning August 31, 2012, the PED collects from schools a detailed accounting of the funding sources that are used to support the schools' athletic programs and how those funds are allocated. Schools must include information related to benefits and services to each team, including information regarding equipment, uniforms and supplies, practice and game schedules, facilities access, and scholarship assistance.

The 2012 amendment (HB 161), effective May 16, 2012, eliminated certain reporting requirements. Additionally, for school athletics programs in grades seven (7) and eight (8), the requirements for accounting of funding sources were eliminated. The SAEA was amended as follows:

- The reporting for total enrollment was changed to reflect an average of the second and third reporting dates.
- "Other school personnel" was eliminated from the reporting requirements and replaced with "other athletic program staff."
- "Seasonal" coaches was eliminated and replaced with "volunteer" coaches.
- The "other athletic staff-to-athlete ratio" was eliminated from reporting requirements.

- Grades seven (7) and eight (8) were eliminated from the requirements for accounting of funding sources.
- Expenditures from “individual teams” was changed to expenditures from “athletic programs” for each school.
- Equipment and supplies were eliminated from the reporting of replacement schedules.
- “Assistance in obtaining scholarships” was eliminated from the required data.

The Act, and subsequent amendment, requires two phases of reports from public schools, for grades 7 to 12. The first of the two phases was due August 31, 2011, and the second phase has been ongoing. The first of these reports was due August 31, 2012, ***and subsequent reports are due each year thereafter, no later than August 31st.***

During the first phase of reporting (2011), the PED entered into a Memorandum of Understanding (MoU) with the New Mexico Activities Association (NMAA), for the NMAA to develop a format for the collection and submission of the data required from their member schools. For the second and subsequent phases (2012, 2013) of the reporting, all submissions were sent directly to the PED.

For the 2012–2013 and subsequent submissions, the PED accepted Title IX Assurance Forms through the Web-EPSS collection system. The SAEA submissions were submitted electronically through a PED-established Athletic Equity database. Submission templates were modified from previous years in order to improve the data entry process. The revised collection database prototype was piloted with select sites during the month of July, 2013. Feedback from the pilot assisted the PED in ensuring that the new database would be both user friendly and, ultimately, less time-consuming for future submissions.

A benefit of the PED-established Athletic Equity database was that it was designed to assist public schools and local and state charter schools in the required data submission elements of the Act by streamlining the electronic submission process. **Select data fields, based on submissions in 2013, were automatically populated allowing the user to simply modify those data elements.**

TITLE IX DATA SUBMITTED

An Explanation of Why Assurance Must Be Provided

The SAEA, Section 22-31-1 to 22-31-6 NMSA 1978, generally applies to schools with an athletics program for grades 7–12, although certain provisions apply only to grades 9–12. The Act implements state-monitoring and district-data-reporting provisions related to the federal Public Law 92-318, Title 9 of the Education Amendments of 1972 which is codified at [20 U.S.C. 1681](#).

Title IX provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...”

New Mexico PED’s rule, [6.13.4 NMAC, Governing Gender Equity in Participation in Interscholastic Sports](#), that reflects the annual assurance requirement of [Section 22-31-5, NMSA 1978](#) of the Act, requires public schools, “no later than August 31st of each year, to submit an assurance of compliance with Title IX to its local school board or governing body and provide a copy to the department.” The PED interprets that this assurance applies to any school that offers instruction in any combination of grades 7–12, where athletic programs are offered to student in any combination of those grades.

Districts and state charter schools providing Title IX assurances indicated compliance with the following 10 key areas of Title IX: 1.) athletics under Title IX, 2.) access to higher education, 3.) career education, 4.) education for pregnant and parenting students, 5.) employment, 6.) learning environment, 7.) math and science, 8.) sexual harassment education, 9.) standardized testing, and 10.) technology.

Failure to Provide Assurance to the New Mexico PED

According to Section 22-31-5, NMSA 1978: “The Department shall publish, in a newspaper of general circulation in the state or on a publicly accessible web site, a list of public schools that fail to submit the assurance of compliance with Title IX.” The Act does not permit the PED to waive this assurance-filing requirement to extend the August 31st deadline.

Public School Districts

Submission of Title IX Assurance Forms by Public School Districts

DISTRICT	RECEIVED	APPROVED	DISTRICT	RECEIVED	APPROVED	DISTRICT	RECEIVED	APPROVED
Alamogordo Public Schools	x	x	Elida Municipal Schools	x	x	Jemez Valley Public Schools	x	x
Animas Public Schools	x	x	Espanola Public Schools	x	x	Melrose Municipal Schools	x	x
Artesia Public Schools	x	x	Estancia Municipal Schools	x	x	Mesa Vista Consolidated Schools	x	x
Aztec Public Schools	x	x	Eunice Public Schools	x	x	Mora Independent Schools	x	x
Belen Consolidated Schools	x	x	Farmington Municipal Schools	x	x	Mountainair Public Schools	x	x
Bloomfield Schools	x	x	Floyd Municipal Schools	x	x	Portales Municipal Schools	x	x
Capitan Municipal Schools	x	x	Fort Sumner Municipal Schools	x	x	Quemado Independent Schools	x	x
Carlsbad Municipal Schools	x	x	Gadsden Independent Schools	x	x	Questa Independent Schools	x	x
Carrizozo Municipal Schools	x	x	Grady Municipal Schools	x	x	Reserve Independent Schools	x	x
Central Consolidated Schools	x	x	Grants/Cibola County Schools	x	x	Rio Rancho Public Schools	x	x
Chama Valley Independent Schools	x	x	Hagerman Municipal Schools	x	x	Roy Municipal Schools	x	x
Cimarron Municipal Schools	x	x	Hatch Valley Public Schools	x	x	Ruidoso Municipal Schools	x	x
Clayton Municipal Schools	x	x	Hobbs Municipal Schools	x	x	San Jon Schools	x	x
Cloudcroft Municipal Schools	x	x	Hondo Valley Public Schools	x	x	Santa Rosa Consolidated Schools	x	x
Clovis Municipal Schools	x	x	House Municipal Schools	x	x	Silver Consolidated Schools	x	x
Cobre Public Schools	x	x	Jemez Mountain Public Schools	x	x	Taos Municipal Schools	x	x

DISTRICT	RECEIVED	APPROVED	DISTRICT	RECEIVED	APPROVED	DISTRICT	RECEIVED	APPROVED
Corona Public Schools	x	x	Lake Arthur Municipal Schools	x	x	Tatum Municipal Schools	x	x
Cuba Independent Schools	x	x	Las Cruces Public Schools	x	x	Texico Municipal Schools	x	x
Deming Public Schools	x	x	Logan Municipal Schools	x	x	Tucumcari Public Schools	x	x
Des Moines Municipal Schools	x	x	Lordsburg Municipal Schools	x	x	Tularosa Municipal Schools	x	x
Dexter Consolidated Schools	x	x	Los Lunas Public Schools	x	x	Vaughn Municipal Schools	x	x
Dora Consolidated Schools	x	x	Loving Municipal Schools	x	x	Wagon Mound Public Schools	x	x
Dulce Independent Schools	x	x	Lovington Municipal Schools	x	x	West Las Vegas Public Schools	x	x
			Magdalena Municipal Schools	x	x	Zuni Public School District	x	x

Districts Not Submitting Title IX Assurance Form*

District	District
Albuquerque Public Schools	Pecos Independent Schools
Bernalillo Public Schools	Peñasco Independent Schools
Gallup-McKinley County Schools	Pojoaque Valley Public Schools
Jal Public Schools	Raton Public Schools
Las Vegas City Public Schools	Roswell Independent Schools
Los Alamos Public Schools	Santa Fe Public Schools
Maxwell Municipal Schools	Socorro Consolidated Schools
Moriarty-Edgewood School District	Springer Municipal Schools
Mosquero Municipal Schools	Truth or Consequences Municipal Schools

* *Non-submission does not necessarily mean non-compliance with Title IX.*

Of the 89 New Mexico public school districts, there were 71 submissions of the Title IX Assurance Form—a 79.8 percent (80%) response rate.

State Charter Schools (with any population of 7–12 students)

Submission of Title IX Assurance Forms

STATE CHARTER SCHOOL	RECEIVED AND APPROVED	STATE CHARTER SCHOOL	RECEIVED AND APPROVED
Albuquerque Sign Language Academy	X	McCurdy Charter School	X
Ace Leadership High School	X	Media Arts Charter	X
Aldo Leopold Charter School	N/A*	Mission Achievement And Success Charter School	X
Alma D'arte Charter School	X	New America School	X
Amy Biehl Charter High School	X	New America School—Las Cruces	X
Anthony Charter School	X	NM School for the Arts	X
Cesar Chavez Community School	X	North Valley Charter	X
Cien Aguas International School	X	Sage Montessori Charter School	N/A
Creative Education Preparatory Institute	X	South Valley Preparatory School	X
Foothills High School (JJS/CYFD)	X	Taos Academy	X
Gilbert L. Sena Charter High School	N/A	Taos Integrated School of the Arts	N/A
J Paul Taylor Academy	X	The Ask Academy	N/A
La Academia Dolores Huerta	N/A	The Great Academy	X
La Promesa Early Learning Center	N/A	The Master Program	X
La Tierra Montessorri School	X		

*N/A was recorded for state charter schools that indicated that they did not offer athletics in grades 7–12.

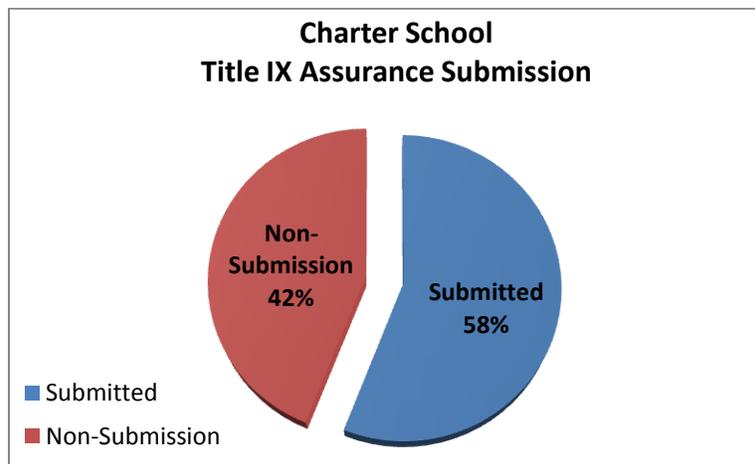
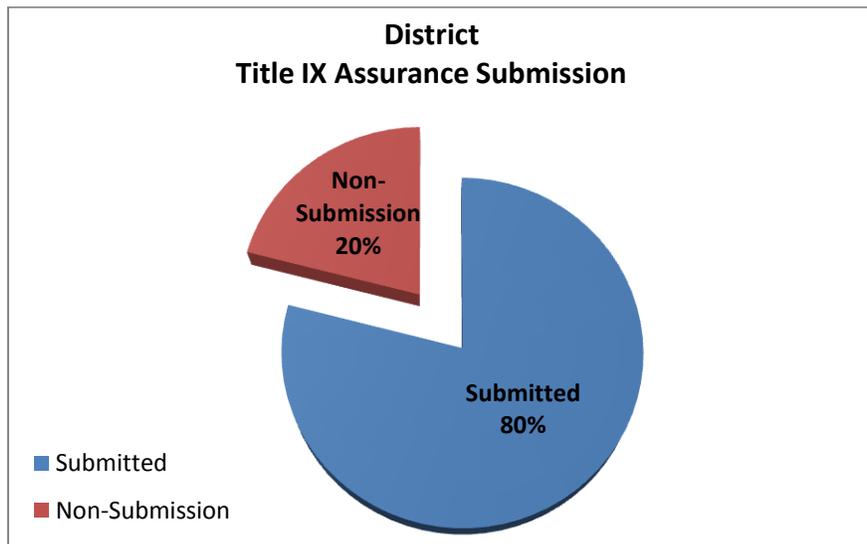
Non-Submission of Title IX Assurance Forms*

DISTRICT	DISTRICT
Academy of Trades and Technology	La Resolana Leadership
Albuquerque Institute of Math and Science	Montessori Elementary School
Albuquerque School of Excellence	New Mexico Connections Academy
Cottonwood Classical Preparatory School	New Mexico International School
Dream Dine Charter School	Red River Valley Charter School
East Mountain High School	School of Dreams Academy
Estancia Valley Classical Academy	Southwest Aeronautics Mathematics and Science
Explore Academy	Southwest Intermediate Learning Center
Health Leadership High School	Southwest Secondary Learning Center
Health Sciences Academy	Taos International School
International School at Mesa Del Sol	Tierra Adentro: The New Mexico School of Academics, Arts and Artesania
La Jicarita Community School	Uplift Community School

*Non-submission does not necessarily mean non-compliance with Title IX.

Of the 53 eligible state charter schools, 24 submitted assurance forms and 7 were N/A—for a 58.5% response rate.

District and Charter School Submission/Non-Submission Breakdown



School Athletics Equity Act Submissions and Non-Submissions

In compliance with *School Athletics Equity Act (SAEA)* (§ 22.31-1 to 22-31-6 NMSA 1978), each public school with athletics for grades 7–12 is required to collect and submit prior year data on team enrollment, information on coaches, income and expenditures, and other data to the PED. The PED prepares and submits a report to the Governor’s office and the New Mexico Legislative Education Study Committee (LESC), providing data from each school that submitted, and a list of schools that did not submit the required information. Additionally, the PED posts this information on its website (6.13.4.8 NMAC).

The SAEA data is site specific. The SAEA data submitted can be accessed at:

<http://ped.state.nm.us/ped/AthleticEquityAct.html>.

The following charts indicate which schools did not submit SAEA data to the PED.

DISCLAIMER

Non-inclusion of data by a middle or high school does not necessarily constitute non-compliance with the SAEA. The PED does not collect information as to whether or not a middle or high school has an athletic program. Additionally, the PED does not collect information on specific sports offered at a school. Data on this page only reflects non-submissions.

DISTRICT	NON-SUBMISSION BY SCHOOL SITE (INCLUDING LOCAL CHARTER SCHOOLS)
Albuquerque	Albuquerque Talent Development Academy
Albuquerque	Corrales International
Albuquerque	El Camino Real Academy
Albuquerque	Grant Middle School
Albuquerque	Hoover Middle School
Albuquerque	Los Puentes Charter
Albuquerque	Madison Middle School
Albuquerque	Truman Middle School
Albuquerque	Washington Middle School
Aztec	Aztec High School
Belen	Belen Infinity High School
Belen	The Family School
Bloomfield	Charlie Y. Brown Alt
Bloomfield	Mesa Alta Jr High School
Central Consolidated	Career Prep High
Chama	Escalante Middle/High
Cimarron	Cimarron Moreno Valley
Clayton	Clayton Junior High
Cloudcroft	Cloudcroft High
Cloudcroft	Cloudcroft Middle
Cobre Cons.	Snell Middle School
Dulce	Dulce Middle School

DISTRICT	NON-SUBMISSION BY SCHOOL SITE (INCLUDING LOCAL CHARTER SCHOOLS)
Espanola	Carlos F. Vigil Middle School
Gadsden	Santa Teresa Middle
Gallup	Miyamura High School
Grants	Grants High School
Grants	Laguna-Acoma High / Mid
House	House High
Jal	Jal Jr High
Las Cruces	White Sands Middle
Melrose	Melrose High
Melrose	Melrose Junior High School
Mesa Vista	Mesa Vista High School
Mora	Mora High
Pojoaque	Pojoaque Middle
Rio Rancho	Mountain View Middle
Roy	Roy High
San Jon	San Jon High
Santa Rosa	Santo Rosa Middle
Silver City	La Plata Middle
Socorro	Socorro High
Springer	Springer High
Tularosa	Tularosa High
West Las Vegas	West Las Vegas High School
Zuni	Zuni High School

STATE CHARTER NON-SUBMISSION	DISTRICT LOCATION
Academy For Technology and the Classics	Santa Fe Public Schools
Academy of Trades and Technology	Albuquerque Public Schools
Amy Biehl Charter High School	Albuquerque Public Schools
Cien Aguas International	Albuquerque Public Schools
Estancia Valley Classical Academy	Moriarty-Edgewood School District
Health Leadership High School	Albuquerque Public Schools
J Paul Taylor Academy	Las Cruces Public Schools
La Tierra Montessori School of the Arts and Sciences	Espanola Public Schools
Mission Achievement and Success	Albuquerque Public Schools
Monte Del Sol	Santa Fe Public Schools
Sage Montessori Charter School	Albuquerque Public Schools
San Diego Riverside	Jemez Valley Public Schools
School of Dreams Academy	Los Lunas Public Schools
South Valley Academy	Albuquerque Public Schools
The Ask Academy	Rio Rancho Public Schools
Tierra Adentro	Albuquerque Public Schools

*If a state charter notified the PED that athletics was not offered in 7–12, then they were deemed not applicable (N/A) and are not reflected in the SAEA non-submission grid.

Recommendations on How to Increase Gender Equity in Athletics

DISCLAIMER

This information is NOT a substitute for legal advice. The school district/charter school is strongly encouraged to seek the advice of their legal counsel.

Title IX of the Educational Amendments of 1972 is the landmark legislation that bans sex discrimination in schools, whether it be in academics or athletics. Title IX states:

"No person in the U.S. shall, on the basis of sex, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal aid."

Athletics has created the most controversy regarding Title IX, but its gains in education and academics are notable. Before Title IX, many schools refused to admit women or enforced strict limits (<http://bailiwick.lib.uiowa.edu/ge/aboutRE.html>).

The Policy Interpretation: Title IX and Intercollegiate Athletics (Federal Register, Vol.44, No. 239—Tuesday, Dec. 11, 1979) articulated three ways compliance with Title IX can be achieved. This is known as the “Three-Part Test”. A recipient of federal funds can demonstrate compliance with Title IX by meeting any one of the three tests (<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>). For a full description of the “Three-Part Test” see Appendix D: United States Department of Education, Office of Civil Rights, Dear Colleague Letter, April 20, 2010.

The Kentucky High School Athletic Association (<http://www.khsaa.org/titleix/>) defines the “Three Part Tests” as:

TEST ONE—PROPORTIONALITY: This first test is based on a comparison of the percent of school enrollment for a gender to the percent of participation in sports by that gender.

TEST TWO—PROGRAM EXPANSION: The second test is designed to judge the school’s efforts to expand or increase the number of participants for the underrepresented sex—nearly always girls. Usually, schools that achieve compliance with test two have added new sports and teams (for example, freshman, junior varsity, and varsity teams) for girls, that has resulted in a significant increase in the number of female participants.

TEST THREE—FULL ACCOMMODATION: The third test assesses whether the school’s athletic program already offers every team for the underrepresented sex, usually girls, for which there is sufficient interest and ability to field a team and sufficient competition for that team in the area where the school normally competes. In Kentucky high schools, an Interscholastic Athletics Student Survey is administered at least every-other school year to gather and analyze responses to determine if increasing athletic offerings should be considered.

Resources

For further guidance in compliance with Title IX, schools may wish to review the following resources:

1. New Mexico Activities Association, Title IX resources: <http://www.nmact.org/>
 2. <http://titleix.info/10-Key-Areas-of-Title-IX/Access-to-Higher-Education.aspx>
 3. Kentucky High School Athletic Association, Components of Title IX:
<http://www.khsaa.org/titleix/>
 4. Minnesota State High School League, Providing Equal Athletic Opportunities, A Guide to Compliance: http://www.mshsl.org/mshsl/titleix/Compliance_Guide.pdf
 5. National Women's Law Center Check it Out: An Athletics Equity Checklist for Students, Athletes, Coaches, Parents, Administrators, and Advocates:
<http://www.nwlc.org/sites/default/files/pdfs/Checkitout.pdf>
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Appendices

Appendix A: PED Rule—6.13.4 NMAC: Governing Gender Equity in Participating in Interscholastic Sports

Appendix B : United States Department of Education, Office of Civil Rights, Dear Colleague Letter, April 20, 2010

Appendix A

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 13 PUBLIC SCHOOL ADMINISTRATION— INTERSCHOLASTIC ACTIVITIES PART 4
GOVERNING GENDER EQUITY IN PARTICIPATION IN INTERSCHOLASTIC
SPORTS

6.13.4.1 ISSUING AGENCY: Public Education Department
[01-29-99, 07-30-99; 6.13.4.1 NMAC - Rn, 6 NMAC 1.2.3.1, 12-29-00; A, 11-13-09]

6.13.4.2 SCOPE: This rule applies to school districts and charter schools.
[01-29-99; 6.13.4.2 NMAC - Rn, 6 NMAC 1.2.3.2, 12-29-00; A, 11-13-09]

6.13.4.3 STATUTORY AUTHORITY: This rule is adopted pursuant to Sections 22-2-1, 22-2-2 NMSA 1978, the School Athletics Equity Act [22-31-1 to 22-31-6 NMSA 1978], and 20 U.S. Code 1681, et seq.
[01-29-99; 6.13.4.3 NMAC - Rn, 6 NMAC 1.2.3.3, 12-29-00; A, 11-13-09]

6.13.4.4 DURATION: Permanent
[01-29-99; 6.13.4.4 NMAC - Rn, 6 NMAC 1.2.3.4, 12-29-00]

6.13.4.5 EFFECTIVE DATE: January 29, 1999, unless a later date is cited at the end of a section [01-29-99; 6.13.4.5 NMAC - Rn, 6 NMAC 1.2.3.5, 12-29-00].

6.13.4.6 OBJECTIVE: The purpose of this rule is to prohibit discrimination on the basis of gender in interscholastic sports.
[01-29-99; 6.13.4.6 NMAC - Rn, 6 NMAC 1.2.3.6, 12-29-00; A, 11-13-09]

6.13.4.7 DEFINITIONS:

- A. "Department" means the public education department.
- B. "School Athletics Equity Act" means a state law enacted to require annual data collection and reporting to ensure that any public school operating an athletics program for grades seven through twelve shall do so in a manner that does not discriminate against students or staff on the basis of gender.
- C. "Title 9" means federal Public Law 92-318, Title 9 of the Education Amendments of 1972 which is codified at 20 U.S. Code 1681, et seq.
[01-29-99; 6.13.4.7 NMAC - Rn, 6 NMAC 1.2.3.7, 12-29-00; A, 11-13-09]

6.13.4.8 REQUIREMENTS:

- A. No officer, agent or employee of any local school board, school district or charter school shall subject any person to discrimination based on gender in any interscholastic sport. Nor shall any public school operate its interscholastic program in a manner that discriminates against students or staff on the basis of gender.
- B. School districts and charter schools shall provide comparable athletic opportunity in interscholastic sports for both genders. Each school district and charter school has the option of prohibiting participation by both genders on the same team, where comparable or separate athletic opportunity exists for both genders. Comparable athletic opportunity exists only where a good faith effort is made so that teams are provided with comparable facilities, equipment, supplies, game and practice schedules, travel and per diem allowances, coaching (including assignment and compensation of coaches), academic tutoring, housing, dining facilities and publicity.
- C. All school districts and charter schools shall designate at least one Title 9 coordinator whose name, title, school address and telephone number shall be prominently displayed on the district's or charter school's website and in school publications and handbooks. A Title 9 coordinator shall, at a minimum, have the following responsibilities:
 - (1) to receive and process complaints and inquiries related to Title 9;
 - (2) to make recommendations to the school administration on best practices for avoiding and correcting sex discrimination in school athletics programs;
 - (3) to carry out the local school's athletic non-discrimination policy; and
 - (4) to enforce corrective measures to comply with Title 9 after an adjudication or determination of non-compliance.

D. In determining comparable athletic opportunity, each public school that has an athletics program for grades seven through twelve shall undertake self-evaluation and continuing reappraisal of student needs as determined by the total educational program. To assist in the self-evaluation, each public school that has an athletics program for grades seven through twelve shall report the following data to the department;

(1) Beginning August 31, 2011 and each year thereafter no later than August 31st, the following data shall be submitted to the department in a format required by the department:

(a) the following information pertaining to enrollment:

(i) the total enrollment in each public school as an average of enrollment at the eightieth and one hundred twentieth days of the school year;

(ii) student enrollment by gender;

(iii) total number of students participating in athletics;

(iv) athletics participation by gender; and

(v) the number of boys' teams and girls' teams by sport and by competition level;

(b) the following information pertaining to athletic directors, coaches and other school personnel:

(i) the name and gender of each public school's athletic director;

(ii) the name of each team's coaches and other team personnel, with their gender, job title and employment status, such as full-time, part-time, contract or seasonal, specified;

(iii) the coach-to-athlete and staff-to-athlete ratio for each team; and

(iv) the stipend or other compensation for coaching paid to coaches of boys' teams and to coaches of girls' teams for each public school.

(2) Beginning August 31, 2012 and each year thereafter no later than August 31st, the following data shall be submitted to the department in a format required by the department:

(a) an accounting of the funding sources that are used to support the school's athletics programs and to which teams those funds are allocated funding sources include;

(i) state funding;

(ii) federal funding;

(iii) fund raising or booster clubs;

(iv) game and concession receipts;

(v) gate receipts;

(vi) cash or in-kind donations;

(vii) grants; and

(viii) any other sources;

(b) the following information regarding expenditures;

(i) any capital outlay expenditures for each public school's athletics programs;

(ii) the expenditures for each public school's athletics programs; and

(iii) the expenditures of individual teams, including travel expenses such as transportation, meal allowances and overnight accommodations; equipment; uniforms; facilities; facilities improvements; publicity expenses; awards; banquets; insurance; and other expenses incurred by each team;

(c) a statement of benefits and services to each team.

E. Each public school shall:

(1) make the above referenced data available to the public including all materials relied upon to compile the data;

(2) at least annually inform all students attending their school of their right to review the data;

(3) maintain in a retrievable form its data and all materials relied upon to complete the data for at least three years;

(4) annually publish its data in a newspaper of general circulation in the state or make the data available on its publicly accessible website; and

(5) no later than August 31st of each year, submit an assurance of compliance with Title 9 to its local school board or governing body and provide a copy to the department.

F. The department shall publish and submit an annual report to the governor and legislature including the following information:

(1) each public school's data;

(2) a list of public schools that did not submit fully completed data;

(3) a list of public school that fail to submit the assurance of compliance with Title 9; and

(4) recommendations on how to increase gender equity in athletics in public schools

[01-29-99; 6.134.8 NMAC- Rn, 6 NMAC 1.2.3.8, 12-29-00; A, 11-13-09]

HISTORY OF 6.13.4 NMAC:

PRE-NMAC HISTORY: The material in this regulation is derived from that previously filed with the State Records Center and Archives under: State Board of Education Regulation No. 76-6, Governing Participation in Interscholastic Sports, filed May 14, 1976.

Appendix B



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

APR 20 2010

Dear Colleague:

Title IX of the Education Amendments of 1972¹ (Title IX) prohibits discrimination on the basis of sex in education programs and activities by recipients of Federal financial assistance, which include schools, colleges and universities. Since its passage, Title IX has dramatically increased academic, athletic and employment opportunities for women and girls. Title IX stands for the proposition that equality of opportunity in America is not rhetoric, but rather a guiding principle.

Although there has been indisputable progress since Title IX was enacted, notably in interscholastic and intercollegiate athletic programs, sex discrimination unfortunately continues to exist in many education programs and activities. I am committed to the vigorous enforcement of Title IX to resolve this discrimination and to provide clear policy guidance to assist a recipient institution (institution) in making the promise of Title IX a reality for all.

To that end, on behalf of the Office for Civil Rights (OCR) of the U.S. Department of Education (Department), it is my pleasure to provide you with this "Intercollegiate Athletics Policy Clarification: The Three-Part Test-Part Three." With this letter, the Department is withdrawing the "Additional Clarification of Intercollegiate Athletics Policy: Three Part Test –Part Three" (2005 Additional Clarification) and all related documents accompanying it, including the "User's Guide to Student Interest Surveys under Title IX" (User's Guide) and related technical report, that were issued by the Department on March 17, 2005.

OCR enforces Title IX and its implementing regulation.² The regulation contains specific provisions governing athletic programs³ and the awarding of athletic scholarships.⁴ Specifically, the Title IX regulation provides that if an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes.⁵ In determining whether equal athletic opportunities are available, the regulation requires OCR to consider whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes.⁶

¹ 20 u.s.c. § 1681et seq.

² 34 C.F.R. Part 106.

³ 34 C.F.R. § 106.41.

⁴ 34 C.F.R. § 106.37(c).

⁵ 34 C.F.R. § 106.41(c).

⁶ 34 C.F.R. § 106.41(c)(1). The Title IX regulation at 34 C.F.R. § 106.41(c) provides that OCR also will consider other factors when determining whether equal athletic opportunity is available at an institution. This Dear Colleague

The "Intercollegiate Athletics Policy Interpretation"⁷ (1979 Policy Interpretation), published on December 11, 1979, provides additional guidance on the Title IX intercollegiate athletic regulatory requirements.⁸ The 1979 Policy Interpretation sets out a three-part test that OCR uses to assess whether an institution is effectively accommodating the athletic interests and abilities of its students to the extent necessary to provide equal athletic opportunity.⁹ On January 16, 1996, OCR issued the "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (1996 Clarification) to provide additional clarification on all parts of the three-part test, including the specific factors that OCR uses to evaluate compliance under the third part of the three-part test (Part Three).¹⁰

In 2005, OCR issued the Additional Clarification regarding application of the indicators in the 1996 Clarification that guided OCR's analysis of Part Three. The accompanying User's Guide included a prototype survey instrument (model survey) that institutions could use to measure student interest in participating in intercollegiate athletics and included specific guidance on its implementation. The Additional Clarification and User's Guide changed OCR's approach from an analysis of multiple indicators to a reliance on a single survey instrument to demonstrate that an institution is accommodating student interests and abilities in compliance with Part Three. After careful review, OCR has determined that the 2005 Additional Clarification and the User's Guide are inconsistent with the nondiscriminatory methods of assessment set forth in the 1979 Policy Interpretation and the 1996 Clarification and do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys, under Part Three. Accordingly, the Department is withdrawing the 2005 Additional Clarification and User's Guide, including the model survey. All other Department policies on Part Three remain in effect and provide the applicable standards for evaluating Part Three compliance.

Given the resource limitations faced by institutions throughout the nation and the effect on institutions' athletics programs, I recognize the importance of assisting institutions in developing their own assessment methods that retain the flexibility to meet their unique circumstances, but are consistent with the nondiscrimination requirements of the Title IX regulation. Therefore, this Dear Colleague letter reaffirms, and provides additional clarification

letter only addresses the regulatory requirement, at 34 C.F.R. § 106.41(c)(1), to effectively accommodate interests and abilities.

⁷ 44 Fed. Reg. 71413 (1979). The 1979 Policy Interpretation was published by the former Department of Health, Education, and Welfare, and was adopted by the Department of Education when it was established in 1980.

⁸ Although the 1979 Policy Interpretation is designed for intercollegiate athletics, its general principles, and those of this letter, often will apply to interscholastic, club, and intramural athletic programs. 44 Fed. Reg. at 71413. Furthermore, the Title IX regulation requires institutions to provide equal athletic opportunities in intercollegiate, interscholastic, club, and intramural athletics. 34 C.F.R. § 106.41(c).

⁹ As discussed in the 1979 Policy Interpretation, OCR also considers the quality of competitive opportunities offered to members of both sexes in determining whether an institution effectively accommodates the athletic interests and abilities of its students. 44 Fed. Reg. at 71418.

¹⁰ OCR's "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance," which was issued as a Dear Colleague letter on July 11, 2003, also reincorporated the 1996 Clarification's broad range of specific factors and illustrative examples.

on, the multiple indicators discussed in the 1996 Clarification that guide OCR's analysis of whether institutions are in compliance with Part Three, as well as the nondiscriminatory implementation of a survey as one assessment technique.

The Three-Part Test

As discussed above, OCR uses the three-part test to determine whether an institution is providing nondiscriminatory athletic participation opportunities in compliance with the Title IX regulation. The test provides the following three compliance options:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.¹¹

The three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs consistent with Title IX's nondiscrimination requirements. As stated in the 1996 Clarification, "[T]he three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement."

Part Three of the Three-Part Test—Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex

This letter focuses on Part Three—whether an institution is fully and effectively accommodating the athletic interests and abilities of the underrepresented sex. As the 1996 Clarification indicates, while disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy Part Three if it can show that the underrepresented sex is not being denied opportunities, i.e., that the interests and abilities of

¹¹ 44 Fed. Reg. at 71418.

the underrepresented sex are fully and effectively accommodated. This letter provides information that guides OCR in its evaluation of compliance with Part Three and the nondiscriminatory implementation of assessments of students' athletic interests and abilities under it.

Under Part Three, the focus is on full and effective accommodation of the interests and abilities of the institution's students who are members of the underrepresented sex—including students who are admitted to the institution though not yet enrolled.¹² As stated in the 1996 Clarification, and as further discussed below, in determining compliance with Part Three, OCR considers all of the following three questions:

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 "no," 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.

A. Unmet Interest and Ability—OCR Evaluation Criteria

In determining whether an institution has unmet interest and ability to support an intercollegiate team in a particular sport, OCR evaluates a broad range of indicators, including:

- whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students;
- whether a viable team for the underrepresented sex recently was eliminated;
- multiple indicators of interest;
- multiple indicators of ability; and
- frequency of conducting assessments.

Each of these five criteria is described below. Following the discussion of these criteria, this section provides technical assistance recommendations for effective assessment procedures and the nondiscriminatory implementation of a survey as one component of assessing the interests and abilities of students of the underrepresented sex. This section concludes with a discussion of the multiple indicators OCR evaluates to determine whether there are a sufficient number of students with unmet interest and ability to sustain a new intercollegiate team.

¹² OCR examines an institution's recruitment practices under another part of the 1979 Policy Interpretation. See 44 Fed. Reg. at 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that its women's teams are provided with substantially equal opportunities to recruit potential student athletes.

1. Nondiscriminatory Methods of Assessment

Under Part Three, OCR evaluates whether an institution uses processes and methods for assessing the athletic interests and abilities of its students of the underrepresented sex that are consistent with the nondiscrimination standards set forth in the 1979 Policy Interpretation. The 1979 Policy Interpretation states that institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

- a. The processes take into account the nationally increasing levels of women's interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and
- d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.¹³

An institution should document its assessment of students' interests and abilities.

2. Assessments Not Used To Eliminate Viable Teams

As discussed in the 1996 Clarification, if an institution recently has eliminated a viable team for the underrepresented sex from the intercollegiate athletics program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport and thus there would be a presumption that the institution is not in compliance with Part Three. This presumption can be overcome if the institution can provide strong evidence that interest, ability, or competition no longer exists.

Accordingly, OCR does not consider the failure by students to express interest during a survey under Part Three as evidence sufficient to justify the elimination of a current and viable intercollegiate team for the underrepresented sex. In other words, students participating on a viable intercollegiate team have expressed interest by active participation, and OCR does not use survey results to nullify that expressed interest.

3. Multiple Indicators Evaluated to Assess Interest

OCR considers a broad range of indicators to assess whether there is unmet athletic interest among the underrepresented sex. These indicators guide OCR in determining whether the institution has measured the interests of students of the underrepresented sex using nondiscriminatory methods consistent with the 1979 Policy Interpretation. As discussed in the

¹³ 44 Fed. Reg. at 71417.

1996 Clarification, OCR evaluates the interests of the underrepresented sex by examining the following list of non-exhaustive indicators:

- requests by students and admitted students that a particular sport be added;
- requests for the elevation of an existing club sport to intercollegiate status;
- participation in club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interests in particular sports;
- results of surveys or questionnaires of students and admitted students regarding interests in particular sports;¹⁴
- participation in interscholastic sports by admitted students; and
- participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.¹⁵

In accordance with the 1996 Clarification, OCR also will consider the likely interest¹⁶ of the underrepresented sex by looking at participation in intercollegiate sports in the institution's normal competitive regions.

4. Multiple Indicators Evaluated to Assess Ability

As discussed in the 1996 Clarification, OCR considers a range of indicators to assess whether there is sufficient ability among interested students of the underrepresented sex to sustain a team in the sport. When making this determination, OCR examines indicators such as:

- the athletic experience and accomplishments—in interscholastic, club or intramural competition—of underrepresented students and admitted students interested in playing the sport;

¹⁴ OCR evaluates all of the indicators discussed here so OCR does not consider survey results alone as sufficient evidence of lack of interest under Part Three.

¹⁵ As discussed in the 1996 Clarification, this indicator may be helpful to OCR in ascertaining likely interest of an institution's students and admitted students in particular sports, especially in the absence of more direct indicia. However, in conducting its investigations, OCR determines whether an institution is meeting the actual interests and abilities of its students and admitted students.

An institution's evaluation should take into account sports played in the high schools and communities from which it draws its students, both as an indication of possible interest at the institution, and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex. For example, if OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport that the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR also may interview students, admitted students, coaches, and others regarding interest in that sport.

¹⁶ See Footnote 15 above.

- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team; and
- if the team has previously competed at the club or intramural level whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Additionally, because OCR recognizes that students may have a broad range of athletic experiences and abilities, OCR also examines other indications of ability such as:

- participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered; and
- tryouts or other direct observations of participation in the particular sport in which there is interest.

As the 1996 Clarification indicated, neither a poor competitive record, nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes, is conclusive evidence of lack of ability. For the purposes of assessing ability, it is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

5. Frequency of Assessments

As discussed in the 1996 Clarification, OCR evaluates whether an institution assesses interest and ability periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. There are several factors OCR considers when determining the rate of frequency for conducting an assessment. These factors include, but are not limited to:

- the degree to which the previous assessment captured the interests and abilities of the institution's students and admitted students of the underrepresented sex;
- changes in demographics or student population at the institution;¹⁷ and
- whether there have been complaints from the underrepresented sex with regard to a lack of athletic opportunities or requests for the addition of new teams.

Further, OCR will consider whether an institution conducts more frequent assessments if a previous assessment detected levels of student interest and ability in any sport that were close to the minimum number of players required to sustain a team.

¹⁷ For example, in a typical four-year institution, the student body population will change substantially each year, by approximately 25 percent annually.

6. Effective Procedures for Evaluating Requests to Add Teams and Assessing Participation

An institution has a continuing obligation to comply with Title IX's nondiscrimination requirements; thus, OCR recommends that institutions have effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of students of the underrepresented sex, including easily understood policies and procedures for receiving and responding to requests for additional teams, and wide dissemination of such policies and procedures to existing and newly admitted students, as well as to coaches and other employees.

OCR also recommends that institutions develop procedures for, and maintain documentation from, routine monitoring of participation of the underrepresented sex in club and intramural sports as part of their assessment of student interests and abilities. OCR further recommends that institutions develop procedures for, and maintain documentation from, evaluations of the participation of the underrepresented sex in high school athletic programs, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students. This is the type of documentation that may be needed in order for an institution to demonstrate that it is assessing interests and abilities in compliance with Part Three.

The Title IX regulation requires institutions to designate at least one employee to coordinate their efforts to comply with and carry out their Title IX responsibilities.¹⁸ Therefore, institutions may wish to consider whether the monitoring and documentation of participation in club, intramural, and interscholastic sports and the processing of requests for the addition or elevation of athletic teams should be part of the responsibilities of their Title IX coordinators in conjunction with their athletic departments. Another option an institution may wish to consider is to create a Title IX committee to carry out these functions. If an institution chooses to form such a committee, it should include the Title IX coordinator as part of the committee and provide appropriate training on the Title IX requirements for committee members.

7. Survey May Assist in Capturing Information on Students' Interests and Abilities

As discussed in the 1996 Clarification, institutions may use a variety of techniques to identify students' interests and abilities. OCR recognizes that a properly designed and implemented survey is one tool that can assist an institution in capturing information on students' interests and abilities. OCR evaluates a survey as one component of an institution's overall assessment under Part Three and will not accept an institution's reliance on a survey alone, regardless of the response rate, to determine whether it is fully and effectively accommodating the interests and abilities of its underrepresented students. If an institution conducts a survey as part of its assessment, OCR examines the content, implementation and response rates of the survey, as well as an institution's other methods of measuring interest and ability.

¹⁸ 34 C.F.R. § 106.8(a).

Under Part Three, OCR evaluates the overall weight it will accord the conclusions drawn by an institution from the results of a survey by examining the following factors, among others:

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

OCR also considers whether a survey is implemented in such a way as to maximize the possibility of obtaining accurate information and facilitating responses. A properly designed survey should effectively capture information on interest and ability¹⁹ across multiple sports, without complicating responses with superfluous or confusing questions.

OCR has not endorsed or sanctioned any particular survey; however, for technical assistance purposes, this letter contains information that an institution may wish to consider in developing its own survey.

a. Content of the Survey

i. *Purpose*

To ensure students understand the importance of responding to the survey, OCR evaluates whether a survey clearly states its purpose. For technical assistance purposes, an example of a purpose statement might be:

Purpose: This data collection is being conducted for evaluation, research, and planning purposes and may be used along with other information to determine whether [Institution] is effectively accommodating the athletic interests and abilities of its students, including whether to add additional teams.

ii. *Collect information regarding all sports*

In addition, OCR evaluates whether the survey lists all sports for the underrepresented sex recognized by the three primary national intercollegiate athletic associations,²⁰ and contains an open-ended inquiry for other sports to allow students to write in any sports that are not

¹⁹ Experience in sports generally is one indicator of ability.

²⁰ These associations are the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association. A current list of these sports for both sexes is: baseball, basketball, bowling, cross country, fencing, field hockey, football, golf, gymnastics, ice hockey, lacrosse, rifle, rowing, skiing, soccer, softball, swimming and diving, tennis, indoor track and field, outdoor track and field, volleyball, water polo, and wrestling.

listed.²¹ OCR considers whether the survey allows students to identify their interest in future or current participation in all of the sports they identify and general athletic experience. OCR also considers whether the survey allows students to provide additional information or comments about their interest, experience, and ability. For technical assistance purposes, the types of questions an institution could ask regarding interest in future participation, current participation, and prior athletic experience might be:

Sport	Interest in Future Participation: At what level do you wish to participate?	Current Participation: At what level are you participating in this sport?	Prior Experience: At what level did you participate in this sport or any other relevant sport in high school, college, or in another capacity?	
Basketball	<input type="radio"/> Intercollegiate <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational	<input type="radio"/> Intercollegiate <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational <input type="radio"/> Other	College <input type="radio"/> Intercollegiate <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational	High School <input type="radio"/> Varsity <input type="radio"/> Junior Varsity <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational <input type="radio"/> Other
Lacrosse	<input type="radio"/> Intercollegiate <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational	<input type="radio"/> Intercollegiate <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational <input type="radio"/> Other	College <input type="radio"/> Intercollegiate <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational	High School <input type="radio"/> Varsity <input type="radio"/> Junior Varsity <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational <input type="radio"/> Other
Other sport identified by student ²²	<input type="radio"/> Intercollegiate <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational	<input type="radio"/> Intercollegiate <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational <input type="radio"/> Other	College <input type="radio"/> Intercollegiate <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational	High School <input type="radio"/> Varsity <input type="radio"/> Junior Varsity <input type="radio"/> Club <input type="radio"/> Intramural <input type="radio"/> Recreational <input type="radio"/> Other

iii. *Contact Information*

OCR also looks at whether an institution requests contact information, to allow the institution to follow-up with students who wish to be contacted regarding their interests and abilities.

b. Target Population Surveyed

OCR considers the target population surveyed at the institution. Under Part Three, OCR evaluates whether the survey is administered as a census to all full-time undergraduate

²¹ An open-ended inquiry for other sports should be prominent or otherwise readily visible and contain a line or other mechanism for students to write in the sport for which they wish to express interest and ability.

²² If the survey is provided in paper form, an institution should provide a surplus of rows to ensure that a respondent can provide information for all the sports for which there is interest.

students of the underrepresented sex and admitted students of the underrepresented sex.²³ Using a census of all students can avoid several issues associated with sample surveys including, but not limited to: selection of the sampling mechanism, selection of the sample size, calculation of sampling error, and using sample estimates. If an institution intends to administer a survey to a sample population to gauge an estimate of interests and abilities, the larger the sample, the more weight OCR will accord the estimate.

c. Responses: Rates and Treatment of Non-Responses

OCR evaluates whether the survey is administered in a manner designed to generate high response rates and how institutions treat responses and non-responses.

OCR looks at whether institutions provide the survey in a context that encourages high response rates, and whether institutions widely publicize the survey; give students, including those participating in club or intramural sports, advance notice of the survey; and provide students adequate time to respond. Generally, OCR accords more weight to a survey with a higher response rate than a survey with a lower response rate, and institutions may want to distribute the survey through multiple mechanisms to increase the response rate.

For example, for enrolled students, an institution may want to administer the survey as part of a mandatory activity, such as during course registration. If administered as part of a mandatory activity, students also should have the option of completing the survey at a later date in order to ensure that they have adequate time to respond. Students who indicate that they wish to complete the survey at a later time should be given the opportunity to provide their contact information to enable the institution to take steps to ensure that they complete the survey. An institution should follow-up with those students who indicate that they wish to respond in the future.

An institution also may choose to send an email to the entire target population that includes a link to the survey. If an institution's assessment process includes email, OCR considers whether the institution takes appropriate cautionary measures, such as ensuring that it has accurate email addresses and that the target population has access to email.²⁴ OCR also expects institutions to take additional steps to follow-up with those who do not respond, including sending widely publicized reminder notices.

If institutions administer the survey through a web-based distribution system, students who indicate that they have no current interest²⁵ in athletic participation should be asked to confirm their lack of interest before they exit the system. If response rates using the methods described

²³ For example, institutions may distribute surveys to all admitted students of the underrepresented sex with acceptance letters.

²⁴ OCR also evaluates whether the survey is administered in a manner designed to ensure the accurate identity of the respondent and to protect against multiple responses by the same individual.

²⁵ Students may have, or may be unaware of whether they will have, a future interest in athletic participation.

above are low, an institution should consider administering the survey in another manner to obtain higher response rates.

OCR does not consider non-responses to surveys as evidence of lack of interest or ability in athletics. As discussed above, regardless of whether students respond to a survey, OCR also evaluates whether students' interest and abilities are assessed using the multiple indicators described above.

d. Confidentiality Protections

OCR also looks at whether institutions notify students that all responses as well as any personally identifiable information they provide will be kept confidential, although the aggregate survey information will be shared with athletic directors, coaches, and other staff, as appropriate. When requesting any personal or personally identifiable data, protecting the respondents' confidentiality helps to ensure that institutions obtain high-quality data and high response rates. If a student has expressed interest in being contacted when responding to the survey, an institution should continue to maintain the student's confidentiality except to the extent needed to follow-up with the student.

e. Frequency of Conducting the Survey

As discussed above, OCR evaluates whether an institution periodically conducts an assessment of interest and abilities. In addition to the factors OCR considers when determining the rate of frequency for conducting an assessment, OCR also will consider factors such as the size of the previously assessed survey population and the rate of response to the immediately preceding survey(s) conducted by the institution, if any.

8. Multiple Indicators Evaluated to Assess Sufficient Number of Interested and Able Students to Sustain a Team

Under Part Three, institutions are not required to create an intercollegiate team or elevate a club team to intercollegiate status unless there are a sufficient number of interested and able students to sustain a team. When OCR evaluates whether there are a sufficient number of students, OCR considers such indicators as the:

- minimum number of participants needed for a particular sport;
- opinions of athletic directors and coaches concerning the abilities required to field an intercollegiate team; and
- size of a team in a particular sport at institutions in the governing athletic association or conference to which the institution belongs or in the institution's competitive regions.

When evaluating the minimum number of athletes needed, OCR may consider factors such as the:

- rate of substitutions necessitated by factors such as length of competitions, intensity of play, or injury;
- variety of skill sets required for competition; and
- minimum number of athletes needed to conduct effective practices for skill development.

B. Reasonable Expectation of Competition—OCR Evaluation Criteria

Lastly, as indicated in the 1996 Clarification, OCR evaluates whether there is a reasonable expectation of intercollegiate competition for the team in the institution's normal competitive regions. In evaluating available competition, OCR considers available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

- competitive opportunities offered by other schools against which the institution competes; and
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.²⁶

If the information or documentation compiled by the institution during the assessment process shows that there is sufficient interest and ability to support a new intercollegiate team and a reasonable expectation of intercollegiate competition in the institution's normal competitive region for the team, the institution is under an obligation to create an intercollegiate team within a reasonable period of time in order to comply with Part Three.

Conclusion

The three-part test gives institutions flexibility and affords them control over their athletics programs. This flexibility, however, must be used consistent with Title IX's nondiscrimination requirements. OCR will continue to work with institutions to assist them in finding ways to address their particular circumstances and comply with Title IX. For technical assistance, please contact the OCR enforcement office that serves your area, found at

<http://wdcrobcolpOed.gov/CFAPPS/OCR/contactus.cfm>.

Sincerely,

Russlynn Ali
Assistant Secretary for Civil Rights

²⁶ Under the 1979 Policy Interpretation, an institution also may be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex. 44 Fed. Reg. at 71418.